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FEDERAL DECISIONS.

CASES ARGUED AND DETERMINED

IN THE

SUPREME, CIRCUIT AND DISTRICT COURTS

OF THE

UNITED STATES.

COMPRISING

THE OPINIONS OF THOSE COURTS FROM THE TIME OF THEIR ORGANIZATION TO
THE PRESENT DATE, TOGETHER WITH EXTRACTS FROM THE OPIN-
IONS OF THE COURT OF CLAIMS AND THE ATTORNEYS-
GENERAL, AND THE OPINIONS OF GENERAL
IMPORTANCE OF THE TERRI-
TORIAL COURTS.

ARRANGED BY

WILLIAM G. MYER,

*Author of an Index to the United States Supreme Court Reports,
also Indexes to the Reports of Illinois, Ohio, Iowa, Missouri
and Tennessee, a Digest of the Texas Reports, and
local works on Pleading and Practice.*

VOL. VII.

CONSTITUTION AND LAWS—CONTRACTOR.

ST. LOUIS, MO.:

THE GILBERT BOOK COMPANY.

1885.

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EXPLANATORY.

1. The cases in this work are arranged by subjects, instead of chronologically. They are assigned to the various general heads of the law, and each subject is divided and subdivided, for convenience of arrangement and reference, with head-notes, or table of contents, at the head of each subject, the same as an ordinary digest.

2. At the head of each division of a subject will be found a digest or summary of the points of law in the cases assigned to such division. This SUMMARY is confined exclusively to the statement of the points of law applicable to the particular division under which the case is published, other points of law in the case, if any, being transferred to other subjects, or to other subdivisions of the same subject. Where points in a case are carried to another division of a subject, they are put into the foot-notes, or notes following the cases, and reference is made to the case by section numbers in parenthesis at the end of the section.

3. The cases in full are arranged, generally, according to the order of the sections of the SUMMARY. Where the court states the facts of the case, it is so indicated by the use of the words STATEMENT OF FACTS at the beginning of the opinion. Where it is necessary to state the facts apart from the opinion, the statement is made as brief as possible, and is confined to the facts necessary to enable the reader to understand the points decided. The cases are also divided into convenient paragraphs, with a brief statement at the beginning of each paragraph of the point of law discussed or decided. Reference is here had to the *italic* sections scattered through the opinion. These take the place of the syllabus usually placed at the head of the opinion, and, besides bringing out every point of law actually decided, in some instances call attention to a review of authorities, as well as various points of law which would ordinarily be classed as *dicta*.

4. At the end of a series of cases is a digest of points applicable to the particular subdivision of the subject. This digest matter is obtained from four sources: 1st. Cases assigned originally to the general head, but digested and thrown out in the final arrangement, not to appear in full in any part of the work. 2d. Points taken from cases which will appear in full under some other division of the same subject. 3d. Points taken from cases which are assigned to some other general head. 4th. A digest of cases from state reports, law periodicals, and the opinions of the Court of Claims and the Attorneys-General.

5. Cases that will not appear in full in any part of the work are denoted by a *star* following the name of the case, thus, *DOE v. ROE*.* The tables of cases will also contain a similar designation of rejected cases, so that in consulting them the reader will readily see whether he is referred to a case in full or only a digest.

6. The *italic* matter at the head of the SUMMARY takes the place of the side-heads, or catch-words, usually prefixed to the sections, and is intended as an index to the contents of the SUMMARY. At the end of each section of the SUMMARY the name of the case of which the section is a digest is given, followed by the numbers of the sections into which the case is divided, so that after the reader has read the section of the SUMMARY, and found that it is what he wants, he can at once turn to the case in full.

CERTIFICATES OF APPROVAL.

[CONSTITUTION AND LAWS.]

I have examined the subject of Constitution and Laws as published in volumes six and seven of Myer's Federal Decisions, and certify that the Star cases,* of which only a digest is published, were properly rejected as unnecessary to be printed in full because the questions therein decided are fully discussed in leading cases which are printed at length, and therefore more than a digest would add nothing to the subject.

WILLIAM G. HAMMOND.†

[CONSULS AND MINISTERS.]

BOSTON, MASS., May 23, 1884.

I hereby certify that the cases under Consuls and Ministers, submitted to me by the general editor of "Federal Decisions," and as not appearing important enough to be printed in full under that head, appear to me to have been thrown out by him, after being digested, with good discretion.

JAMES SCHOULER.‡

* Cases originally assigned to this topic to be therein printed at length, if so printed anywhere in the series, but afterwards reduced to a digest as not of sufficient value to warrant ~~anything~~ more because they come under the following rule announced as part of our plan, viz.: "All important cases will be published in full, but cases which merely affirm or follow some leading case, or those which are based upon a particular state of facts and do not announce any important principle of law, and in some instances those which turn upon a well settled principle of law, will not be published in full, but only digested, the extract to be sufficiently full for all practical purposes. Where a series of cases, all covering the same ground and addressed to the same subject-matter, are reviewed and affirmed in a later case, usually the last case will be given in full, and the others will be digested. Whenever there is a well grounded doubt whether a digest of a case will be sufficient, the case will be given in full. It is not intended, however, to publish in full the opinions of the Court of Claims, nor those found in the State reports and law periodicals, except such as are of more than ordinary value."

† Dean of the St. Louis Law School and lecturer in the Boston University Law School; formerly Professor of Law in the Iowa State University and member of the Commission of 1873 to revise the laws of Iowa; author of a Digest of Iowa Reports, and editor of Lieber's Hermeneutics.

‡ Author of treatises on Domestic Relations, Personal Property, Bailments, Executors and Administrators, and a History of the United States under the Constitution.

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Abbott's Admiralty	Abb. Adm.	Lowell	Low.
Abbott's U. S.	Abb.	McAllister.....	McAl.
Albany Law Journal	Alb. L. J.	McCahon	McCahon.
American Law Register... ..	Am. L. Reg.	McCrary	McC.
Baldwin	Bald.	McLean	McL.
Bee	Bee.	MacArthur	MacArth.
Benedict	Ben.	Marshall	Marsh.
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Cooke	Cooke (Tenn.).	Philadelphia Reports	Phil.
Court of Claims	Ct. Cl.	Pittsburgh Reports	Pittsb. R.
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Day	Day (Conn.)	Vermont Reports	Vt.
Deady	Deady.	Wallace	Wall.
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Gilpin	Gilp.	Wheaton	Wheat.
Hempstead	Hemp.	Wheeler's Criminal Cases ..	Wheeler.
Hoffman.....	Hoff.	Woods	Woods.
Holmes	Holmes.	Woodbury & Minot.....	Woodb. & M.
Howard	How.	Woolworth	Woolw.
Hughes	Hughes.	Wyoming Territory	Wyom. T'y.
Law and Equity Reporter..	Law & Eq. Rep.	Van Ness	Van Ness.
Legal Gazette Reports	Leg. Gaz. R.		

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IX. MISCELLANEOUS MATTERS UNDER THE RECENT AMENDMENTS.

[Consult sub-titles VI and VII.]

SUMMARY — *Provision of fourteenth amendment as to holding office*, § 1548. — *Admission of West Virginia*, § 1549. — *Right of suffrage*, §§ 1550, 1551.

§ 1548. The third section of the fourteenth amendment, declaring that no person should hold office who had participated in the rebellion, and who had previously, as a state or federal officer, sworn to support the federal constitution, had no affirmative effect upon persons holding office at the time of its promulgation, and none until congress passed legislation carrying out its provisions. A sentence by a judge under such disability after such promulgation, but before such legislation, was valid, he having been in office at the time of such promulgation. *Griffin's Case*, §§ 1552-67.

§ 1549. Congress and the president having recognized as the only lawful government of Virginia the government which was organized at Wheeling, after the secession of the state from the Union, and having admitted the senators and representatives chosen to congress by the legislature of such new government, and such new government having assented to the formation of the state of West Virginia out of the state, that state was constitutionally admitted into the Union. *Ibid*.

§ 1550. The fifteenth amendment does not confer the right of suffrage, but it prohibits discrimination on account of race, color or previous condition of servitude. *United States v. Reese*, §§ 1558-86.

§ 1551. The only power granted to congress by the fifteenth amendment is to enact laws securing citizens of the United States against denial of the right of suffrage on account of their race or color. And it not plainly appearing by sections 3 and 4 of the Enforcement Act of May 31, 1870, that the inspectors of election were to be punished for refusing the votes of citizens on that ground, but the sections apparently aiming to punish them for refusal upon any ground, or for a refusal without assignment of ground, and the power to punish such conduct being beyond the scope of congress, those sections are unconstitutional. *Ibid*.

[NOTES. — See §§ 1587-1611.]

GRIFFIN'S CASE.

(Circuit Court for Virginia: Chase's Decisions, 364-426. 1869.)

Opinion by CHASE, C. J.

STATEMENT OF FACTS.—This is an appeal from an order of discharge from imprisonment made by the district judge acting as a judge of the circuit court, upon a writ of *habeas corpus*, allowed upon the petition of Cæsar Griffin. The petition alleged unlawful restraint of the petitioner, in violation of the constitution of the United States, by the sheriff of Rockbridge county, Virginia, in virtue of a pretended judgment rendered in the circuit court of that county by Hugh W. Sheffey, present and presiding therein as judge, though disabled from holding any office whatever by the fourteenth amendment of the constitution of the United States. Upon this petition a writ of *habeas corpus* was allowed and served, and the body of the petitioner, with a return showing the cause of detention, was produced by the sheriff in conformity with its command.

The general facts of the case, as shown to the district judge, may be briefly stated as follows: The circuit court of Rockbridge county is a court of record of the state of Virginia, having civil and criminal jurisdiction. In this court, the petitioner, Cæsar Griffin, indicted in the county court for shooting with intent to kill, was regularly tried in pursuance of his own election; and, having been convicted, was sentenced according to the finding of the jury to imprisonment for two years, and was in the custody of the sheriff to be conveyed to the penitentiary in pursuance of this sentence. Griffin is a colored man; but there was no allegation that the trial was not fairly conducted, or that any discrimination was made against him, either in indictment, trial or sentence, on account of color. It was not claimed that the grand jury by which he was indicted, or the petit jury by which he was tried, was not in all respects lawful and competent. Nor was it alleged that Hugh W. Sheffey, the judge who presided at the trial and pronounced the sentence, did not conduct the trial with fairness and uprightness.

One of the counsel for the petitioner, indeed, upon the hearing in this court, pronounced an eulogium upon his character, both as a man and as a magistrate, to deserve which might well be the honorable aspiration of any judge. But it was alleged and was admitted that Judge Sheffey, in December, 1849, as a member of the Virginia house of delegates, took an oath to support the constitution of the United States, and also that he was a member of the legislature of Virginia in 1862, during the late rebellion, and as such voted for measures to sustain the so-called Confederate States in their war against the United States; and it was claimed in behalf of the petitioner, that he thereby became, and was at the time of the trial of the petitioner, disqualified to hold any office, civil or military, under the United States, or under any state, and it was specially insisted that the petitioner was entitled to his discharge upon the ground of the incapacity of Sheffey, under the fourteenth amendment, to act as judge and pass sentence of imprisonment. Upon this showing and argument, it was held by the district judge that the sentence of Cæsar Griffin was absolutely null; that his imprisonment was in violation of the constitution of the United States, and an order for his discharge from custody was made accordingly.

§ 1552. *The government organized at Wheeling soon after the secession of Virginia was the lawful government of the state.*

The general question to be determined on the appeal from this order is whether or not the sentence of the circuit court of Rockbridge county must be

regarded as a nullity because of the disability to hold any office under the state of Virginia, imposed by the fourteenth amendment, on the person who, in fact, presided as judge in that court. It may be properly borne in mind that the disqualification did not exist at the time that Sheffey became judge. When the functionaries of the state government existing in Virginia at the commencement of the late civil war took part, together with a majority of the citizens of the state, in rebellion against the government of the United States, they ceased to constitute a state government for the state of Virginia, which could be recognized as such by the national government. Their example of hostility to the Union, however, was not followed throughout the state. In many counties, the local authorities and majority of the people adhered to the national government; and representatives from these counties soon after assembled in convention at Wheeling, and organized a government for the state.

§ 1553. *The recognition by congress and the president of a state government de facto is conclusive upon the judicial department.*

This government was recognized as the lawful government of Virginia by the executive and legislative departments of the national government; and this recognition was conclusive upon the judicial department. The government of the state thus recognized was in contemplation of law the government of the whole state of Virginia, though excluded, as the government of the United States was itself excluded, from the greater portion of the territory of the state. It was the legislature of the reorganized state which gave the consent of Virginia to the formation of the state of West Virginia. To the formation of that state, the consent of its own legislature, and of the legislature of the state of Virginia, and of congress, was indispensable. If either had been wanting, no state, within the limits of the old, could have been constitutionally formed; and it is clear that if the government instituted at Wheeling was not the government of the whole state of Virginia, no new state has ever been constitutionally formed within her ancient boundaries.

§ 1554. *Formation of the state of West Virginia.*

It cannot admit of question, then, that the government which consented to the formation of the state of West Virginia remained in all national relations the government of Virginia, although that event reduced to very narrow limits the territory acknowledging its jurisdiction, and not controlled by insurgent force. Indeed, it is well known historically that the state and the government of Virginia, thus organized, was recognized by the national government. Senators and representatives from the state occupied seats in congress, and when the insurgent force which held possession of the principal part of the territory was overcome, and the government recognized by the United States was transferred from Alexandria to Richmond, it became in fact what it was before in law, the government of the whole state. As such it was entitled, under the constitution, to the same recognition and respect, in national relations, as the government of any other state. It was under this government that Hugh W. Sheffey was, on February 22, 1866, duly appointed judge of the circuit court of Rockbridge county, and he was in the regular exercise of his functions as such when Griffin was tried and sentenced.

§ 1555. *Construction of the fourteenth amendment with reference to writs of habeas corpus and otherwise.*

More than two years had elapsed after the date of his appointment, when the ratification of the fourteenth amendment, by the requisite number of states, was officially promulgated by the secretary of state, on July 28, 1868.

That amendment, in its third section, ordains that "no person shall be a senator or representative in congress, or elector of president and vice-president, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath as a member of congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof." And it is admitted that the office held by Judge Sheffey, at the time of the trial of Griffin, was an office under the state of Virginia, and that he was one of the persons to whom the prohibition to hold office pronounced by the amendment applied.

The question to be considered, therefore, is whether, upon a sound construction of the amendment, it must be regarded as operating directly, without any intermediate proceeding whatever, upon all persons within the category of prohibition, and as depriving them at once, and absolutely, of all official authority and power. One of the counsel for the petitioner suggested that the amendment must be construed with reference to the act of 1867, which extends the writ of *habeas corpus* to a large class of cases in which the previous legislation did not allow it to be issued. And it is proper to say a few words on this suggestion here. The judiciary act of 1789 expressly denied the benefit of the writ of *habeas corpus* to prisoners not confined under or by color of the authority of the United States. Under that act, no person confined under state authority could have the benefit of the writ. Afterwards, in 1833 and 1842, the writ was extended to certain cases specially described, of imprisonment under state process; and in 1867, by the act to which the counsel referred, the writ was still further extended "to all cases where any person may be restrained of liberty in violation of the constitution, or of any treaty or law of the United States." And the learned counsel was doubtless correct in maintaining, that, without the act of 1867, there would be no remedy by *habeas corpus* in the case of the petitioner, nor indeed in any case of imprisonment in violation of the constitution of the United States, except in the possible case of an imprisonment, not only within the provisions of this act, but also within the provisions of some one of the previous acts of 1789, 1833 and 1842.

But if, in saying that the amendment must be construed with reference to the act, the counsel meant to affirm that the existence of the act throws any light whatever upon the construction of the amendment, the court is unable to perceive the force of his observation. It is not pretended that imprisonment for shooting, with intent to kill, is unconstitutional, and it will hardly be affirmed that the act of 1867 throws any light whatever upon the question, whether such imprisonment, in any particular case, is unconstitutional. The case of unconstitutional imprisonment must be established by appropriate evidence. It cannot be inferred from the existence of a remedy for such a case. And, surely, no construction, otherwise unwarranted, can be put upon the amendment more than upon any other provision of the constitution, to make a case of violation out of acts which otherwise must be regarded as not only constitutional, but right.

§ 1556. *Definition of the word "hold," with reference to public office.*

We come, then, to the question of construction. What was the intention of the people of the United States in adopting the fourteenth amendment? What is the true scope and purpose of the prohibition to hold office contained in the third section? The proposition maintained in behalf of the petitioner is, that

this prohibition, instantly, on the day of its promulgation, vacated all offices held by persons within the category of prohibition, and made all official acts; performed by them, since that day, null and void. One of the counsel sought to vindicate this construction of the amendment upon the ground that the definitions of the verb "to hold," given by Webster in his dictionary, are "to stop; to confine; to restrain from escape; to keep fast; to retain;" of which definitions the author says that "to hold rarely or never signifies the first act of seizing or falling on, but the act of retaining a thing when seized on or confined." The other counsel seemed to be embarrassed by the difficulties of this literal construction, and sought to establish a distinction between sentences in criminal cases and judgments and decrees in civil cases. He admitted, indeed, that the latter might be valid when made by a court held by a judge within the prohibitive category of the amendment; but insisted that the sentence of the same court in criminal cases must be treated as nullities.

§ 1557. *The prohibitions of the fourteenth amendment are general.*

The ground of the distinction, if we correctly apprehend the argument, was found in the circumstance that the act of 1867 provided a summary redress to the latter class of cases; while in the former, no summary remedy could be had, and great inconvenience would arise from regarding decrees and judgments as utterly null and without effect. But this ground of distinction seems to the court unsubstantial. It rests upon the fallacy already commented on. The amendment makes no such distinction as is supposed. It does not deal with cases, but with persons. The prohibition is general. No person in the prohibitive category can hold office. It applies to all persons, and to all officers under the United States, or any state. If upon a true construction, it operates as a removal of a judge, and avoids all sentences in criminal cases, pronounced by him after the promulgation of the amendment, it must be held to have the effect of removing all judges and officers, and annulling all their official acts after that date. The literal construction, therefore, is the only one upon which the order of the learned district judge, discharging the prisoner, can be sustained; and was, indeed, as appears from his certificate, the construction upon which the order was made. He says expressly, "the right of the petitioner to his discharge appeared to me to rest solely on the incapacity of the said Hugh W. Sheffey to act (that is, as judge), and so to sentence the prisoner under the fourteenth amendment."

§ 1558. *A construction which will occasion great public inconvenience must not be preferred to one which will not, unless the terms of the instrument are imperative.*

Was this a correct construction?

In the examination of questions of this sort great attention is properly paid to the argument from inconvenience. This argument, it is true, cannot prevail over plain words or clear reason. But, on the other hand, a construction which must necessarily occasion great public and private mischief, must never be preferred to a construction which will occasion neither, or neither in so great degree, unless the terms of the instrument absolutely require such preference. Let it then be considered what consequences would spring from the literal interpretation contended for in behalf of the petition. The amendment applies to all the states of the Union, to all offices under the United States or under any state, and to all persons in the category of prohibition, and for all time, present and future. The offenses for which exclusion from office is denounced are not merely engaging in insurrection or rebellion against the United States,

but the giving of aid or comfort to their enemies. They are offenses not only civil, but of foreign war.

§ 1559. *Effect of a literal construction of the prohibitory clauses of the fourteenth amendment.*

Now, let it be supposed that some of the persons described in the third section, during the war with Mexico, gave aid and comfort to the enemies of their country, and, nevertheless, held some office on July 28, 1868, or subsequently. Is it a reasonable construction of the amendment which will make it annul every official act of such an officer? But let another view be taken. It is well known that many persons, engaged in the late rebellion, have emigrated to states which adhered to the national government, and it is not to be doubted that not a few among them, as members of congress, or officers of the United States, or as members of state legislatures, or as executive or judicial officers of a state, had before the war taken an oath to support the constitution of the United States. In their new homes, capacity, integrity, fitness and acceptability may very possibly have been more looked to than antecedents. Probably some of these persons have been elected to office in the states which have received them. It is not unlikely that some of them held office on July 28, 1868. Must all their official acts be held to be null under the inexorable exigencies of the amendment?

§ 1560. *The purpose of the disability clause of the fourteenth amendment.*

But the principal intent of the amendment was, doubtless, to provide for the exclusion from office, in the lately insurgent states, of all persons within the prohibitive description. Now, it is well known that before the amendment was proposed by congress governments acknowledging the constitutional supremacy of the national government had been organized in all these states. In some these governments had been organized through the direct action of the people, encouraged and supported by the president, as in Tennessee, Louisiana and Arkansas; and in some through similar action in pursuance of executive proclamations, as in North Carolina, Alabama and several other states. In Virginia such a state government had been organized, as has been already stated, soon after the commencement of the war; and this government had been fully recognized by congress, as well as by the president. This government, indeed, and all the others, except that of Tennessee, were declared by congress to be provisional only. But in all these states all offices had been filled, before the ratification of the amendment, by citizens who, at the time of the ratification, were actively engaged in the performance of their several duties. Very many, if not a majority, of these officers, had, in one or another of the capacities described in the third section, taken an oath to support the constitution, and had afterwards engaged in the late rebellion; and most, if not all, of them continued in the discharge of their functions after the promulgation of the amendment, not supposing that by its operation their offices could be vacated without some action of congress. If the construction now contended for be given to the prohibitive section, the effect must be to annul all official acts performed by these officers. No sentence, no judgment, no decree, no acknowledgment of a deed, no record of a deed, no sheriff's or commissioner's sale — in short no official act — is of the least validity. It is impossible to measure the evils which such a construction would add to the calamities which have already fallen upon the people of these states.

§ 1561. *Rule for construing amendments.*

The argument from inconveniences, great as these, against the construction

contended for, is certainly one of no light weight. But there is another principle which, in determining the construction of this amendment, is entitled to equal consideration with that which has just been stated and illustrated. It may be stated thus: Of two constructions, either of which is warranted by the words of an amendment of a public act, that is to be preferred which best harmonizes the amendment with the general terms and spirit of the act amended. This principle forbids a construction of the amendment, not clearly required by its terms, which will bring it into conflict or disaccord with the other provisions of the constitution. And here it becomes proper to examine somewhat more particularly the character of the third section of the amendment. The amendment itself was the first of the series of measures proposed or adopted by congress with a view to the reorganization of state governments acknowledging the constitutional supremacy of the national government, in those states which had attempted to break up their constitutional relations with the Union, and to establish an independent confederacy.

All citizens who had, during its earlier stages, engaged in or aided the war against the United States, which resulted inevitably from this attempt, had incurred the penalties of treason under the statute of 1790. But, by the act of July 17, 1862, while the civil war was flagrant, the death penalty for treason, committed while engaging in rebellion, was practically abolished. Afterwards, in December, 1863, full amnesty, on conditions which now certainly seem to be moderate, was offered by President Lincoln, in accordance with the same act of congress; and after organized resistance to the United States had ceased, amnesty was again offered in accordance with the same act by President Johnson, in May, 1865. In both these offers of amnesty extensive exceptions were made.

§ 1562. *Quære, whether the fourteenth amendment remitted all other punishment.*

In June, 1866, little more than a year later, the fourteenth amendment was proposed; and was ratified in July, 1868. The only punitive section contained in it is the third, now under consideration. It is not improbable that one of the objects of this section was to provide for the security of the nation and of individuals, by the exclusion of a class of citizens from office; but it can hardly be doubted that the main purpose was to inflict upon the leading and most influential characters who had been engaged in the rebellion, exclusion from office as a punishment for the offense. It is true that in the judgment of some enlightened jurists, its legal effect was to remit all other punishment. And such certainly was its practical effect, for it led to the general amnesty of December 25th, of the same year, and to the order discontinuing all prosecutions for crime, and proceedings for confiscations originating in the rebellion. But this very effect shows distinctly its punitive character.

§ 1563. *It is presumed that by amendments the people seek to confirm and improve, rather than to weaken, the general spirit of the constitution.*

Now it is undoubted that those provisions of the constitution which deny to the legislature power to deprive any person of life, liberty or property without due process of law, or to pass a bill of attainder or an *ex post facto*, are inconsistent in their spirit and general purpose with a provision which, at once without trial, deprives a whole class of persons of offices held by them, for cause, however grave. It is true that no limit can be imposed on the people when exercising their sovereign power in amending their own constitution of government. But it is a necessary presumption that the people, in the exercise of

that power, seek to confirm and improve, rather than to weaken and impair, the general spirit of the constitution.

§ 1564. *The real object of the fourteenth amendment was to exclude certain persons from certain offices through the instrumentality of the appropriate legislation it authorized.*

If there were no other grounds than these for seeking another interpretation of the amendment than that which we are asked to put upon it, we should feel ourselves bound to hold them sufficient. But there is another and sufficient ground, and it is this: that the construction demanded in behalf of the petitioner is nugatory except for mischief. In the language of one of the counsel, "the object had in view by us is not to unseat Hugh W. Sheffey, and no judgment of the court can effect that." Now the object of the amendment is to unseat every officer, whether judicial or executive, who holds civil or military office in contravention of the terms of the amendment. Surely a construction which fails to accomplish the main purpose of the amendment, and yet necessarily works the mischief and inconveniences which have been described, and is repugnant to the first principles of justice and right embodied in other provisions of the constitution, is not to be favored, if any other reasonable construction can be found.

Is there, then, any other reasonable construction? In the judgment of the court there is another, not only reasonable, but very clearly warranted by the terms of the amendment, and recognized by the legislation of congress. The object of the amendment is to exclude from certain offices a certain class of persons. Now, it is obviously impossible to do this by a simple declaration, whether in the constitution or in an act of congress, that all persons included within a particular description shall not hold office. For, in the very nature of things, it must be ascertained what particular individuals are embraced by the definition, before any sentence of exclusion can be made to operate. To accomplish this ascertainment and insure effective results, proceedings, evidence, decisions, and enforcements of decisions, more or less formal, are indispensable; and these can only be provided for by congress. Now, the necessity of this is recognized by the amendment itself, in its fifth and final section, which declares that "congress shall have power to enforce, by appropriate legislation, the provisions of this article."

§ 1565. *The third and fifth sections of the fourteenth amendment to be construed together.*

There are, indeed, other sections than the third, to the enforcement of which legislation is necessary; but there is no one which more clearly requires legislation in order to give effect to it. The fifth section qualifies the third to the same extent as it would if the whole amendment consisted of these two sections. And the final clause of the third section itself is significant. It gives to congress absolute control of the whole operation of the amendment. These are its words: "But congress may, by a vote of two-thirds of each house, remove such disability." Taking the third section, then, in its completeness with this final clause, it seems to put beyond reasonable question the conclusion that the intention of the people of the United States, in adopting the fourteenth amendment, was to create a disability, to be removed in proper cases by a two-thirds vote, and to be made operative in other cases by the legislation of congress in its ordinary course. This construction gives certain effect to the undoubted intent of the amendment to insure the exclusion from office of the designated class of persons, if not relieved from their disabilities, and avoids

the manifold evils which must attend the construction insisted upon by the counsel for the petitioner.

§ 1566. *Persons in office when the fourteenth amendment was adopted were not removed by it. Legislation by congress was necessary to accomplish that purpose.*

It results from the examination that persons in office by lawful appointment or election before the promulgation of the fourteenth amendment are not removed therefrom by the direct and immediate effect of the prohibition to hold office contained in the third section; but that legislation by congress is necessary to give effect to the prohibition, by providing for such removal. And it results further, that the exercise of their several functions by these officers, until removed in pursuance of such legislation, is not unlawful.

The views which have been just stated receive strong confirmation from the action of congress and of the executive department of the government. The decision of the district judge, now under revision, was made in December, 1868, and two months afterwards, in February, 1869, congress adopted a joint resolution entitled "A resolution respecting the provisional governments of Virginia and Texas." In this resolution it was provided that persons, "holding office in the provisional governments of Virginia and Texas," but unable to take and subscribe the test oath prescribed by the act of July 2, 1862, except those relieved from disability, "be removed therefrom;" but a provision was added, suspending the operation of the resolution for thirty days from its passage. The joint resolution was passed and received by the president on February 6th, and not having been returned in ten days, became a law without his approval. It cannot be doubted that this joint resolution recognized persons unable to take the oath required, to which class belonged all persons within the description of the third section of the fourteenth amendment, as holding office in Virginia at the date of its passage, and provided for their removal from office.

It is not clear whether it was the intent of congress that this removal should be effected in Virginia by the force of the joint resolution itself, or by the commander of the first military district. It was understood by the executive or military authorities as directing the removal of the persons described, by military order. The resolution was published by command of the general of the army for the information of all concerned, March 22, 1869. It had been previously published by direction of the commander of the first military district, accompanied by an order, to take effect on March 18, 1869, removing the persons described from office. The date at which this order was to take effect was afterwards changed to March 21st. It is plain enough from this statement that persons holding office in Virginia, and within the prohibition of the fourteenth amendment, were not regarded by congress, or by the military authority, in March, 1869, as having been already removed from office.

It is unnecessary to discuss here the question whether the government of Virginia, which seems to have been not provisional, but permanent, when transferred from Alexandria to Richmond, became provisional under the subsequent legislation of congress, or to express any opinion concerning the validity of the joint resolution, or of the proceedings under it. The resolution and proceedings are referred to here only for the purpose of showing that the amendment had not been regarded by congress or the executive, so far as represented by the military authorities, as effecting an immediate removal of the officers described in the third section. After the most careful consideration,

therefore, I find myself constrained to the conclusion that Hugh W. Sheffey had not been removed from the office of judge at the time of the trial and sentence of the petitioner; and that the sentence of the circuit court of Rockbridge county was lawful.

§ 1567. *The effect of a sentence by a de facto court.*

In this view of the case, it becomes unnecessary to determine the question relating to the effect of the sentence of a judge *de facto*, exercising the office with the color, but without the substance, of right. "It is proper to say, however, that I should have no difficulty in sustaining the custody of the sheriff, under sentence of a court held by such a judge. Instructive argument and illustration of this branch of the case might be derived from an examination of those provisions of the constitution ordaining that no person shall be a representative or senator, or president, or vice-president, unless having certain prescribed qualifications. These provisions, as well as those which ordain that no senator or representative shall, during his term of service, be appointed to any office under the United States, under certain circumstances, and that no person holding any such office shall, while holding such office, be a member of either house, operate on the capacity to take office. The election or appointment itself is prohibited and invalidated; and yet no instance is believed to exist where a person has been actually elected, and has actually taken the office, notwithstanding the prohibition, and his acts, while exercising its functions, have been held invalid. But it is unnecessary to pursue the examination. The cases cited by counsel cover the whole ground, both of principle and authority. *Taylor v. Skinner*, 2 S. C., 696; *State v. Bloom*, 17 Wis., 521; *Ex rel. Ballou v. Bangs*, 24 Ill., 184. This subject received the consideration of the judges of the supreme court at the last term, with reference to this and kindred cases in this district, and I am authorized to say that they unanimously concur in the opinion that a person convicted by a judge *de facto*, acting under color of office, though not *de jure*, and detained in custody in pursuance of his sentence, cannot be properly discharged upon *habeas corpus*. It follows that the order of the district judge must be reversed, and that the petitioner must be remanded to the custody of the sheriff of Rockbridge county.

UNITED STATES v. REESE.

(2 Otto, 214-256. 1875.)

ERROR to U. S. Circuit Court, District of Kentucky.

Opinion by WAITE, C. J.

STATEMENT OF FACTS.— This case comes here by reason of a division of opinion between the judges of the circuit court in the district of Kentucky. It presents an indictment containing four counts, under sections 3 and 4 of the act of May 31, 1870 (16 Stat., 140), against two of the inspectors of a municipal election in the state of Kentucky, for refusing to receive and count at such election the vote of William Garner, a citizen of the United States of African descent. All the questions presented by the certificate of division arose upon general demurrers to the several counts of the indictment. In this court the United States abandon the first and third counts, and expressly waive the consideration of all claims not arising out of the enforcement of the fifteenth amendment of the constitution. After this concession, the principal question left for consideration is, whether the act under which the indictment is found can be made effective for the punishment of inspectors of elections who refuse

to receive and count the votes of citizens of the United States, having all the qualifications of voters, because of their race, color or previous condition of servitude.

If congress has not declared an act done within a state to be a crime against the United States, the courts have no power to treat it as such. *United States v. Hudson*, 7 Cranch, 32. It is not claimed that there is any statute which can reach this case, unless it be the one in question. Looking, then, to this statute, we find that its first section provides that all citizens of the United States, who are or shall be otherwise qualified by law to vote at any election, etc., shall be entitled and allowed to vote thereat, without distinction of race, color or previous condition of servitude, any constitution, etc., of the state to the contrary notwithstanding. This simply declares a right, without providing a punishment for its violation. The second section provides for the punishment of any officer charged with the duty of furnishing to citizens an opportunity to perform any act, which, by the constitution or laws of any state, is made a prerequisite or qualification of voting, who shall omit to give all citizens of the United States the same and equal opportunity to perform such prerequisite, and become qualified on account of the race, color or previous condition of servitude of the applicant. This does not apply to or include the inspectors of an election, whose only duty it is to receive and count the votes of citizens, designated by law as voters, who have already become qualified to vote at the election. The third section is to the effect that, whenever, by or under the constitution or laws of any state, etc., any act is or shall be required to be done by any citizen as a prerequisite to qualify or entitle him to vote, the offer of such citizen to perform the act required to be done "as aforesaid" shall, if it fail to be carried into execution by reason of the wrongful act or omission "aforesaid" of the person or officer charged with the duty of receiving or permitting such performance, or offer to perform, or acting thereon, be deemed and held as a performance in law of such act; and the person so offering and failing as aforesaid, and being otherwise qualified, shall be entitled to vote in the same manner and to the same extent as if he had, in fact, performed such act; and any judge, inspector or other officer of election whose duty it is to receive, count, etc., or give effect to, the vote of any such citizen, who shall wrongfully refuse or omit to receive, count, etc., the vote of such citizen, upon the presentation by him of his affidavit stating such offer, and the time and place thereof, and the name of the person or officer whose duty it was to act thereon, and that he was wrongfully prevented by such person or officer from performing such act, shall, for every such offense, forfeit and pay, etc. The fourth section provides for the punishment of any person who shall, by force, bribery, threats, intimidation, or other unlawful means, hinder, delay, etc., or shall combine with others to hinder, delay, prevent or obstruct, any citizen from doing any act required to be done to qualify him to vote, or from voting, at any election. The second count in the indictment is based upon the fourth section of this act, and the fourth upon the third section.

§ 1568. *The fifteenth amendment does not confer the right of suffrage, but it prohibits discrimination.*

Rights and immunities created by or dependent upon the constitution of the United States can be protected by congress. The form and the manner of the protection may be such as congress, in the legitimate exercise of its legislative discretion, shall provide. These may be varied to meet the necessities of the particular right to be protected. The fifteenth amendment does not confer the

right of suffrage upon any one. It prevents the states or the United States, however, from giving preference, in this particular, to one citizen of the United States over another on account of race, color or previous condition of servitude. Before its adoption this could be done. It was as much within the power of a state to exclude citizens of the United States from voting on account of race, etc., as it was on account of age, property or education. Now it is not. If citizens of one race, having certain qualifications, are permitted by law to vote, those of another, having the same qualifications, must be. Previous to this amendment there was no constitutional guaranty against this discrimination; now there is. It follows that the amendment has invested the citizens of the United States with a new constitutional right which is within the protecting power of congress. That right is exemption from discrimination in the exercise of the elective franchise on account of race, color or previous condition of servitude. This, under the express provisions of the second section of the amendment, congress may enforce by "appropriate legislation."

§ 1569. — *and congress can interfere only when the discrimination is on account of race, color, etc.*

This leads us to inquire whether the act now under consideration is "appropriate legislation" for that purpose. The power of congress to legislate at all upon the subject of voting at state elections rests upon this amendment. The effect of article 1, section 4, of the constitution, in respect to elections for senators and representatives, is not now under consideration. It has not been contended, nor can it be, that the amendment confers authority to impose penalties for every wrongful refusal to receive the vote of a qualified elector at state elections. It is only when the wrongful refusal at such an election is because of race, color or previous condition of servitude that congress can interfere and provide for its punishment. If, therefore, the third and fourth sections of the act are beyond that limit, they are unauthorized. The third section does not in express terms limit the offense of an inspector of elections, for which the punishment is provided, to a wrongful discrimination on account of race, etc. This is conceded; but it is urged that when this section is construed with those which precede it, and to which, as is claimed, it refers, it is so limited. The argument is that the only wrongful act, on the part of the officer whose duty it is to receive or permit the requisite qualification, which can dispense with actual qualification under the state laws and substitute the prescribed affidavit therefor, is that mentioned and prohibited in section 2, to wit, discrimination on account of race, etc.; and that, consequently, section 3 is confined in its operation to the same wrongful discrimination.

§ 1570. *Penal statutes to be construed strictly.*

This is a penal statute, and must be construed strictly; not so strictly, indeed, as to defeat the clear intention of congress, but the words employed must be understood in the sense they were obviously used. *United States v. Wiltberger*, 5 Wheat., 85. If, taking the whole statute together, it is apparent that it was not the intention of congress thus to limit the operation of the act, we cannot give it that effect.

§ 1571. *Congress cannot make it penal simply for an officer to refuse to allow a person to prove his right to vote.*

The statute contemplates a most important change in the election laws. Previous to its adoption, the states, as a general rule, regulated in their own way all the details of all elections. They prescribed the qualifications of voters, and the manner in which those offering to vote at an election should make

known their qualifications to the officers in charge. This act interferes with this practice, and prescribes rules not provided by the laws of the states. It substitutes, under certain circumstances, performance wrongfully prevented for performance itself. If the elector makes and presents his affidavit in the form and to the effect prescribed, the inspectors are to treat this as the equivalent of the specified requirement of the state law. This is a radical change in the practice, and the statute which creates it should be explicit in its terms. Nothing should be left to construction, if it can be avoided. The law ought not to be in such a condition that the elector may act upon one idea of its meaning, and the inspector upon another.

The elector, under the provisions of the statute, is only required to state in his affidavit that he has been wrongfully prevented by the officer from qualifying. There are no words of limitation in this part of the section. In a case like this, if an affidavit is in the language of the statute, it ought to be sufficient both for the voter and the inspector. Laws which prohibit the doing of things, and provide a punishment for their violation, should have no double meaning. A citizen should not unnecessarily be placed where, by an honest error in the construction of a penal statute, he may be subjected to a prosecution for a false oath; and an inspector of elections should not be put in jeopardy because he, with equal honesty, entertains an opposite opinion. If this statute limits the wrongful act which will justify the affidavit to discrimination on account of race, etc., then a citizen who makes an affidavit that he has been wrongfully prevented by the officer, which is true in the ordinary sense of that term, subjects himself to indictment and trial, if not to conviction, because it is not true that he has been prevented by such a wrongful act as the statute contemplated; and if there is no such limitation, but any wrongful act of exclusion will justify the affidavit, and give the right to vote without the actual performance of the prerequisite, then the inspector who rejects the vote because he reads the law in its limited sense, and thinks it is confined to a wrongful discrimination on account of race, etc., subjects himself to prosecution, if not to punishment, because he has misconstrued the law. Penal statutes ought not to be expressed in language so uncertain. If the legislature undertakes to define by statute a new offense, and provide for its punishment, it should express its will in language that need not deceive the common mind. Every man should be able to know with certainty when he is committing a crime. But when we go beyond the third section, and read the fourth, we find there no words of limitation, or reference even, that can be construed as manifesting any intention to confine its provisions to the terms of the fifteenth amendment. That section has for its object the punishment of all persons who, by force, bribery, etc., hinder, delay, etc., any person from qualifying or voting. In view of all these facts, we feel compelled to say, that, in our opinion, the language of the third and fourth sections does not confine their operation to unlawful discriminations on account of race, etc. If congress had the power to provide generally for the punishment of those who unlawfully interfere to prevent the exercise of the elective franchise without regard to such discrimination, the language of these sections would be broad enough for that purpose.

It remains now to consider whether a statute, so general as this in its provisions, can be made available for the punishment of those who may be guilty of unlawful discrimination against citizens of the United States, while exercising the elective franchise, on account of their race, etc. There is no attempt in the sections now under consideration to provide specifically for such an offense.

If the case is provided for at all, it is because it comes under the general prohibition against any wrongful act or unlawful obstruction in this particular. We are, therefore, directly called upon to decide whether a penal statute enacted by congress, with its limited powers, which is in general language broad enough to cover wrongful acts without as well as within the constitutional jurisdiction, can be limited by judicial construction so as to make it operate only on that which congress may rightfully prohibit and punish. For this purpose, we must take these sections of the statute as they are. We are not able to reject a part which is unconstitutional, and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there. Each of the sections must stand as a whole, or fall altogether. The language is plain. There is no room for construction, unless it be as to the effect of the constitution. The question, then, to be determined, is, whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only.

§ 1572. *The courts cannot construe a law so as to limit its operation to the constitutional limits.*

It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government. The courts enforce the legislative will when ascertained, if within the constitutional grant of power. Within its legitimate sphere, congress is supreme, and beyond the control of the courts; but if it steps outside of its constitutional limitations and attempts that which is beyond its reach, the courts are authorized to, and when called upon in due course of legal proceedings must, annul its encroachments upon the reserved power of the states and the people. To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty. We must, therefore, decide that congress has not as yet provided by "appropriate legislation" for the punishment of the offense charged in the indictment; and that the circuit court properly sustained the demurrers, and gave judgment for the defendants.

§ 1573. *Practice on certificate of division of opinion.*

This makes it unnecessary to answer any of the other questions certified. Since the law which gives the presiding judge the casting vote in cases of division, and authorizes a judgment in accordance with his opinion (R. S., sec. 650), if we find that the judgment as rendered is correct, we need not do more than affirm. If, however, we reverse, all questions certified, which may be considered in the final determination of the case according to the opinion we express, should be answered.

Judgment affirmed.

Dissenting opinion by MR. JUSTICE CLIFFORD.

I concur that the indictment is bad, but for reasons widely different from those assigned by the court. States, as well as the United States, are prohibited by the fifteenth amendment of the constitution from denying or abridging the right of citizens of the United States to vote on account of race, color or previous condition of servitude; and power is vested in congress, by the second article of that amendment, to enforce that prohibition "by appropriate legisla-

tion." Since the adoption of that amendment, congress has legislated upon the subject; and, by the first section of the Enforcement Act, it is provided that citizens of the United States, without distinction of race, color or previous condition of servitude, shall, if *otherwise* qualified to vote in state, territorial or municipal elections, be entitled and allowed to vote at all such elections, any constitution, law, custom, usage or regulation of any state or territory, or by or under its authority, to the contrary notwithstanding.

Beyond doubt, that section forbids all discrimination between white citizens and citizens of color in respect to their right to vote; but the section does not provide that the person or officer making such discrimination shall be guilty of any offense, nor does it prescribe that the person or officer guilty of making such discrimination shall be subject to any fine, penalty or punishment whatever. None of the counts of the indictment in this case, however, are framed under that section; nor will it be necessary to give it any further consideration, except so far as it may aid in the construction of the other sections of the act. 16 Stat., 140. Section 2 of the act will deserve more examination, as it assumes that certain acts are or may be required to be done by or under the authority of the constitution or laws of certain states, or the laws of certain territories, as a prerequisite or qualification for voting, and that certain persons or officers are or may be, by such constitution or laws, charged with the performance of duties in furnishing to such citizens an opportunity to perform such prerequisites to become qualified to vote; and provides that it shall be the duty of every such person or officer to give all such citizens, without distinction of race, color or previous condition of servitude, the same and equal opportunity to perform such prerequisites to become qualified to vote.

Equal opportunity is required by that section to be given to all such citizens, without distinction of race, color or previous condition of servitude, to perform the described prerequisite; and the further provision of the same section is that, if any such person or officer charged with the performance of the described duties shall refuse or knowingly omit to give full effect to the requirements of that section, he shall for every such offense forfeit and pay \$500 to the person aggrieved, and also be deemed guilty of a misdemeanor, and punished as therein provided. Other sections applicable to the subject are contained in the Enforcement Act, to which reference will hereafter be made. 16 id., 141.

1. Four counts are exhibited in the indictment against the defendants; and the record shows that the defendants filed a demurrer to each of the counts, which was joined in behalf of the United States. Two of the counts — to wit, the first and the third — having been abandoned at the argument, the examination will be confined to the second and the fourth. By the record, it also appears that the defendants, together with one William Farnaugh, on the 30th of January, 1873, were the lawful inspectors of a municipal election held on that day in the city of Lexington, in the state of Kentucky, pursuant to the constitution and laws of that state, and that they, as such inspectors, were then and there charged by law with the duty of receiving, counting, certifying, registering, reporting and giving effect to the vote of all citizens qualified to vote at said election in Ward 3 of the city; and the accusation set forth in the second count of the indictment is, that one William Garner, at said municipal election, offered to the said inspectors at the polls of said election in said Ward 3 to vote for members of the said city council, the said poll being then and there the lawful and proper voting place and precinct of the said William Gar-

ner, who was then and there a free male citizen of the United States, and of the state, of African descent, and having then and there resided in said state more than two years, and in said city more than one year, next preceding said election, and having been a resident of said voting precinct and ward in which he offered to vote more than sixty days immediately prior to said election, and being then and there, at the time of such offer to vote, qualified and entitled, as alleged, by the laws of the state, to vote at said election.

Offer in due form to vote at the said election having been made, as alleged, by the said William Garner, the charge is that the said William Farnaugh consented to receive, count, register and give effect to the vote of the party offering the same; but that the defendants, constituting the majority of the inspectors at the election, and, as such, having the power to receive or reject all votes offered at said poll, did then and there, when the said party offered to vote, unlawfully agree and confer with each other that they, as such inspectors, would not take, receive, certify, register, report or give effect to the vote of any voters of African descent, offered at said election, unless the voter so offering to vote, besides being *otherwise* qualified to vote, had paid to said city the capitation tax of \$1.50 for the preceding year, on or before the 15th of January prior to the day of the election; which said agreement, the pleader alleges, was then and there made with intent thereby to hinder, prevent and obstruct all voters of African descent on account of their race and color, though lawfully entitled to vote at said election, from so voting. Taken separately, that allegation would afford some support to the theory of the United States; but it must be considered in connection with the allegation which immediately follows it in the same count, where it is alleged as follows: That the defendants, in pursuance of said unlawful agreement, did then and there, at the election aforesaid, wrongfully and illegally require and demand of said party, when he offered to vote as aforesaid, that he should, as a prerequisite and qualification to his voting at said election, produce evidence of his having paid to said city or its proper officers the said capitation tax of \$1.50 for the year preceding, on or before the 15th of January preceding the day of said election; and the averment is to the effect that the party offering his vote then and there refused to comply with that illegal requirement and demand, or to produce the evidence so demanded and required.

§ 1574. *Every ingredient of which the offense is composed must be accurately and clearly alleged in the indictment.*

Offenses created by statute, as well as offenses created at common law, with rare exceptions, consist of more than one ingredient, and, in some cases, of many; and the rule is universal, that every ingredient of which the offense is composed must be accurately and clearly alleged in the indictment, or the indictment will be bad on demurrer, or it may be quashed on motion, or the judgment may be arrested before sentence, or be reversed on a writ of error. *United States v. Cook*, 17 Wall., 174. Matters well pleaded, it is true, are admitted by the demurrer; but it is equally true, that every ingredient of the offense must be accurately and clearly described, and that no indictment is sufficient if it does not accurately and clearly describe all the ingredients of which the offense is composed.

§ 1575. *The first section of the Enforcement Act clearly secures the voter against discrimination on account of his race or color.*

Citizens of the United States, without distinction of race, color or previous condition of servitude, if *otherwise* qualified to vote at a state, territorial or

municipal election, shall be entitled and allowed to vote at such an election, even though the constitution, laws, customs, usages or regulations of the state or territory do not allow, or even prohibit, such voter from exercising that right. 16 Stat., 140, sec. 1. Evidently the purpose of that section is to place the male citizen of color, as an elector, on the same footing with the white male citizen. Nothing else was intended by that provision, as is evident from the fact that it does not profess to enlarge or vary the prior existing right of white male citizens in any respect whatever. Conclusive support to that theory is also derived from the second section of the same act, which was obviously passed to enforce obedience to the rule forbidding discrimination between colored male citizens and white male citizens in respect to their right to vote at such elections.

By the charter of the city of Lexington, it is provided that a tax shall be levied on each free male inhabitant of twenty-one years of age and upwards, except paupers, inhabiting said city, at a ratio not exceeding \$1.50 each. Sess. Laws 1867, p. 441. Such citizens, without distinction of race, color or previous condition of servitude, in order that they may be entitled to vote at any such election, must be free male citizens "over twenty-one years of age, have been a resident of the city at least six months, and of the ward in which he resides at least sixty days, prior to the day of the election, and have paid the capitation tax assessed by the city on or before the 15th of January preceding the day of election." 2 Sess. Laws 1870, p. 71. White male citizens, not possessing the qualifications to vote required by law, find no guaranty of the right to exercise that privilege by the first section of the Enforcement Act; but the mandate of the section is explicit and imperative, that all citizens, without distinction of race, color or previous condition of servitude, if *otherwise* qualified to vote at any state, territorial or municipal election, shall be entitled and allowed to vote at all such elections, even though forbidden so to do, on account of race, color or previous condition of servitude, by the constitution of the state, or by the laws, custom, usage or regulation of the state or territory where the election is held.

Disability to vote of every kind, arising from race, color or previous condition of servitude, is declared by the first section of that act to be removed from the colored male citizen; but, unless *otherwise* qualified by law to vote at such an election, he is no more entitled to enjoy that privilege than a white male citizen who does not possess the qualifications required by law to constitute him a legal voter at such an election. Legal disability to vote at any such election, arising from race, color or previous condition of servitude, is removed by the fifteenth amendment, as affirmed in the first section of the Enforcement Act; but the congress knew full well that cases would arise where the want of other qualifications, if not removed, might prevent the colored citizen from exercising the right of suffrage at such an election; and the intent and purpose of the second section of the act are to furnish to all citizens an opportunity to remove every such other disability to enable them to become qualified to exercise that right, and to punish persons and officers charged with any duty in that regard who unlawfully and wrongfully refuse or wilfully omit to co-operate to that end. Hence it is provided, that where any act is or shall be required to be done as a prerequisite or qualification for voting, and persons or officers are charged in the manner stated with the performance of duties in furnishing to citizens an opportunity to perform such prerequisite or to become qualified to vote, it shall be the duty of every such person and officer to give all citizens,

without distinction of race, color or previous condition of servitude, the same and equal opportunity to perform such prerequisite, and to become qualified to vote.

Persons or officers who wrongfully refuse or knowingly omit to perform the duty with which they are charged by that clause of the second section of the Enforcement Act commit the offense defined by that section, and incur the penalty, and subject themselves to the punishment prescribed for that offense.

§ 1576. *The fifteenth amendment does not give any one the right to vote; it merely protects those otherwise qualified to vote against denial of the right on account of color or race.*

Enough appears in the second count of the indictment to show beyond all question that it cannot be sustained under the second section of the Enforcement Act, as the count expressly alleges that the defendants as such inspectors, at the time the complaining party offered his vote, refused to receive and count the same because he did not produce evidence that he had paid to the city the capitation tax of \$1.50 assessed against him for the preceding year, which payment, it appears by the law of the state, is a prerequisite and necessary qualification to enable any citizen to vote at that election, without distinction of race, color or previous condition of servitude; and the express allegation of the count is, that the party offering his vote then and there refused to comply with that prerequisite, and then and there demanded that his vote should be received and counted without his complying with that prerequisite. Argument to show that such allegations are insufficient to constitute the offense defined in the second section of the Enforcement Act, or any other section of that act, is quite unnecessary, as it appears in the very terms of the allegations that the party offering his vote was not, irrespective of his race, color or previous condition of servitude, a qualified voter at such an election by the law of the state where the election was held.

Persons within the category described in the first section of the Enforcement Act, of whom it is enacted that they shall be entitled and allowed to vote at such an election, without distinction of race, color or previous condition of servitude, are citizens of the United States *otherwise qualified to vote* at the election pending; and inasmuch as it is not alleged in the count that the party offering his vote in this case was *otherwise* qualified by law to vote at the time he offered his vote, and inasmuch as no excuse is pleaded for not producing evidence to establish that prerequisite of qualification, it is clear that the supposed offense is not set forth with sufficient certainty to justify a conviction and sentence of the accused.

2. Defects also exist in the fourth count; but it becomes necessary, before considering the questions which those defects present, to examine with care the third section of the Enforcement Act. Section 3 of that act differs in some respects from the second section; as, for example, section 3 provides that whenever, under the constitution and laws of a state, or the laws of a territory, any act is or shall be required to be done by any such citizen as a prerequisite to qualify or entitle him to vote, the offer of any such citizen to perform the act required to be done as aforesaid shall, *if it fail to be carried into execution* by reason of the wrongful act or omission aforesaid of the person or officer charged with the duty of receiving or permitting such performance or offer to perform, be deemed and held as a performance in law of such act; and the person so offering and failing as aforesaid, and *being otherwise qualified*, shall be entitled to vote in the same manner and to the same extent as if he had, in fact, per-

formed the said act. By that clause of the section, it is enacted that the offer of the party interested to perform the prerequisite act to qualify or entitle him to vote shall, if it fail for the reason specified, have the same effect as the actual performance of the prerequisite act would have; and the further provision is, that any judge, inspector or other officer of election, whose duty it is, or shall be, to receive, count, certify, register, report or give effect to the vote of such citizen, upon the presentation by him of his affidavit, stating such offer and the time and place thereof, and the name of the officer or person whose duty it was to act thereon, and that he was wrongfully prevented by such person or officer from performing such act, shall, for every such offense, forfeit and pay the sum of \$500 to the person aggrieved, and also be guilty of a misdemeanor.

Payment of the capitation tax, on or before the 15th of January preceding the day of the election, is, beyond all doubt, one of the prerequisite acts, if not the only one, referred to in that part of the section; and it is equally clear that the introductory clause of the section is wholly inapplicable to a case where the citizen, claiming the right to vote at such an election, has actually paid the capitation tax as required by the election law of the state. Voters who have seasonably paid the tax are in no need of any opportunity to perform such a prerequisite to qualify them to vote; but the third section of the act was passed to provide for a class of citizens who had not paid the tax, and who had offered to pay it, and the offer had failed to be carried into execution by reason of the wrongful act or omission of the person or officer charged with the duty of receiving or permitting the performance of such prerequisite. Qualified voters, by the law of the state, are male citizens over twenty-one years of age, who have been residents of the city at least six months, and of the ward in which they reside at least sixty days, immediately prior to the day of the election, and who have paid the capitation tax assessed by the city on or before the 15th day of January preceding the day of the election. Obviously, the payment of the capitation tax, on or before the time mentioned, is a prerequisite to qualify the citizen to vote; and the purpose of the second section is to secure to the citizen an opportunity to perform that prerequisite, and to punish the persons and officers charged with the duty of furnishing the citizen with such an opportunity to perform such prerequisite, in case such person or officer refuses or knowingly omits to do his duty in that regard. Grant that, still it is clear that the punishment of the offender would not retroact and give effect to the right of the citizen to vote, nor secure to the public the right to have his vote received, counted, registered, reported, and made effectual at that election.

3. Injustice of the kind, it was foreseen, might be done; and, to remedy that difficulty, the third section was passed, the purpose of which is to provide that the offer of any such citizen to perform such prerequisite, if the offer fails to be carried into execution by reason of the wrongful act or omission of the person or officer charged with the duty of receiving or permitting such performance, shall be deemed and held as a performance in law of such act and prerequisite; and the person so offering to perform such prerequisite, and so failing by reason of the wrongful act or omission of the person or officer charged with such duty, if *otherwise* qualified, shall be entitled to vote in the same manner, and to the same extent, as if he had in fact performed such prerequisite act. Nothing short of the performance of the prerequisite act will entitle any citizen to vote at any such election in that state, if the opportunity to perform the prerequisite is furnished as required by the act of

congress; but if those whose duty it is to furnish the opportunity to perform the act refuse or omit so to do, then the offer to perform such prerequisite act, if the offer fails to be carried into execution by the wrongful act or omission of those whose duty it is to receive and permit the performance of the prerequisite act, shall have the same effect in law as the actual performance.

Such an offer to perform can have the same effect in law as actual performance *only* in case where it fails to be carried into execution by reason of the wrongful act or omission of the person or officer charged with the duty of receiving or permitting such performance; from which it follows that the offer must be made in such terms, and under such circumstances, that, if it should be received and carried into execution, it would constitute a legal and complete performance of the prerequisite act. What the law of the state requires in that regard is, that the citizen offering to vote at such an election should have paid the capitation tax assessed by the city, which in this case was \$1.50, on or before the 15th of January preceding the day of election. Unless the offer is made in such terms, and under such circumstances, that, if it is accepted and carried into execution, it would constitute a legal and complete performance of the prerequisite act, the person or officer who refused or omitted to carry the offer into execution would not incur the penalty nor be guilty of the offense defined by that section of the act; for it could not be properly alleged that it failed to be carried into effect by the wrongful act or omission of the person or officer charged with the duty of receiving and permitting such performance. Viewed in the light of these suggestions, it must be that the offer contemplated by the third section of the act is an offer made in such terms, and under such circumstances, that, if it be accepted and carried into execution by the person or officer to whom it is made, it will constitute a complete performance of the prerequisite, and show that the party making the offer, if *otherwise* qualified, is entitled to vote at the election.

Evidence is entirely wanting to show that the authors of the Enforcement Act ever intended to abrogate any state election law, except so far as it denies or abridges the right of the citizen to vote on account of race, color or previous condition of servitude. Every discrimination on that account is forbidden by the fifteenth amendment; and the first section of the act under consideration provides, as before remarked, that all citizens, *otherwise* qualified to vote, . . . shall be entitled and allowed to vote, . . . without distinction of race color or previous condition of servitude, any constitution, law, etc., to the contrary notwithstanding. State election laws creating such discriminations are superseded in that regard by the fifteenth amendment; but the Enforcement Act furnishes no ground to infer that the law-makers intended to annul the state election laws in any other respect whatever. Had congress intended by the third section of that act to abrogate the election law of the state creating the prerequisite in question, it is quite clear that the second section would have been wholly unnecessary, as it would be a useless regulation to provide the means to enable citizens to comply with a prerequisite which is abrogated and treated as null by the succeeding section.

§ 1577. *Statutes should be interpreted so that all their provisions may be given sensible effect.*

Statutes should be interpreted, if practicable, so as to avoid any repugnancy between the different parts of the same, and to give a sensible and intelligent effect to every one of their provisions; nor is it ever to be presumed that any part of a statute is supererogatory or without meaning. Potter's Dwarris,

145. Difficulties of the kind are all avoided if it be held that the second section was enacted to afford citizens an opportunity to perform the prerequisite act to qualify themselves to vote, and to punish the person or officer who refuses or knowingly omits to perform his duty in furnishing them with that opportunity, and that the intent and purpose of the third section are to protect such citizens from the consequences of the wrongful refusal or wilful omission of such person or officer to receive and give effect to the actual offer of such citizen to perform such prerequisite, if made in terms, and under such circumstances, that the offer, if accepted and carried into execution, would constitute an actual and complete performance of the act made a prerequisite to the right of voting by the state law. Apply these suggestions to the fourth count of the indictment, and it is clear that the allegations in that regard are insufficient to describe the offense defined by the third section of the Enforcement Act.

§ 1578. *It is sufficient, in describing a statutory offense in an indictment, to follow the words of the statute.*

4. Beyond all doubt, the general rule is, that, in an indictment for an offense created by statute, it is sufficient to describe the offense in the words of the statute; and it is safe to admit that that general rule is supported by many decided cases of the highest authority; but it is equally certain that exceptions exist to the rule, which are as well established as the rule itself, most of which result from another rule of criminal pleading, which, in framing indictments founded upon statutes, is paramount to all others, and is one of universal application,—that every ingredient of the offense must be accurately and clearly expressed; or, in other words, that the indictment must contain an allegation of every fact which is legally essential to the punishment to be inflicted. *United States v. Cook*, 17 Wall., 174. Speaking of that principle, Mr. Bishop says it pervades the entire system of the adjudged law of criminal procedure, as appears by all the cases; that, wherever we move in that department of our jurisprudence, we come in contact with it; and that we can no more escape from it than from the atmosphere which surrounds us. 1 Bishop, Cr. Pro., 2d ed., sec. 81; Archbold's Crim. Plead., 15th ed., 54; 1 Stark Crim. Plead., 236; 1 Am. Cr. Law, 6th rev. ed., sec. 364; *Steel v. Smith*, 1 Barn. & Ald., 99. Examples of the kind, where it has been held that exceptions exist to the rule that it is sufficient in an indictment founded upon a statute to follow the words of the statute, are very numerous, and show that many of the exceptions have become as extensively recognized, and are as firmly settled, as any rule of pleading in the criminal law. Moreover, says Mr. Bishop, there must be such an averment of facts as shows *prima facie* guilt in the defendant; and if, supposing all the facts set out to be true, there is, because of the possible non-existence of some fact not mentioned, room to escape from the *prima facie* conclusion of guilt, the indictment is insufficient, which is the exact case before the court. 1 Bishop, Cr. Pro., 2d ed., sec. 325.

§ 1579. — *but the indictment must be then sufficient to answer the other rules of criminal pleading.*

It is plain, says the same learned author, that if, after a full expression has been given to the statutory terms, any of the other rules relating to the indictment are left uncomplied with, the indictment is still insufficient. To it must be added what will conform also to the other rules. Consequently, the general doctrine, that the indictment is sufficient if it follows the words of the statute creating and defining the offense, is subject to exceptions, requiring the allegation to be expanded beyond the prohibiting terms. 1 id., sec. 623. In general,

says Marshall, C. J., it is sufficient in a libel (being a libel of information) to charge the offense in the very words which direct the forfeiture; but the proposition is not, we think, universally true. If the words which describe the subject of the law are general, . . . we think the charge in the libel ought to conform to the true sense and meaning of those words as used by the legislature. *The Mary Ann*, 8 Wheat., 389. Similar views are expressed by this court in *United States v. Gooding*, 12 Wheat., 474, in which the opinion was given by Mr. Justice Story. Having first stated the general rule, that it is sufficient certainty in an indictment to allege the offense in the very terms of the statute, he proceeds to remark: "We say, in general; for there are doubtless cases where more particularity is required, either *from the obvious intention of the legislature*, or from the application of *known principles of law*." Known principles of law require more particularity in this case, in order that all the ingredients of the offense may be accurately and clearly alleged; and it is equally clear that the intention of the legislature also requires the same thing, as it is obvious that the mere statement of the party that he offered to perform the prerequisite was never intended to be made equivalent to performance, unless such statement was accompanied by an offer to pay the tax, and under circumstances which show that he was ready and able to make the payment. Authorities are not necessary to prove that an indictment upon a statute must state all such facts and circumstances as constitute the statute offense, so as to bring the party indicted precisely within the provisions of the statute defining the offense.

Statutes are often framed, says Colby, to meet the relations of parties to each other, to prevent frauds by the one upon the other; and, in framing such statutes, the language used is often elliptical, leaving some of the circumstances expressive of the relation of the parties to each other to be supplied by intentment or construction. In all such cases, the facts and circumstances constituting such relation must be alleged in the indictment, though not expressed in the words of the statute. 2 Colby, Cr. Law, 114; *People v. Wilbur*, 4 Park, Cr. Cas., 21; *Com. v. Cook*, 18 B. Mon., 149; *Pearce v. The State*, 1 Sneed, 63; *People v. Stone*, 9 Wend., 191; *Whiting v. The State*, 14 Conn., 487; *Anthony v. The State*, 29 Ala., 27; 1 Am. Cr. Law, 6th rev. ed., sec. 364, note d, and cases cited.

Like the preceding counts, the preliminary allegations of the fourth count are without objection; and the jury proceed to present that the party offering to vote, having then and there all the qualifications, as to age, citizenship and residence, required by the state law, did, *on the 30th day of January*, 1873, in order that he might become qualified to vote at said election, offer to the collector at his office in said city to pay any capitation tax due from him to said city, or any capitation tax that had been theretofore assessed against him by said city, or which could be assessed against him by said city, or which said city or said collector claimed was due from him to said city; and that the said collector then and there wrongfully refused, on account of his race or color, to give the said party an opportunity to pay said capitation tax for the preceding year, and then and there wrongfully refused to receive said tax from the said party in order that he might become qualified to vote at said election, the said collector having then and there given to citizens of the white race an opportunity to pay such taxes due from them to said city, in order that they might become qualified for that purpose. All that is there alleged may be admitted, and yet it may be true that the complaining party never made any

offer at the time and place mentioned to pay the capitation tax of \$1.50 due to the city at the time and place mentioned, in such terms, and under such circumstances, that if the offer as made had been accepted by the person or officer to whom the offer was made, and that such person or officer had done everything which it was his duty to do, or everything which it was in his power to do, to carry it into effect, the offer would have constituted performance of the prerequisite act.

Actual payment of the capitation tax on or before the 15th of January preceding the day of election is the prerequisite act to be performed to qualify the citizen, without distinction of race, color or previous condition of servitude, to vote at said election. Such an offer, therefore, in order that it may be deemed and held as a performance in law of such prerequisite, must be an offer to pay the amount of the capitation tax; and the party making the offer must then and there possess *the ability and means* to pay the amount to the person or officer to whom the offer is made; for unless payment of the amount of tax is then and there made to the said person or officer, he would not be authorized to discharge the tax, and could not carry the offer into execution without violating his duty to the city.

5. Readiness to pay, therefore, is necessarily implied from the language of the third section, as it is only in case the offer fails to be carried into execution by reason of the wrongful act or omission of the person or officer charged with the duty of receiving or permitting such performance that the offer can be deemed and held as performance in law of such prerequisite act. Where the party making the offer is not ready to pay the tax to the person or officer to whom the offer is made, and has not then and there the means to make the payment, it cannot be held that the offer fails to be carried into execution by reason of the wrongful act or omission of the person or officer to whom the offer is made, as it would be a perversion of law and good sense to hold that it is the duty of such a person or officer to carry such an offer into execution by discharging the tax without receiving the amount of the tax from the party making the offer of performance.

Giving full effect to the several allegations of the count, nothing approximating to such a requirement is therein alleged, nor can anything of the kind be implied from the word "offer" as used in any part of the indictment. Performance of that prerequisite, by citizens *otherwise* qualified, entitles all such, without distinction of race, color or previous condition of servitude, to vote at such an election; and the offer to perform the same, if the offer is made in terms, and under such circumstances, that, if it be accepted and carried into execution, it will constitute performance, will also entitle such citizens to vote in the same manner and to the same extent as if they had performed such prerequisite, provided the offer fails to be carried into execution by reason of the wrongful act or omission of the person or officer charged with the duty of receiving and permitting such performance.

Judges, inspectors and other officers of elections must take notice of these provisions, as they constitute the most essential element or ingredient of the offense defined by the third section of the act. Officers of the elections, whether judges or inspectors, are required to carry those regulations into full effect; and the provision is, that any judge, inspector or other officer of election, whose duty it is or shall be to receive, count, certify, register, report or give effect to the vote of such citizens, who shall wrongfully refuse or omit to

receive, count, certify, register, or give effect to the vote of any such citizen, upon the presentation by him of his affidavit stating such offer, and the time and place thereof, and the name of the officer or person whose duty it was to act on such offer, and that he, the citizen, was wrongfully prevented by such person or officer from performing such prerequisite act, shall for every such offense forfeit and pay the sum of \$500 to the person aggrieved, and also be guilty of a misdemeanor, and be fined and imprisoned as therein provided.

6. Of course, it must be assumed that the terms of the affidavit were exactly the same as those set forth in the third count of the indictment; and, if so, it follows that the word "offer" used in the affidavit must receive the same construction as that already given to the same word in that part of the section which provides that the offer, if it fail to be carried into execution by reason of the wrongful act or omission of the person or officer charged with the duty of receiving or permitting such performance, shall be deemed and held as a performance in law of such prerequisite act. Decisive confirmation of that view is derived from the fact that the complaining party is only required to state in his affidavit the offer, the time, and the place thereof, the name of the person or officer whose duty it was to act thereon, and that he, the affiant, was wrongfully prevented by such person or officer from performing such prerequisite act.

None will deny, it is presumed, that the word "offer" in the affidavit means the same thing as the word "offer" used in the declaratory part of the same section; and, if so, it must be held that the offer described in the affidavit must have been one made in such terms, and under such circumstances, that, if the offer had been accepted, it might have been carried into execution by the person or officer to whom it was made; or, in other words, it must have been an offer to do whatever it was necessary to do to perform the prerequisite act; and it follows, that if the word "offer," as used in the act of congress, necessarily includes readiness to pay the tax, it is equally clear that the affidavit should contain the same statement. Plainly it must be so; for unless the offer has that scope, if it failed to be carried into execution, it could not be held that the failure was by the wrongful act or omission of the person or officer to whom the offer was made. Such a construction must be erroneous; for, if adopted, it would lead to consequences which would shock the public sense, as it would require the collector to discharge the tax without payment, which would be a manifest violation of his duty. Taken in any point of view, it is clear that the third count of the indictment is too vague, uncertain and indefinite in its allegations to constitute the proper foundation for the conviction and sentence of the defendants. Even suppose that the signification of the word "offer" is sufficiently comprehensive to include readiness to perform, which is explicitly denied, still it is clear that the offer, as pleaded in the fourth count, was not in season to constitute a compliance with the prerequisite qualification, for the reason that the state statute requires that the capitation tax shall be paid *on or before the 15th day of January preceding the day of the election*.

Having come to these conclusions, it is not necessary to examine the fourth section of the enforcement act, for the reason that it is obvious, without much examination, that no one of the counts of the indictment is sufficient to warrant the conviction and sentence of the defendants for the offense defined in that section.

Dissenting opinion by MR. JUSTICE HUNT.

I am compelled to dissent from the judgment of the court in this case.

The defendants were indicted in the circuit court of the United States for the district of Kentucky. Upon the trial, the defendants were, by the judgment of the court, discharged from the indictment on account of its alleged insufficiency.

The fourth count of the indictment contains the allegations concerning the election in the city of Lexington; that by the statute of Kentucky, to entitle one to vote at an election in that state, the voter must possess certain qualifications recited, and have paid a capitation tax assessed by the city of Lexington; that James F. Robinson was the collector of said city, entitled to collect said tax; that Garner, in order that he might be entitled to vote, did offer to said Robinson, at his office, to pay any capitation tax which had been or could be assessed against him, or which was claimed against him; that Robinson refused to receive such tax on account of the race and color of Garner; that at the time of the election, having the other necessary qualifications, Garner offered his vote, and at the same time presented an affidavit to the inspector stating his offer aforesaid made to Robinson, with the particulars required by the statute, and the refusal of Robinson to receive the tax; that Farnaugh consented to receive his vote, but the defendants, constituting a majority of the inspectors, wrongfully refused to receive the same, which refusal was on account of the race and color of the said Garner.

This indictment is based upon the act of congress of May 31, 1870. 16 Stat., 140. The first four sections of the act are as follows:

"Section 1. That all citizens of the United States, who are or shall be otherwise qualified by law to vote at any election by the people in any state, territory, district, county, city, parish, township, school district, municipality or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color or previous condition of servitude; any constitution, law, custom, usage or regulation of any state or territory, or by or under its authority, to the contrary notwithstanding.

"Sec. 2. That if, by or under the authority of the constitution or laws of any state or the laws of any territory, any act is or shall be required to be done as a prerequisite or qualification for voting, and, by such constitution or laws, persons or officers are or shall be charged with the performance of duties, in furnishing to citizens an opportunity to perform such prerequisite, or to become qualified to vote, it shall be the duty of every such person and officer to give to all citizens of the United States the same and equal opportunity to perform such prerequisite, and to become qualified to vote, without distinction of race, color or previous condition of servitude; and if any such person or officer shall refuse or knowingly omit to give full effect to this section, he shall, for every such offense, forfeit and pay the sum of \$500 to the person aggrieved thereby, to be recovered by an action on the case with full costs, and such allowance for counsel fees as the court shall deem just; and shall also, for every such offense, be deemed guilty of a misdemeanor, and shall, on conviction thereof, be fined not less than \$500, or be imprisoned not less than one month and not more than one year, or both, at the discretion of the court.

"Sec. 3. That whenever, by or under the authority of the constitution or laws of any state, or the laws of any territory, any act is or shall be required to [be] done by any citizen as a prerequisite to qualify or entitle him to vote, the offer of any such citizen to perform the act required to be done as afore-

said shall, if it fail to be carried into execution by reason of the wrongful act or omission aforesaid of the person or officer charged with the duty of receiving or permitting such performance, or offer to perform, or acting thereon, be deemed and held as a performance in law of such act; and the person so offering and failing as aforesaid, and being otherwise qualified, shall be entitled to vote in the same manner and to the same extent as if he had, in fact, performed such act; and any judge, inspector or other officer of election, whose duty it is or shall be to receive, count, certify, register, report or give effect to the vote of any such citizen who shall wrongfully refuse or omit to receive, count, certify, register, report or give effect to the vote of such citizen, upon the presentation by him of his affidavit stating such offer, and the time and place thereof, and the name of the officer or person whose duty it was to act thereon, and that he was wrongfully prevented by such person or officer from performing such act, shall, for every such offense, forfeit and pay the sum of \$500 to the person aggrieved thereby, to be recovered by an action on the case, with full costs, and such allowance for counsel fees as the court shall deem just; and shall also, for every such offense, be guilty of a misdemeanor, and shall, on conviction thereof, be fined not less than \$500, or be imprisoned not less than one month and not more than one year, or both, at the discretion of the court.

“Sec. 4. That if any person, by force, bribery, threats, intimidation or other unlawful means, shall hinder, delay, prevent or obstruct, or shall combine and confederate with others to hinder, delay, prevent or obstruct, any citizen from doing any act required to be done to qualify him to vote or from voting at any election as aforesaid, such person shall, for every such offense, forfeit and pay the sum of \$500 to the person aggrieved thereby, to be recovered by an action on the case, with full costs and such allowance for counsel fees as the court shall deem just; and shall also, for every such offense, be deemed guilty of a misdemeanor, and shall, on conviction thereof, be fined not less than \$500, or be imprisoned not less than one month and not more than one year, or both, at the discretion of the court.”

It is said, in opposition to this indictment and in hostility to the statute under which it is drawn, that while the second section makes it a penal offense for any officer to refuse an opportunity to perform the prerequisite therein referred to on account of the race and color of the party, and therefore an indictment against that officer may be good as in violation of the fifteenth amendment, the third section, which relates to the inspectors of elections, omits all reference to race and color, and therefore no indictment can be sustained against those officers. It is said that congress has no power to punish for violation of the rights of an elector generally, but only where such violation is attributable to race, color or condition. It is said, also, that the prohibition of an act by congress in general language is not a prohibition of that act on account of race or color.

Hence it is insisted that both the statute and the indictment are insufficient. This I understand to be the basis of the opinion of the majority of the court. On this I observe:

1. That the intention of congress on this subject is too plain to be discussed. The fifteenth amendment had just been adopted, the object of which was to secure to a lately enslaved population protection against violations of their right to vote on account of their color or previous condition. The act is entitled “An act to enforce the right of citizens of the United States to vote in the

several states of the Union, and for other purposes." The first section contains a general announcement that such right is not to be embarrassed by the fact of race, color or previous condition. The second section requires that equal opportunity shall be given to the races in providing every prerequisite for voting, and that any officer who violates this provision shall be subject to civil damages to the extent of \$500, and to fine and imprisonment. To suppose that congress in making these provisions intended to impose no duty upon, and subject to no penalty, the very officers who were to perfect the exercise of the right to vote,—to wit, the inspectors who receive or reject the votes,—would be quite absurd.

2. Garner, a citizen of African descent, had offered to the collector of taxes to pay any capitation tax existing or claimed to exist against him as a prerequisite to voting at an election to be held in the city of Lexington on the 30th day of January, 1873. The collector illegally refused to allow Garner, on account of his race and color, to make the payment. This brought Garner and his case within the terms of the third section of the statute, that "the person so offering and failing as aforesaid"—that is, who had made the offer which had been illegally rejected on account of his race and color—shall be entitled to vote "as if he had, in fact, performed such act." He then made an affidavit setting forth these facts, stating, with the particularity required in the statute, that he was wrongfully prevented from paying the tax, and presented the same to the inspector, who wrongfully refused to receive the same and to permit him to vote on account of his race and color.

A wrongful refusal to receive a vote which was, in fact, incompetent only by reason of the act "aforesaid,"—that is, on account of his race and color,—brings the inspector within the statutory provisions respecting race and color. By the words "as aforesaid," the provisions respecting race and color of the first and second sections of the statute are incorporated into and made a part of the third and fourth sections. To illustrate: Section 4 enacts that if any person, by unlawful means, shall hinder or prevent any citizen from voting at any election "as aforesaid," he shall be subject to fine and imprisonment. What do the words "as aforesaid" mean? They mean, for the causes and pretenses or upon the grounds in the first and second sections mentioned; that is, on account of the race or color of the person so prevented. All those necessary words are by this expression incorporated into the fourth section. The same is true of the words "the wrongful act or omission as aforesaid," and "the person so offering and failing as aforesaid," in the third section. By this application of the words "as aforesaid," they become pertinent and pointed. Unless so construed they are wholly and absolutely without meaning. No other meaning can possibly be given to them. "The person (Garner) so offering and failing as aforesaid shall be entitled to vote as if he had performed the act." He failed "as aforesaid" on account of his race. The inspectors thereupon "wrongfully refused to receive his vote" because he had not paid his capitation tax. His race and color had prevented that payment. The words "hindered and prevented his voting as aforesaid," in the fourth section, and in the third section the words "wrongfully refuse" and "as aforesaid," sufficiently accomplish this purpose of the statute. They amount to an enactment that the refusal to receive the vote on account of race or color shall be punished as in the third and fourth sections is declared. I am the better satisfied with this construction of the statute, when, looking at the senate debates at the time of its passage, I find, 1st, That attention was called to the point whether this

act did make the offense dependent on race, color or previous condition; 2d, that it was conceded by those having charge of the bill that its language must embrace that class of cases; 3d, that they were satisfied with the bill as it then stood, and as it now appears in the act we are considering

§ 1580. *Rules for determining whether indictments are sufficient.*

The particularity required in an indictment or in the statutory description of offenses has at times been extreme, the distinctions almost ridiculous. I cannot but think that in some cases good sense is sacrificed to technical nicety, and a sound principle carried to an extravagant extent. The object of an indictment is to apprise the court and the accused of what is charged against him, and the object of a statute is to declare or define the offense intended to be made punishable. It is laid down, that "when the charge is not the absolute perpetration of an offense, but its primary characteristic lies in the intent, instigation or motives of the party towards its perpetration, the acts of the accused, important only as developing the *mala mens*, and not constituting of themselves the crime, need not be spread upon the record." *United States v. Almeida*, Whart. Prec., 1061, 1062, note; 1 Whart. C. L., § 285, note.

In the case before us, the acts constituting the offense are all spread out in the indictment, and the alleged defects are in the facts constituting the *mala mens*. The refusal to receive an affidavit as evidence that the tax had been paid by Garner, and the rejection of his vote, are the essential acts of the defendants which constitute their guilt. The rest is matter of motive or instigation only. As to these, the extreme particularity and the strict construction expected in indictments and penal statutes would seem not to be necessary.

§ 1581. *Penal statutes, how construed.*

In *Sickles v. Sharp*, 13 Johns., 49, it is said: "The rule that penal statutes are to be strictly construed admits of some qualification. The plain and manifest intention of the legislature ought to be regarded." In *United States v. Hartwell*, 6 Wall., 385, it is said: "The object in construing penal as well as other statutes is to ascertain the legislative intent. The words must not be narrowed to the exclusion of what the legislature intended to embrace, but that intention must be gathered from the words. When the words are general, and embrace various classes of persons, there is no authority in the court to restrict them to one class, when the purpose is alike applicable to all." In *Ogden v. Strong*, 2 Paine, 584, it is said: "Statutes must be so construed as to make all parts harmonize, and give a sensible effect to each. It should not be presumed that the legislature meant that any part of the statute should be without meaning or effect."

In *United States v. Morris*, 14 Pet., 474, the statute made it unlawful for a person "voluntarily to serve on a vessel employed and made use of in the transportation of slaves from one foreign country to another." No slaves had been actually received or transported on board the defendant's vessel; but the court held that the words of the statute embraced the case of a vessel sailing with the intent to be so employed. The court say: "A penal statute will not be extended beyond the plain meaning of its words; . . . yet the evident intention of the legislature ought not to be defeated by a forced and overstrict construction." In the case of *The Donna Mariana*, 1 Dods., 91, the vessel was condemned by Sir William Scott under the English statute condemning vessels in which slaves "shall be exported, transported, carried," etc., although she was on her outward voyage, and had never taken a slave on board. "The result is, that, where the general intent of a statute is to prevent certain acts,

the subordinate proceedings necessarily connected with them, and coming within that intent, are embraced in its provisions." *Id.* In *Hodgman v. People*, 4 Den., 235; 5 *id.*, 116, an act subjecting an offender to "the penalties" of a prior act was held to subject him to an indictment, as well as to the pecuniary penalties in the prior statute provided for. Especially should this liberal rule of construction prevail, where, though in form the statute is penal, it is in fact to protect freedom.

An examination of the surrounding circumstances, a knowledge of the evil intended to be prevented, a clear statement in the statute of the acts prohibited and made punishable, a certain knowledge of the legislative intention, furnish a rule by which the language of the statute before us is to be construed. The motives instigating the acts forbidden, and by which those acts are brought within the jurisdiction of the federal authority, need not be set forth with the technical minuteness to which reference has been made. The intent is fully set forth in the second section; and the court below ought to have held that, by the references in the third and fourth sections to the motives and instigations declared in the second section, they were incorporated into and became a part of the third and fourth sections, and that a sufficient offense against the United States authority was therein stated.

§ 1582. *The third and fourth sections of the act do provide for the punishment of inspectors for refusing to receive votes on account of race or color.*

I hold, therefore, that the third and fourth sections of the statute we are considering do provide for the punishment of inspectors of elections who refuse the votes of qualified electors on account of their race or color. The indictment is sufficient, and the statute sufficiently describes the offense.

The opinion of the majority of the court discusses no subjects except the sufficiency of the indictment and the validity of the act of May 31, 1870. Holding that there was no valid law upon which the crime charged could be predicated, it became unnecessary that the opinion should discuss other points. If it had been held by the court that the indictment was good, and that the statute created the offense charged, the question would have arisen whether such statute was constitutional; and it was to this question that much the larger part of the argument of the counsel in the cause was directed. If the conclusions I have reached are correct, this question directly presents itself; and I trust it is not unbecoming that my views upon the constitutional points thus arising should be set forth. I have no warrant to say that those views are, or are not, entertained by any or all of my associates. The opinions and the arguments are those of the writer only.

The question of the constitutionality of the act of May 31, 1870, arises mainly upon the fifteenth amendment to the constitution of the United States. It is as follows: "1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color or previous condition of servitude. 2. The congress shall have power to enforce this article by appropriate legislation."

§ 1583. *History of the fifteenth amendment.*

I observe, in the first place, that the right here protected is in behalf of a particular class of persons, to wit, citizens of the United States. The limitation is to the persons concerned, and not to the class of cases in which the question shall arise. The right of citizens of the United States to vote, and not the right to vote at an election for United States officers, is the subject of the provision. The person protected must be a citizen of the United States; and,

whenever a right to vote exists in such person, the case is within the amendment. This is the literal and grammatical construction of the language; and that such was the intention of congress will appear from many considerations. As originally introduced by Mr. Senator Henderson, it read, "No state shall deny or abridge the right of its citizens to vote and hold office on account of race, color or previous condition." *Globe*, 1868-69, pt. i., p. 542, January 23, 1869.

The judiciary committee reported back the resolution in this form: "The right of citizens of the United States to vote and hold office shall not be denied or abridged by the United States or any state on account of race, color or previous condition of servitude. The congress, by appropriate legislation, may enforce the provisions of this article." *Id.* Omitting the words "and hold office," this is the form in which it was adopted. The class of persons indicated in the original resolution to be protected were described as citizens of a state; in the resolution when reported by the committee, as citizens of the United States. In neither resolution was there any limitations as to the character of the elections at which the vote was to be given. If there was a right to vote, and the person offering the vote was a citizen, the clause attached. It is both illiberal and illogical to say that this protection was intended to be limited to an election for particular officers, to wit, those to take part in the affairs of the federal government.

Congress was now completing the third of a series of amendments intended to protect the rights of the newly emancipated freedmen of the south. In the adoption of the thirteenth amendment,—that slavery or involuntary servitude should not exist within the United States, or any place subject to their jurisdiction,—it took the first and the great step for the protection and confirmation of the political rights of this class of persons. In the adoption of the fourteenth amendment,—that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the states in which they reside," and that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,"—another strong measure in the same direction was taken. A higher privilege was yet untouched; a security, vastly greater than any thus far given to the colored race, was not provided for, but, on the contrary, its exclusion was permitted. This was the elective franchise,—the right to vote at the elections of the country, and for the officers by whom the country should be governed.

By the second section of the fourteenth amendment, each state had the power to refuse the right of voting at its elections to any class of persons; the only consequence being a reduction of its representation in congress, in the proportion which such excluded class should bear to the whole number of its male citizens of the age of twenty-one years. This was understood to mean, and did mean, that if one of the late slaveholding states should desire to exclude all its colored population from the right of voting, at the expense of reducing its representation in congress, it could do so. The existence of a large colored population in the southern states, lately slaves and necessarily ignorant, was a disturbing element in our affairs. It could not be overlooked. It confronted us always and everywhere. Congress determined to meet the emergency by creating a political equality, by conferring upon the freedmen all the political

rights possessed by the white inhabitants of the state. It was believed that the newly enfranchised people could be most effectually secured in the protection of their rights of life, liberty and the pursuit of happiness, by giving to them that greatest of rights among freemen,—the ballot. Hence the fifteenth amendment was passed by congress, and adopted by the states. The power of any state to deprive a citizen of the right to vote on account of race, color or previous condition of servitude, or to impede or to obstruct such right on that account, was expressly negatived. It was declared that this right of the citizen should not be thus denied or abridged.

The persons affected were citizens of the United States; the subject was the right of these persons to vote, not at specified elections or for specified officers, not for federal officers or for state officers, but the right to vote in its broadest terms. The citizen of this country, where nearly everything is submitted to the popular test, and where office is eagerly sought, who possesses the right to vote, holds a powerful instrument for his own advantage. The political and personal importance of the large bodies of emigrants among us, who are intrusted at an early period with the right to vote, is well known to every man of observation. Just so far as the ballot to them or to the freedman is abridged, in the same degree is their importance and their security diminished. State rights and municipal rights touch the numerous and the every-day affairs of life: those of the federal government are less numerous, and, to most men, less important. That congress, possessing, in making a constitutional amendment, unlimited power in what it should propose, intended to confine this great guaranty to a single class of elections,—to wit, elections for United States officers,—is scarcely to be credited.

§ 1584. *Scope of the fifteenth amendment.*

I hold, therefore, that the fifteenth amendment embraces the case of elections held for state or municipal as well as for federal officers; and that the first section of the act of May 31, 1870, wherein the right to vote is freed from all restriction by reason of race, color or condition, at all elections by the people,—state, county, town, municipal, or of other subdivision,—is justified by the constitution.

§ 1585. *Meaning of the word "state," as it occurs in the amendments.*

It is contended, also, that, in the case before us, there has been no denial or abridgment by the state of Kentucky of the right of Garner to vote at the election in question. The state, it is said, by its statute authorized him to vote; and if he has been illegally prevented from voting, it was by an unauthorized and illegal act of the inspectors. The word "state" "describes sometimes a people or community of individuals, united more or less closely in political relations, inhabiting temporarily or permanently the same country; often it denotes only the country or territorial region inhabited by such a community; not unfrequently it is applied to the government under which the people live; at other times it represents the combined idea of people, territory and government. It is not difficult to see that in all these senses the primary conception is that of a people or community. The people, in whatever territory dwelling, either temporarily or permanently, and whether organized under a regular government, or united by looser and less definite relations, constitute the state. . . . In the constitution, the term 'state' most frequently expresses the combined idea, just noticed, of people, territory and government. A state, in the ordinary sense of the constitution, is a political community of free citizens, occupying a territory of defined boundaries, organized under a govern-

ment sanctioned and limited by a written constitution, and established by the consent of the governed. It is the union of such states under a common constitution which forms the distinct and greater political unit which that constitution designates as the United States, and makes of the people and states which compose it one people and one country." *Texas v. White*, 7 Wall., 720, 721 (§§ 140-160, *supra*). That the word "state" is not confined in its meaning to the legislative power of a community is evident, not only from the authority just cited, but from a reference to the various places in which it is used in the constitution of the United States. A few only of these will be referred to.

The power of congress to "regulate commerce among the several states" (sec. 8, subd. 3) refers to the commerce between the inhabitants of the different states, and not to transactions between the political organizations called "states." The people of a state are here intended by the word "state." The numerous cases in which this provision has been considered by this court were cases where the questions arose upon individual transactions between citizens of different states, or as to rights in, upon, or through the territory of different states. "Vessels bound to or from one state shall not be obliged to enter, clear, or pay duties, in another." Sec. 9, subd. 5. This refers to region or locality only. So "the electors (of president and vice-president) shall meet in their respective states, and vote," etc. Art. 2, sec. 1, subd. 3. Again, when it is ordained that the judicial power of the United States shall extend "to controversies between two or more states, between a state and the citizens of another state, between citizens of different states, between citizens of the same state claiming lands under grants of different states, and between a state or the citizens thereof and foreign states, citizens or subjects" (art. 3, sec. 2, subd. 1), we find different meaning attached to the same word in different parts of the same sentence. The controversy "between two or more states" spoken of refers to the political organizations known as states; the controversy "between a state and the citizens of another state" refers to the political organization of the first-named party, and again to the persons living within the locality where the citizens composing the second party may reside; the controversy "between citizens of different states, between citizens of the same state claiming lands under grants of different states," refers to the local region or territory described in the first branch of the sentence, and to the political organization as to the grantor under the second branch.

"Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state." Art. 4, sec. 1. Full faith shall be given in or throughout the territory of each state. By whom? By the sovereign state, by its agencies and authorities. To what is faith and credit to be given? To the acts of the political organization known as the state. Not only this, but to all its agencies, to the acts of its executive, to the acts of its courts of record. The expression "state," in this connection, refers to and includes all these agencies; and it is to these agencies that the legislation of congress under this authority has been directed, and it is to the question arising upon the agencies of the courts that the questions have been judicially presented. *Hampton v. McConnel*, 3 Wheat., 234; *Green v. Sarmiento*, 3 Wash., 17; *Bank of Alabama v. Dalton*, 9 How., 528. The judicial proceedings of a state mean the proceedings of the courts of the state. It has never been doubted, that, under the constitutional authority to provide that credit should be given to the records of a "state," it was lawful to provide that credit should be given to the records of the courts of a state. For this purpose, the court is the state.

The provision that "the United States shall guaranty to every state a republican form of government," is a guaranty to the people of the state, and may be exercised in their favor against the political power called the "state." It seems plain that when the constitution speaks of a state, and prescribes what it may do or what it may not do, it includes, in some cases, the agencies and instrumentalities by which the state acts. When it is intended that the prohibition shall be upon legislative action only, it is so expressed. Thus, in art. 1, sec. 10, subd. 1, it is provided that "no state shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts." The provision is, not that no state shall impair the obligation of contracts, but that no state shall pass a law impairing the obligation of contracts.

The word "state" in the fifteenth amendment is to be construed as in the paragraph heretofore quoted respecting commerce among the states, and in that which declares that acts of a state shall receive full faith and credit in every other state; that is, to include the acts of all those who proceed under the authority of the state. The political organization called the "state" can act only through its agents. It may act through a convention, through its legislature, its governor, or its magistrates and officers of lower degree. Whoever is authorized to wield the power of the state is the state, and this whether he acts within his powers or exceeds them. If a convention of the state of Kentucky should ordain or its legislature enact that no person of African descent, or who had formerly been a slave, should be entitled to vote at its elections, such ordinance or law would be void. It would be in excess of the power of the body enacting it. It would possess no validity whatever. It cannot be doubted, however, that it would afford ground for the jurisdiction of the courts under the fifteenth amendment. It is the state that speaks and acts through its agents; although such agents exercise powers they do not possess, or that the state does not possess, and although their action is illegal. Inspectors of elections represent the state. They exercise the whole power of the state in creating its actual government by the reception of votes and the declaration of the results of the votes. If they wilfully and corruptly receive illegal votes, reject legal votes, make false certificates by which a usurper obtains an office, the act is in each case the act of the state, and the result must be abided by until corrected by the action of the courts. No matter how erroneous, how illegal or corrupt, may be their action, if it is upon the subject which they are appointed to manage, it binds all parties, as the action of the state, until legal measures are taken to annul it. They are authorized by the state to act in the premises; and if their act is contrary to their instructions or their duty, they are nevertheless officers of the state, acting upon a subject committed to them by the state, and their acts are those of the state. The legislature speaks; its officers act. The voice and the act are equally those of the state. I am of the opinion, therefore, that the refusal of the defendants, inspectors of elections, to receive the vote of Garner, was a refusal by the state of Kentucky, and was a denial by that state, within the meaning of the fifteenth amendment, of the right to vote.

§ 1586. *The powers given to congress by the fifteenth amendment.*

It is contended, further, that congress has no power to enforce the provisions of this amendment by the enactment of penal laws; that the power of enforcement provided for is limited to correcting erroneous decisions of the state courts, when presented to the federal courts by appeal or writ of error. "For example (it is said), when it is declared that no state shall deprive any person

of life, liberty or property without due process of law, this declaration is not intended as a guaranty against the commission of murder, false imprisonment, robbery or other crimes committed by individual malefactors, so as to give congress power to pass laws for the punishment of such crimes in the several states generally."

So far as the act of May, 1870, shall be held to include cases not dependent upon race, color or previous condition, and so far as the power to impose pains and penalties for those offenses may arise, I am not here called upon to discuss the subject. So far as this argument is applied to legislation for offenses committed on account of race or color, I hold it to be entirely unsound. If sound, it brings to an impotent conclusion the vigorous amendments on the subject of slavery. If there be no protection to the ignorant freedman against hostile legislation and personal prejudice other than a tedious, expensive and uncertain course of litigation through state courts, thence by appeal or writ of error to the federal courts, he has practically no remedy. It were as well that the amendments had not been passed. Of rights infringed, not one in a thousand could be remedied or protected by this process.

In adopting the fifteenth amendment, it was ordained as the second section thereof, "The congress shall have power to enforce this article by appropriate legislation." This was done to remove doubts, if any existed, as to the former power; to add, at least, the weight of repetition to an existing power.

It was held in the United States Bank Cases and in the Legal Tender Cases (*McCulloch v. State of Maryland*, 4 Wheat., 316 (§§ 380-398, *supra*); *Gibbons v. Ogden*, 9 id., 204 (§§ 1183-1201, *supra*); *City of New York v. Miln*, 11 Pet., 102 (§§ 1274-83, *supra*); *Legal Tender Cases*, 12 Wall., 457; *Dooley v. Smith*, 13 id., 604), that it was for congress to determine whether the necessity had arisen which called for its action. If congress adjudges that the necessities of the country require the establishment of a bank, or the issue of legal tender notes, that judgment is conclusive upon the court. It is not within their power to review it. If congress, being authorized to do so, desires to protect the freedman in his rights as a citizen and a voter, and as against those who may be prejudiced and unscrupulous in their hostility to him and to his newly conferred rights, its manifest course would be to enact that they should possess that right; to provide facilities for its exercise by appointing proper superintendents and special officers to examine alleged abuses, giving jurisdiction to the federal courts, and providing for the punishment of those who interfere with the right. The statute books of all countries abound with laws for the punishment of those who violate the rights of others, either as to property or person, and this not so much that the trespassers may be punished as that the peaceable citizen may be protected. Punishment is the means; protection is the end. The arrest, conviction and sentence to imprisonment, of one inspector, who refused the vote of a person of African descent on account of his race, would more effectually secure the right of the voter than would any number of civil suits in the state courts, prosecuted by timid, ignorant and penniless parties against those possessing the wealth, the influence, and the sentiment of the community. It is certain that in fact the legislation taken by congress, which we are considering, was not only the appropriate, but the most effectual, means of enforcing the amendment. That the legislation in this respect is constitutional is also proved by the previous action of congress and of this court.

Article 4, section 5, subdivision 3, of the constitution provides as follows: "No person held to service or labor in one state, under the laws thereof, escap-

ing into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due." At the time of the adoption of the constitution containing this provision, slavery was recognized as legal in many states. The rights of the slaveholder in his slave were intended to be protected by this clause. To enforce this protection, congress, from time to time, passed laws providing not only the means of restoring the escaped slave to his master, but inflicting punishment upon those who violated that master's rights. Thus, as early as 1793, congress enacted not only that the master or his agent might seize and arrest such fugitive slave, and, upon obtaining a certificate from a judge or magistrate, carry him back to the state from whence he escaped, and return him into slavery, but that every person who hindered or obstructed such master or agent, or who harbored or concealed such fugitive, after notice that he was such, should be subject to damages not only, but to a penalty of \$500, to be recovered for the benefit of the claimant in any court proper to try the same. 1 Stat., 302. By the act of 1850 (9 Stat., 462), the circuit courts were ordered to enlarge the number of commissioners, "with a view to afford reasonable facilities to reclaim fugitives from labor." The ninth section of the act provided that any person who should wilfully obstruct or hinder the removal of such fugitive, either with or without process, or should rescue or aid or abet an attempt to escape, or should harbor or conceal the fugitive, having notice, should for either of said offenses be subject to a fine not exceeding \$1,000, and imprisonment not exceeding six months, by indictment and conviction in the United States court, "and shall pay and forfeit, by way of civil damages to the party injured by such illegal conduct, the sum of \$1,000 for each fugitive so lost as aforesaid, to be recovered by action of debt," etc.

In *Prigg v. Pennsylvania*, 16 Pet., 539, the legislation of 1793 was held to be valid. It was held in *Sims' Case*, 7 Cush., 285, that the act of 1850 was constitutional, and that the state tribunals cannot by writ of *habeas corpus* interfere with the federal authorities when acting upon cases arising under that act. In *Ableman v. Booth*, 21 How., 506, it was held by this court that the Fugitive-slave Act of 1850 was constitutional in all its provisions, and that a *habeas corpus* under the state laws must not be obeyed, but the authority of the United States must be executed.

The case of *Prigg*, decided under the act of 1793, and that of *Booth*, under the act of 1850, are pertinent to the present question. In the former case, it was held that the act of 1793, so far as it authorized the owner to seize and recapture his slave in any state of the Union, was self-executing, requiring no aid from legislation, either state or national. The clause relating to fugitive slaves, it is there said, is found in the national and not in the state constitution. It was said to be a necessary conclusion, in the absence of all positive provision to the contrary, that the national government is bound through its own departments, legislative, judicial or executive, to carry into effect all the rights and duties imposed upon it by the constitution. This doctrine is useful at the present time, and is pertinent to the point we are considering. The clause protecting the freedmen, like that sustaining the rights of slaveholders, is found in the federal constitution only. Like the former, it provides the means of enforcing its authority, through fines and imprisonments, in the federal courts; and here, as there, the national government is bound, through its own departments, to carry into effect all the rights and duties imposed upon it by the

constitution. In connection with the clause of the constitution just quoted, there was not found, as here, an express authority in congress to enforce it by appropriate legislation; and yet the court decide not only that congress had power to enforce its provisions by fine and imprisonment, but that the right to legislate on the subject belongs to congress exclusively. Courts should be ready, now and here, to apply these sound and just principles of the constitution.

This provision of the constitution and these decisions seem to furnish the rule of deciding the constitutionality of the law in question, rather than that which provides that life, liberty or property shall not be interfered with except by due process of law. It is not necessary to consider how far congress may legislate upon individual crimes under that provision. If I am right in this view, the legislation we are considering—to wit, the enforcement of the fifteenth amendment by the means of penalties and indictments—is legal.

It is a well-settled principle, that, if an indictment contain both good counts and bad counts, a judgment of guilty upon the whole indictment will be sustained. The record shows that the court below considered each and every count of the indictment as insufficient, and that judgment was entered discharging the defendants without day; *i. e.*, from the whole indictment. Upon the view I have taken of the validity of the fourth count, this judgment was erroneous. It should be reversed, and a trial ordered upon the indictment.

§ 1587. The thirteenth amendment to the constitution, having been adopted for the purpose of abolishing slavery, and being remedial in its character, must be construed so as to suppress the whole mischief. *Buckner v. Street*, 1 Dill., 260.

§ 1588. The effect of the thirteenth amendment was to abolish slavery wherever it existed within the jurisdiction of the United States. It reversed and annulled the original policy of the constitution, which left it to each state to decide exclusively for itself whether slavery should or should not exist as a local institution, and what disabilities should attach to those of the servile race within its limits. *United States v. Rhodes*, 1 Abb., 52.

§ 1589. Neither the thirteenth amendment to the constitution of the United States, nor the Civil Rights Bill of April 9, 1866, repeals the act of congress of February 23, 1803, prohibiting the importation of persons of color into certain states of the Union. Nor do they repeal the acts of the legislature of Florida prohibiting the importation of colored British subjects into that state. The amendment was not designed to repeal or modify any pre-existing legislation which was a regulation of commerce, and which excluded from our borders persons or classes of persons subjects of a foreign power. *The Passengers of the Schooner Dart*,* 12 Op. Att'y Gen'l, 414.

§ 1590. The thirteenth amendment was adopted solely with the view of the amelioration of the condition of the colored race, and to secure them equal rights. *Slaughter-House Cases*, 16 Wall., 36 (§§ 752-801).

§ 1591. One who sold and warranted a slave for life, when slavery was recognized and sanctioned, is not responsible for the abolition of slavery by the thirteenth amendment, and the contract of warranty is not broken by that amendment so as to make the vendor liable. *Osborn v. Nicholson*, 13 Wall., 654 (§§ 1636-41).

§ 1592. Contracts relating to slaves, valid when made, are not impaired by the thirteenth amendment. *Boyce v. Tabb*,* 18 Wall., 546. See §§ 1619, 1694.

§ 1593. To hold that the thirteenth amendment abrogated prior contracts for the sale of slaves would have the effect to deprive a person of his property without due process of law. *Osborn v. Nicholson*, 13 Wall., 654 (§§ 1636-41).

§ 1594. But in *Buckner v. Street*, 1 Dill., 250, it was held that this amendment repealed all laws relating to the enforcement of contracts growing out of the traffic in slaves; and as slavery was in derogation of the common law and against natural right and justice, contracts relating to slavery were sanctioned solely by the laws in existence at the time they were entered into, and had no validity independent thereof, and the repeal of such laws by the supreme authority of the people of the United States destroyed all rights of action previously protected by them.

§ 1595. *Citizenship*.—The object of the first clause of the first section of the fourteenth amendment was to settle the question whether the allegiance of a citizen to the United

States or to his particular state was paramount, and to make the United States a nation by declaring "that all persons born in the United States are citizens thereof," owing allegiance at birth, and that consequently the power to protect such persons as owe this allegiance belongs to the United States as fully as the power to protect its citizens for the purposes of its organization inheres in any other nation. (Per BOND, C. J.) *United States v. Petersburg Judges of Election*, 1 Hughes, 496.

§ 1596. The fourteenth amendment, which declares that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state in which they reside," except as to the words having reference to naturalization, is merely declaratory of the common law, and was not made to change it. It does not include Indians, whether of the whole-blood or half-blood, or any other person not born subject to the jurisdiction of the United States. Such persons have no right to vote under the fifteenth amendment. *McKay v. Campbell*, 2 Saw., 118. See CITIZENS.

§ 1597. The full rights of citizenship were conferred upon colored men by the amendments to the national and state constitutions, and were not created by the Civil Rights Bill. The Civil Rights Bill,* 1 Hughes, 541.

§ 1598. By the original constitution citizenship in the United States was a consequence of citizenship in a state, but by the first section of the fourteenth amendment this order of things is reversed. By this section citizenship of the United States is defined and made independent of citizenship in a state, and citizenship in a state is a result of citizenship in the United States. So that a person born or naturalized in the United States, and subject to its jurisdiction, is, without reference to state constitutions or laws, entitled to all the privileges and immunities secured by the constitution of the United States to the citizens thereof. *United States v. Hall*,* 18 Int. Rev. Rec., 182.

§ 1599. Apprentices.—Immediately after the constitution of Maryland abolishing slavery went into operation, in 1864, many of the freed people in a certain county were collected together, and the younger ones bound as apprentices to their late masters. From the indenture of apprenticeship of one of these, who petitioned to be relieved from the apprenticeship, it appeared that the terms of the indenture (which was claimed to have been executed under the law of Maryland relating to negro apprentices) varied much from those required by law for the apprenticeship of white persons. The petitioner, by the indenture, was not entitled to any education, white apprentices being required to be taught; was liable to be transferred at the will of the master to any other person in the same county, white apprentices not being so liable; and the authority of the master over the petitioner was described in the law as a "property and interest," no such description being applied to authority over white apprentices. The apprenticeship was held to be involuntary servitude within the meaning of the first clause of the thirteenth amendment, and also in contravention of that clause in the first section of the Civil Rights Law of April 9, 1866, which assures to all citizens, without regard to race or color, "full and equal benefit of all laws and proceedings for security and property as is enjoyed by white citizens." *Ex parte Turner*,* Chase's Dec., 157; 1 Am. L. T. Rep., 7.

§ 1600. The Civil Rights Law of April 9, 1866, having been enacted under the second clause of the thirteenth amendment, in the enforcement of the first clause of the same amendment, is constitutional, and applies to all conditions prohibited by it, whether originating in transactions before or since its enactment. *Ibid.* See § 846.

§ 1601. Right to vote.—A female can claim no constitutional right, under the provisions of the fourteenth and fifteenth amendments, to vote in the District of Columbia, congress having extended that right to male citizens only. *Spencer v. Board of Registration*,* 1 Mac-Arth., 169. See §§ 741, 1550; also II, 2, *supra*.

§ 1602. Neither the fourteenth nor the fifteenth amendment gave the female sex a right to vote. The right to vote is a privilege of citizenship of the state and not of the United States. A law confining the right of suffrage to the male sex does not violate either of these amendments. *United States v. Anthony*,* 11 Blatch., 200.

§ 1603. Under the fifteenth amendment, and the act of congress of May 31, 1870, entitled "An act to enforce the rights of the citizens of the United States to vote in the several States," a person may be punished for hindering another from voting on account of race, color or previous condition of servitude, whether the election be state or federal. *United States v. Crosby*, 1 Hughes, 448.

§ 1604. The fifteenth amendment does not take away the power of the states to deny the right of citizens of the United States to vote, except on account of race, color or previous condition of servitude. *McKay v. Campbell*, 2 Abb., 120.

§ 1605. It is not doubted that that provision of the Civil Rights Act of April 9, 1866, permitting a state election to be contested in the United States courts, where the party seeking to recover possession of the office has been deprived thereof because the votes of citizens have

§§ 1606-1614. CONSTITUTION AND LAWS.—OBLIGATION OF CONTRACTS.

been rejected on account of their race, color or previous condition of servitude, is constitutional. *Harrison v. Hadley*, 2 Dill., 229.

§ 1606. Whether section 4 of the Enforcement Act of May 31, 1870, making it penal to prevent a voter from voting at a state election, when not done on account of race, color or previous condition of servitude, is constitutional, the circuit and district judges were divided in opinion. They were also divided as to whether an indictment under this act was sufficient which did not charge that the prevention was on account of race, color, etc. *United States v. Petersburg Judges of Election*, 1 Hughes, 493.

§ 1607. The recent amendment to the constitution of the United States, guarantying to all native-born male persons the full rights of citizenship, irrespective of race, color or previous condition, implies the right of suffrage, and includes clearly the African race. The fourth section of the act of congress of May 31, 1870, providing that any person who, by bribery, threats, intimidation or violence, shall hinder and prevent any qualified voter from exercising that right, shall be subject to punishment by fine or imprisonment, was passed to carry into effect this amendment, and is valid. *United States v. Canter*,* 2 Bond, 389.

§ 1608. The power of congress to legislate upon the subject of voting at state elections is derived solely from the fifteenth amendment, and can be exercised by prescribing punishment only when the wrongful prevention of a qualified voter from voting is on account of his race, color or previous condition of servitude. The prohibition against discrimination is against the states and the United States, and not against individuals. The fifth section of the "Enforcement Act," punishing any person who shall prevent, hinder, control or intimidate any person from "exercising the right of suffrage, to whom the right of suffrage is secured or guarantied by the fifteenth amendment to the constitution of the United States," not being limited to prevention on account of race, color, etc., and to persons who act or claim to act under prohibited legislation, but providing for the punishment of individuals acting for themselves, is unauthorized by the amendment, and cannot support an indictment of an individual for preventing a voter from voting at a state election. *United States v. Amsden*,* 6 Fed. R., 819.

§ 1609. The fifteenth amendment was primarily and principally intended for the benefit of the colored race. It does not confer the right to vote. That is the prerogative of the state laws. It only conferred the right not to be excluded from voting on account of race, color or previous condition of servitude, and this is all the right that congress can enforce. It does not confer upon congress any power to regulate elections or the right of voting where it did not have that power before, except in the particular matter specified. *United States v. Cruikshank*,* 1 Woods, 308, and 2 Otto, 542 (§§ 898-911); *United States v. Crosby*, 1 Hughes, 448.

§ 1610. Section 4 of the "Enforcement Act" of May 31, 1870, making it an offense for any person, by force, bribery or threats, to hinder or prevent any citizen from voting at any election, is unauthorized by the fifteenth amendment, because not limited to such prevention on account of race, color or previous condition of servitude. *United States v. Cruikshank*,* 1 Woods, 308. See §§ 898-911.

§ 1611. Whether the fifteenth amendment authorizes any act by congress punishing the prevention of the exercise of the right of suffrage, by individuals as such, and not acting under color of some law, state or national, *quære*. *United States v. Souders*, 2 Abb., 456.

X. IMPAIRING THE OBLIGATION OF CONTRACTS.

1. In General.

SUMMARY—*Constitutional provision*, § 1612.—*Vested rights*, §§ 1613, 1618.—*Any impairment prohibited*, § 1614.—*Impairing the remedy*, §§ 1614, 1615, 1622, 1629.—*Obligation defined*, § 1615.—*Legalizing void contracts*, § 1616.—*Changing law of landlord and tenant*, § 1617.—*Contracts for sale of slaves*, § 1619.—*Payment of taxes as a condition to a recovery on a contract*, § 1620.—*Giving an additional remedy*, § 1621.—*Regulating sales of mortgaged property*, § 1623; *of property on execution*, § 1624.—*Exemption laws*, §§ 1625, 1626, 1628.—*Impairment by state constitutional provision*, §§ 1627, 1628.

§ 1612. "No state shall . . . pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts." Const., art. I, sec. 10.

§ 1613. The federal constitution does not prohibit state laws divesting vested rights, provided they do not impair the obligation of a contract. *Satterlee v. Matthewson*, §§ 1630-35. See §§ 74, 1720.

§ 1614. Any impairment of the obligation of a contract is prohibited. The remedy may be changed, provided no substantial right secured by the contract is impaired. *Walker v. Whitehead*, §§ 1642-43. See §§ 1676, 1735.

§ 1615. The obligation of a contract consists in its binding force on the party who makes it, and any law which in its operation amounts to a denial or obstruction of the rights accruing by a contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the constitution. *McCracken v. Hayward*, §§ 1656-58. See §§ 1674, 1676.

§ 1616. The provision against the impairment by states of the obligation of any contract does not prohibit the states from passing laws validating void contracts. *Satterlee v. Matthewson*, §§ 1630-35. See §§ 1732, 1749, 1750.

§ 1617. A legislative provision, declaring that the rule of law that tenants are estopped to deny their landlords' title, should apply to certain leased lands held by the supreme court to be without the rule, does not impair the obligation of the contract implied in leases executed prior to the passage of such act. *Ibid.*

§ 1618. Vested rights cannot be destroyed by implication. *Osborn v. Nicholson*, §§ 1636-41. See § 74.

§ 1619. The provision in the Arkansas constitution, prohibiting the states from taking cognizance of any suit upon any contract relating to slaves, although valid when made, is unconstitutional as impairing the obligation of contracts. *Ibid.* See §§ 1592-94, 1694.

§ 1620. An act of a state legislature, enacted in 1870, providing that no recovery should be had in any court of the state upon any contract made before June 1, 1865, unless certain taxes should be paid from the time the debt was contracted, impairs the obligation of the contract, and is therefore unconstitutional. *Walker v. Whitehead*, §§ 1642, 1643.

§ 1621. A law which merely gives an additional remedy to those already provided upon contracts made prior to its passage does not impair the obligation of the contracts. So a law giving a person a lien upon land for work done prior to its passage is valid. *Gordon v. The South Fork Canal Co.*, §§ 1644-49.

§ 1622. Whatever belongs merely to the remedy may be altered, provided the alteration does not impair the obligation of the contract. *Bronson v. Kinzie*, §§ 1650-55. See § 1676.

§ 1623. A state law forbidding any sale of mortgaged premises for less than two-thirds of its appraised valuation, either under a power of sale or decree of court, and when sold giving the mortgagor twelve months, and his judgment creditors fifteen months, to redeem the same, is, as to mortgages executed prior to its passage, a law impairing the obligation of contracts, and void. *Ibid.* See § 1754.

§ 1624. A law providing that no sale upon execution should take place of the property of the judgment debtor, unless two-thirds of the appraised value should be bid therefor, is, in respect to such judgments as are founded on contracts entered into prior to its passage, one impairing the obligation of contracts, and consequently void. *McCracken v. Hayward*, §§ 1656-58. See § 1757.

§ 1625. A state constitutional provision, which increases the amount of a debtor's exemptions, and thus destroys the lien of a judgment recovered before its adoption, impairs the obligation of a contract. *Gunn v. Barry*, §§ 1659-63. See § 1746.

§ 1626. And it is not material in such case that the constitution was sanctioned by congress. *Ibid.*

§ 1627. Congress cannot, by ratification or authorization, give the slightest effect to a state law or constitution in conflict with the constitution of the United States. A state can no more impair an existing contract by a constitutional provision than by a legislative act. *Ibid.* See § 1740.

§ 1628. Constitutional and statutory provisions of a state, which increase a debtor's exemptions so as materially to impair the remedy on contracts entered into before their adoption, impair the obligation of the contracts, and are void. *Edwards v. Kearzey*, §§ 1664-71. See § 1746.

§ 1629. The remedy subsisting in a state when and where a contract is made and is to be performed is a part of its obligation. *Ibid.* See § 1676.

[NOTES.—See §§ 1672-1763.]

SATTERLEE v. MATTHEWSON.

(2 Peters, 380-416. 1829.)

Opinion by MR. JUSTICE WASHINGTON.

STATEMENT OF FACTS.—This is a writ of error to the supreme court of Pennsylvania. An ejectment was commenced by the defendant in error, in the court of common pleas, against Elisha Satterlee, to recover the land in controversy, and, upon the motion of the plaintiff in error, he was admitted, as her landlord, a defendant to the suit. The plaintiff, at the trial, set up a title under a warrant

dated the 10th of January, 1812, founded upon an improvement in the year 1785, which it was admitted was under a Connecticut title, and a patent bearing date the 19th of February, 1813. The defendant claimed title under a patent issued to Wharton, in the year 1781, and a conveyance by him to John F. Satterlee, in April, 1812. It was contended on the part of the plaintiff, that admitting the defendant's title to be the oldest and best, yet he was stopped from setting it up in that suit, as it appeared in evidence that he had come into possession as tenant to the plaintiff some time in the year 1790. The court of common pleas decided in favor of the plaintiff upon the ground just stated, and judgment was accordingly rendered for her. Upon a writ of error to the supreme court of that state, that court decided, in June, 1825 (13 Serg. & Rawle, 133), that, by the settled law of Pennsylvania, the relation of landlord and tenant could not subsist under a Connecticut title; upon which ground the judgment was reversed, and a *venire facias de novo* was awarded.

On the 8th of April, 1826, and before the second trial of this cause took place, the legislature of that state passed a law in substance as follows, viz.: "That the relation of landlord and tenant shall exist, and be held as fully and effectually between Connecticut settlers and Pennsylvania claimants, as between other citizens of this commonwealth, on the trial of any cause now pending, or hereafter to be brought within this commonwealth, any law or usage to the contrary notwithstanding." Upon the retrial of this cause in the inferior court, in May, 1826, evidence was given conducing to prove that the land in dispute was purchased of Wharton by Elisha Satterlee, the father of John F. Satterlee, and that by his direction the conveyance was made to the son. It further appeared in evidence that the son brought an ejectment against his father, in the year 1813, and by some contrivance between those parties, alleged by the plaintiff below to be merely colorable and fraudulent, for the purpose of depriving her of her possession, obtained a judgment and execution thereon, under which the possession was delivered to the plaintiff in that suit, who immediately afterwards leased the premises to the father for two lives, at a rent of \$1 per annum. The fairness of the transactions was made a question on the trial, and it was asserted by the plaintiff that, notwithstanding the eviction of Elisha Satterlee under the above proceedings, he still continued to be her tenant.

The judge, after noticing in his charge the decision of the supreme court in 1825, and the act of assembly before recited, stated to the jury the general principle of law, which prevents a tenant from controverting the title of his landlord by showing it to be defective, the exception to that principle where the landlord claims under a Connecticut title, as laid down by the above decision, and the effect of the act of assembly upon that decision, which act he pronounced to be binding on the court. He therefore concluded, and so charged the jury, that if they should be satisfied from the evidence that the transactions between the two Satterlees before mentioned were *bona fide*, and that John F. Satterlee was the actual purchaser of the land, then the defendants might set up the eviction as a bar to the plaintiff's recovery as landlord. But that, if the jury should be satisfied that those transactions were collusive, and that Elisha Satterlee was in fact the real purchaser, and the name of his son inserted in the deed for the fraudulent purpose of destroying the right of the plaintiff as landlord, then the merely claiming under a Connecticut title would not deprive her of her right to recover in that suit. To this charge, of which the substance only has been stated, an exception was taken, and the whole of it is

spread upon the record. The jury found a verdict for the plaintiff; and judgment being rendered for her, the cause was again taken to the supreme court by a writ of error.

§ 1630. *The supreme court has jurisdiction if it appears from the record that the constitutionality of a state law was drawn in question.*

The only question which occurs in this cause, which it is competent to this court to decide, is whether the statute of Pennsylvania which has been mentioned, of the 8th of April, 1826, is or is not objectionable, on the ground of its repugnancy to the constitution of the United States. But before this inquiry is gone into, it will be proper to dispose of a preliminary objection made to the jurisdiction of this court, upon the ground that there is nothing apparent on this record to raise that question, or otherwise to bring this case within any of the provisions of section 25 of the Judiciary Act of 1789. Stats. at Large, 85.

Questions of this nature have frequently occurred in this court, and have given occasion for a critical examination of the above section, which has resulted in the adoption of certain principles of construction applicable to it, by which the objection now to be considered may, without much difficulty, be decided. 2 Wheat., 363; 4 Wheat., 311; 12 Wheat., 117. One of those principles is, that if it sufficiently appear from the record itself, that the repugnancy of a statute of a state to the constitution of the United States was drawn into question, or that that question was applicable to the case, this court has jurisdiction of the cause under the section of the act referred to; although the record should not, in terms, state a misconstruction of the constitution of the United States, or that the repugnancy of the statute of the state to any part of that constitution was drawn into question. Now it is manifest from this record, not only that the constitutionality of the statute of the 8th of April, 1826, was drawn into question, and was applicable to the case, but that it was so applied by the judge, and formed the basis of his opinion to the jury, that they should find in favor of the plaintiff, if in other respects she was entitled to a verdict. It is equally manifest that the right of the plaintiff to recover in that action depended on that statute; the effect of which was to change the law as the supreme court had decided it to be in this very case in the year 1825. 13 Serg. & Rawle, 133.

§ 1631. — *when the opinion of the court becomes a part of the record.*

That the charge of the judge forms a part of this record is unquestionable. It was made so by the bill of exceptions, and would have been so without it, under the statute of the 24th of February, 1806, of that state, which directs, that in all cases in which the opinion of the court shall be delivered, if either party require it, it is made the duty of the judges to reduce the opinion, with their reasons therefor, to writing, and to file the same of record in the cause. In the case of *Downing v. Baldwin*, 1 Serg. & Rawle, 298, it was decided by the supreme court of Pennsylvania that the opinion so filed becomes part of the record, and that any error in it may be taken advantage of on a writ of error without a bill of exceptions. It will be sufficient to add that this opinion of the court of common pleas was, upon a writ of error, adopted and affirmed by the supreme court; and it is the judgment of that court upon the point so decided by the inferior court, and not the reasoning of the judges upon it, which this court is now called upon to revise.

§ 1632. *A state law declaring a void contract valid is not one impairing the obligation of contracts.*

We come now to the main question in this cause. Is the act which is

objected to repugnant to any provision of the constitution of the United States? It is alleged to be so by the counsel for the plaintiff in error, for a variety of reasons; and particularly because it impairs the obligation of the contract between the state of Pennsylvania and the plaintiff, who claims title under her grant to Wharton, as well as of the contract between Satterlee and Matthewson; because it creates a contract between parties where none previously existed, by rendering that a binding contract which the law of the land had declared to be invalid; and because it operates to divest and destroy the vested rights of the plaintiff. Another objection relied upon is, that in passing the act in question the legislature exercised those functions which belong exclusively to the judicial branch of the government. Let these objections be considered. The grant to Wharton bestowed upon him a fee simple estate in the land granted, together with all the rights, privileges and advantages which, by the laws of Pennsylvania, that instrument might legally pass. Were any of those rights, which it is admitted vested in his vendee or alienee, disturbed or impaired by the act under consideration? It does not appear from the record, or even from the reasoning of the judges of either court, that they were in any instance denied, or even drawn into question. Before Satterlee became entitled to any part of the land in dispute under Wharton, he had voluntarily entered into a contract with Matthewson, by which he became his tenant, under a stipulation that either of the parties might put an end to the tenancy at the termination of any one year. Under this new contract, which, if it was ever valid, was still subsisting and in full force at the time when Satterlee acquired the title of Wharton, he exposed himself to the operation of a certain principle of the common law, which estopped him from controverting the title of his landlord by setting up a better title to the land in himself, or one outstanding in some third person.

It is true that the supreme court of the state decided, in the year 1825, that this contract, being entered into with a person claiming under a Connecticut title, was void; so that the principle of law which has been mentioned did not apply to it. But the legislature afterwards declared, by the act under examination, that contracts of that nature were valid, and that the relation of landlord and tenant should exist and be held effectual as well in contracts of that description as in those between other citizens of the state. Now, this law may be censured, as it has been, as an unwise and unjust exercise of legislative power; as retrospective in its operation; as the exercise by the legislature of a judicial function; and as creating a contract between parties where none previously existed. All this may be admitted; but the question which we are now considering is, does it impair the obligation of the contract between the state and Wharton or his alienee? Both the decision of the supreme court in 1825, and this act, operate, not upon that contract, but upon the subsequent contract between Satterlee and Matthewson. No question arose or was decided to disparage the title of Wharton, or of Satterlee, as his vendee. So far from it, that the judge stated in his charge to the jury that if the transactions between John F. Satterlee and Elisha Satterlee were fair, then the elder title of the defendant must prevail, and he would be entitled to a verdict.

We are, then, to inquire whether the obligation of the contract between Satterlee and Matthewson was impaired by this statute. The objections urged at the bar, and the arguments in support of them, apply to that contract if to either. It is that contract which the act declared to be valid, in opposition to the decision of the supreme court; and admitting the correctness of that

decision, it is not easy to perceive how a law which gives validity to a void contract can be said to impair the obligation of that contract. Should a statute declare, contrary to the general principles of law, that contracts founded upon an illegal or immoral consideration, whether in existence at the time of passing the statute, or which might hereafter be entered into, should nevertheless be valid and binding upon the parties, all would admit the retrospective character of such an enactment, and that the effect of it was to create a contract between parties where none had previously existed. But it surely cannot be contended that to create a contract, and to destroy or impair one, mean the same thing.

§ 1633. *The constitution of the United States does not prohibit a state from passing retrospective laws.*

If the effect of the statute in question be not to impair the obligation of either of those contracts, and none other appear upon this record, is there any other part of the constitution of the United States to which it is repugnant? It is said to be retrospective. Be it so; but retrospective laws, which do not impair the obligation of contracts, or partake of the character of *ex post facto* laws, are not condemned or forbidden by any part of that instrument.

§ 1634. *The constitution of the United States does not prohibit the legislature of a state from exercising judicial power.*

All the other objections which have been made to this statute admit of the same answer. There is nothing in the constitution of the United States which forbids the legislature of a state to exercise judicial functions. The case of *Ogden v. Blackledge*, 2 Cranch, 272, came into this court from the circuit court of the United States, and not from the supreme court of North Carolina; and the question whether the act of 1799, which partook of a judicial character, was repugnant to the constitution of the United States, did not arise, and consequently was not decided. It may safely be affirmed that no case has ever been decided in this court, upon a writ of error to a state court, which affords the slightest countenance to this objection.

§ 1635. *The federal constitution does not prohibit the states from passing laws divesting vested rights, so long as they do not impair the obligation of contracts.*

The objection, however, which was most pressed upon the court, and relied upon by the counsel for the plaintiff in error, was, that the effect of this act was to divest rights which were vested by law in *Satterlee*. There is certainly no part of the constitution of the United States which applies to a state law of this description; nor are we aware of any decision of this or of any circuit court which has condemned such a law upon this ground, provided its effect be not to impair the obligation of a contract; and it has been shown that the act in question has no such effect upon either of the contracts which have been before mentioned.

In the case of *Fletcher v. Peck*, 6 Cranch, 87 (§§ 1805-12, *infra*), it was stated by the chief justice that it might well be doubted whether the nature of society and of government do not prescribe some limits to the legislative power; and he asks, "if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation?" It is nowhere intimated in that opinion that a state statute which divests a vested right is repugnant to the constitution of the United States; and the case in which that opinion was pronounced was removed into this court by writ of error, not from the supreme court of a state, but from a circuit court. The strong expressions of the court upon this point in the cases of *Van-*

horne v. Dorance, 2 Dal., 304, and *Society for Propagation of Gospel v. Wheeler*, 2 Gall., 105, were founded expressly on the constitution of the respective states in which those cases were tried. We do not mean in any respect to impugn the correctness of the sentiments expressed in those cases, or to question the correctness of a circuit court, sitting to administer the laws of a state, in giving to the constitution of that state a paramount authority over a legislative act passed in violation of it. We intend to decide no more than that the statute objected to in this case is not repugnant to the constitution of the United States, and that, unless it be so, this court has no authority, under the twenty-fifth section of the Judiciary Act, to re-examine and to reverse the judgment of the supreme court of Pennsylvania in the present case. That judgment, therefore, must be affirmed, with costs.

MR. JUSTICE JOHNSON concurred in the decision, but disapproved of the ground on which it was placed, to wit, that a state legislature could declare a void contract valid. He contended that the whole difficulty arises out of that "unhappy idea that the phrase *ex post facto*, in the constitution of the United States, was confined to criminal cases exclusively;" that the statute complained of was no more than declarative of the law on a point on which the decisions of the state courts had fluctuated, and which never was finally settled until the decision took place on which the writ of error was sued out.

OSBORN v. NICHOLSON.

(18 Wallace, 654-664. 1871.)

ERROR to U. S. Circuit Court, District of Arkansas.

Opinion by MR. JUSTICE SWAYNE.

STATEMENT OF FACTS.—The plaintiff in error brought this suit on the 10th of February, 1869, in that court, and declared upon a promissory note made to him by the defendants in error for \$1,300, dated March 26, A. D. 1861, and payable on the 26th day of December following, with interest at the rate of ten per cent. from date. The defendants pleaded that the instrument sued upon was given in consideration of the conveyance of a certain negro *slave* for life, and none other; and that at the time of the making of the instrument the plaintiff, by his authorized agent, executed to the defendant a bill of sale, as follows:

"MARCH 20, 1861.

"For the consideration of \$1,300 I hereby transfer all the right, title and interest I have to a negro boy named Albert, aged about twenty-three years. I warrant said negro to be sound in body and mind, and a slave for life; and I also warrant the title to said boy clear and perfect."

And that the said negro soon thereafter, to wit, on the 1st day of January, 1862, was liberated by the United States government, the said slave being then alive, and that the plaintiff ought not, therefore, to recover. The plaintiff demurred. The court overruled the demurrer, and the plaintiff electing to stand by it, the court gave judgment for the defendants. This writ of error has brought the case here for review. The question presented for our determination is, whether the court erred in overruling the demurrer; or, in other words, whether the facts pleaded were sufficient to bar the action.

§ 1636. *The constitution of Arkansas of 1868, so far as it forbids suits on contracts for sales of slaves, impairs the obligation of contracts and is invalid.*

We lay out of view *in limine* the constitution of Arkansas of 1868, which annuls all contracts for the purchase or sale of slaves, and declares that no court of the state should take cognizance of any suit founded on such a contract, and that nothing should ever be collected upon any judgment or decree which had been, or should thereafter be, "rendered upon any such contract or obligation." It is sufficient to remark that as to all prior transactions the constitution is in each of the particulars specified clearly in conflict with that clause of the constitution of the United States which ordains that "no state shall" . . . "pass any law impairing the obligation of contracts." *Von Hoffman v. City of Quincy*, 4 Wall., 535 (§§ 1877-82, *infra*); *White v. Hart*, 13 Wall., 646. Nor do we deem it necessary to discuss the validity of the contract here in question when it was entered into. Being valid when and where it was made, it was so everywhere. With certain qualifications, not necessary to be considered in this case, this is the rule of the law of nations. Judge Story says: "The rule is founded not merely on the convenience, but on the necessity, of nations; for otherwise it would be impracticable for them to carry on an extensive intercourse and commerce with each other." Story's *Confl. of Laws* (Redfield's ed.), § 242. It may be safely asserted that this contract when made could have been enforced in the courts of every state of the Union, and in the courts of every civilized country elsewhere. In the celebrated case of *Somerset*, Lord Mansfield said: "A contract for the sale of a slave is good here; the sale is a matter to which the law properly and readily attaches, and will maintain the price according to the agreement. But *here* the *person* of the slave himself is immediately the object of inquiry, which makes a very material difference." 20 Howell's State Trials, 79. See, also, *Madrazo v. Willes*, 3 Barn. & Ald., 353; *Santos v. Illidge*, 98 Eng. Com. L., 861; *The Antelope*, 10 Wheat., 66; *Emerson v. Howland*, 1 Mason, 50; *Commonwealth v. Aves*, 18 Pick., 215; *Groves v. Slaughter*, 15 Pet., 449; and *Andrews v. Hensler*, 6 Wall., 254.

§ 1637. *A warranty that the status of a slave is that of slave for life relates to the time the warranty is given and not to changes at a subsequent period.*

Nor is there any question as to an implied warranty of title or otherwise. There being an express warranty, that must be taken to contain the entire contract on the part of the seller. This warranty embraces four points: that the slave was sound in body; that he was sound in mind; that he was a slave for life; and that the seller's title was perfect. It is not averred or claimed that the warranty was false when it was given, in either of these particulars. The title to the slave passed at that time, and if the warranty were true then, no breach could be wrought by any after event. Let it be supposed that, subsequently, a lesion of the brain of the slave occurred, and that permanent insanity ensued, or that, from subsequent disease, he became a cripple for life or died, or that, by the subsequent exercise of the power of eminent domain, the state appropriated his ownership and possession to herself; can there be a doubt that neither of these things would have involved any liability on the part of the seller? He was not a perpetual assurer of soundness of mind, health of body, or continuity of title. A change of the ownership and possession of real estate by the process of eminent domain is not a violation of the covenant for quiet enjoyment. *Frost v. Earnest*, 4 Whart., 86; *Ellis v. Welch*, 6 Mass., 246. Nor is it such an eviction as will support an action for a breach of the covenant of

general warranty. In *Dobbins v. Brown*, 12 Penn. St., 80, it was said by the court: "It will scarcely be thought that a covenant of warranty extends to the state in the exercise of its eminent domain. Like any other covenant it must be restrained to what was supposed to be the matter in view. No grantor who warrants the possession dreams that he covenants against the entry of the state to make a railroad or a canal, nor would it be a sound interpretation of the contract that would make him liable for it. *An explicit covenant against all the world would bind him*; but the law is not so unreasonable as to imply it."

In *Bailey v. Miltenberger*, 31 Penn. St., 41, it was said: "It has never been supposed that the vendor or vendee contemplated a warranty against the exercise of this power whenever the public good or convenience might require it." These remarks are strikingly apposite to the point here under consideration. As regards the principle involved, we see nothing to distinguish those cases from the one before us. In all of them the property was lost to the owner by the paramount act of the state, which neither party anticipated, and in regard to which the contract was silent. Emancipation and the eminent domain work the same result as regards the title and possession of the owner. Both are put an end to. Why should the seller be liable in one case and not in the other? We can see no foundation, in reason or principle, for such a claim.

§ 1638. *There can be a warranty against a future event, but courts cannot interpolate it into the agreements of parties.*

It was formerly held that there could be no warranty against a future event. It is now well settled that the law is otherwise. *Benjamin on Sales*, 463. The buyer might have guarded against his loss by a guaranty against the event which has caused it. We are asked, in effect, to interpolate such a stipulation and to enforce it, as if such were the agreement of the parties. This we have no power to do. Our duty is not to make contracts for the parties but to administer them as we find them. Parties must take the consequences, both of what is stipulated and of what is admitted. We can neither detract from one nor supply the other. *Dermott v. Jones*, 2 Wall., 1; *Revell v. Hussey*, 2 Ball & B., 287.

Where an article is on sale in the market, and there is no fraud on the part of the seller, and the buyer gets what he intended to buy, he is liable for the purchase price, though the article turns out to be worthless. Thus, where certain railroad scrip had been openly sold in London for several months, but was subsequently repudiated by the directors of the company as having been signed and issued by the secretary without authority, it was held that the buyer could not set up as a defense a failure of consideration. *Lambert v. Heath*, 15 Mees. & W., 487. See, also, *Lawes v. Purser*, 6 Ell. & Bl., 930. These cases go further than it is necessary for us to go in order to sustain the liability of the defendants upon the contract here in question. There, as in this case, the buyer might have protected himself by a proper warranty, but had failed to do so.

§ 1639. *A loss by vis major falls on the party who was the proprietor when the loss was occasioned.*

But we think the exact point here under consideration was settled by the court of queen's bench in *Mittelholzer v. Fullarton*, 6 Ad. & El., 989. That case, so far as it is necessary to state it, was this: The contract was made at *Burbice*, in *British Guiana*. The plaintiff sold to the defendant the services of one hundred and fifty-three apprentice laborers who had been slaves, for £7,800, payable in six annual instalments of £1,300 each. The defendant paid four

instalments. The apprentices were then declared free by the local governor and council. The defendant refused to pay the two last instalments. The suit was brought to recover them. The court held that the plaintiff was entitled to judgment, "though the legislature had determined the apprenticeship before they became due." Lord Chief Justice Denman said: "My Brother Weightman asked, during the argument, what would have been the result, if, at the end of a year, the services had been determined by the act of God; and to this no sufficient answer was given. . . . The plaintiff's right vested when the bargain was made. The subsequent interference of the colonial legislature does not prevent his recovering what was then stipulated for."

Williams, Justice, said: "The whole question is, who shall bear the loss occasioned by a *vis major*? and that depends much upon the question, *who was the proprietor when that loss was occasioned*? The property in the services of these laborers had been transferred to the defendant. Then the question is analogous to those which often arise in cases of loss by fire; as whether the goods were *in transitu* or the transit was ended. If the property had passed, and the residue of it was destroyed by a *vis major*, the loss must fall upon the proprietor of the thing, namely, of the services during the unexpired term." The other justices expressed themselves to the same effect, and the judgment was unanimously given.

If all the buildings upon leasehold premises be destroyed by fire, the lessee is nevertheless liable for the full amount of the rent during the residue of the term. *Baker v. Holtzaffell*, 4 Taunt., 45. And if he has covenanted to repair, he must also rebuild. *Phillips v. Stevens*, 16 Mass., 238. So, if a fire occur after the contract of sale, but before the conveyance is executed, the loss must be borne by the buyer. *Sugden on Vendors*, 291. All contracts are inherently subject to the paramount power of the sovereign, and the exercise of such power is never understood to involve their violation, and is not within that provision of the national constitution which forbids a state to pass laws impairing their obligation. The power acts upon the property which is the subject of the contract, and not upon the contract itself. *West River Bridge Co. v. Dix*, 6 How., 532, 536 (§§ 2188-90, *infra*). Such also is the rule of the French law and such was the Roman law. The seller is not bound to warrant the buyer against acts of mere force, violence and casualties, nor against the act of the sovereign. 1 Domat., part 1, book 1, tit. 2, § 10, paragraph 4. "After the bargain is completed the purchaser stands to all losses." *Digest* 2, 14, 77, *Cooper's Justinian*, 615. The case is one in which the maxim applies, *Res perit suo domino*. *Meredith's Emerigon*, 419; *Paine v. Meller*, 6 Ves. Jr., 349.

§ 1640. *The abolition of slavery did not extinguish contracts founded on that relation.*

It has been earnestly insisted that contracts for the purchase and sale of slaves are contrary to natural justice and right, and have no validity unless sustained by positive law; that the right to enforce them rests upon the same foundation, and that when the institution is abolished all such contracts and the means of their enforcement, unless expressly saved, are thereby destroyed. Slavery was originally introduced into the American colonies by the mother country, and into some of them against their will and protestations. In most, if not all, of them, it rested upon universally recognized custom, and there were no statutes legalizing its existence more than there were legalizing the tenure of any other species of personal property. Though contrary to the law of nature it was recognized by the law of nations. The atrocious traffic in human

beings, torn from their country to be transported to hopeless bondage in other lands, known as the slave trade, was also sanctioned by the latter code. 1 Wildman's Internat. Law, 70; Dana's Wheat., 199; The Antelope, 10 Wheat., 67; Le Louis, 2 Dodson, 210.

Where the traffic was carried on by the subjects of governments which had forbidden it, a different rule was applied. The Amedie, Acton, 240; The Diana, 1 Dodson, 95; The Fortuna, id., 81. Humane and just sentiments upon the subject were of slow growth in the minds of publicists. 1 Phillmore's Law of Nations, 316. The institution has existed largely under the authority of the most enlightened nations of ancient and modern times. Wherever found, the rights of the owner have been regarded there as surrounded by the same sanctions and covered by the same protection as other property. Le Louis, 2 Dodson, 250. The British government paid for the slaves carried off by its troops from this country, in the war of 1812, as they did for other private property in the same category. Lawrence's Wheat., 496. The constitution of the United States guarantied the return of persons "held to service or labor in one state under the laws thereof, escaping into another." "The object of this clause was to secure to the citizens of the slaveholding states the complete right and title of ownership in their slaves as property in every state in the Union, into which they might escape." Historically it is known that without this provision the constitution would not have been adopted and the Union could not have been formed. *Prigg v. Pennsylvania*, 16 Pet., 611.

§ 1641. *Vested rights cannot be destroyed by implication. A vested right of action for purchase money of a slave is not impaired by subsequent emancipation of the slave.*

But without considering at length the several assumptions of the proposition, it is a sufficient answer to say that when the thirteenth amendment to the constitution of the United States was adopted, the rights of the plaintiff in this action had become legally and completely vested. Rights acquired by a deed, will or contract of marriage, or other contract executed according to statutes subsequently repealed, subsist afterwards, as they were before, in all respects as if the statutes were still in full force. This is a principle of universal jurisprudence. It is necessary to the repose and welfare of all communities. A different rule would shake the social fabric to its foundations and let in a flood-tide of intolerable evils. It would be contrary to "the general principles of law and reason," and to one of the most vital ends of government. *Calder v. Bull*, 3 Dal., 388 (§§ 582-599, *supra*). The doctrines of the repeal of statutes, and the destruction of vested rights by implication, are alike unfavored in the law. Neither is to be admitted unless the implication is so clear as to be equivalent to an explicit declaration. Every doubt should be resolved against a construction so fraught with mischiefs. There is nothing in the language of the amendment which in the slightest degree warrants the inference that those who framed or those who adopted it intended that such should be its effect. It is wholly silent upon the subject. The proposition, if carried out in this case, would, in effect, take away one man's property and give it to another. And the deprivation would be "without due process of law." This is forbidden by the fundamental principles of the social compact, and is beyond the sphere of the legislative authority both of the states and the nation. *Taylor v. Porter*, 4 Hill, 146; *Wynehamer v. The People*, 3 Kern., 394; *Wilkinson v. Leland*, 2 Pet., 658. What would be the effect of an amendment of the national constitution reaching so far — if such a thing should occur — it is not necessary to

consider, as no such question is presented in the case before us. Many cases have been decided by the highest state courts where the same questions arose which we have been called upon to consider in this case. In very nearly all of them the contract was adjudged to be valid, and was enforced. They are too numerous to be named. The opinions in some of them are marked by great ability.

Whatever we may think of the institution of slavery viewed in the light of religion, morals, humanity, or a sound political economy,—as the obligation here in question was valid when executed, sitting as a court of justice, we have no choice but to give it effect. We cannot regard it as differing in its legal efficacy from any other unexecuted contract to pay money made upon a sufficient consideration at the same time and place. Neither in the precedents and principles of the common law, nor in its associated system of equity jurisprudence, nor in the older system known as the civil law, is there anything to warrant the result contended for by the defendants in error. Neither the rights nor the interests of those of the colored race lately in bondage are affected by the conclusions we have reached. This opinion decides nothing as to the effect of President Lincoln's emancipation proclamation. We have had no occasion to consider that subject.

Judgment reversed, and the cause remanded to the circuit court with directions to proceed in conformity to this opinion.

The CHIEF JUSTICE dissented.

WALKER v. WHITEHEAD.

(16 Wallace, 814-818. 1872.)

ERROR to the Supreme Court of Georgia.

Opinion by MR. JUSTICE SWAYNE.

STATEMENT OF FACTS.—The case, as it appears in the record, is as follows: On the 1st of January, 1870, the plaintiff in error instituted this suit against the defendant in error upon a promissory note, made by the latter to the former, dated March 28, 1864, for \$7,219.47, payable on the 19th of March then next ensuing. The defendant interposed two pleas: 1st. That after the maturity of the note he had tendered payment in Confederate treasury notes. 2d. That he was a loser by the result of the late war against the United States of one hundred negroes worth \$50,000, and of Confederate securities of the value of \$20,000; that he was a citizen of the Confederate States who waged and carried on that war, and that he pleads those losses as an offset to the demand of the plaintiff to the amount of the principal and interest of that demand.

When the case was called on the calendar the defendant moved the court to dismiss it, because the plaintiff had not filed an affidavit of the payment of the taxes upon the note as required by the act of the legislature of Georgia of the 18th of October, 1870. The plaintiff objected upon several grounds. The court overruled his objection, and dismissed the case. The plaintiff thereupon removed it to the supreme court of the state. That court affirmed the judgment of the court below.

The first and second sections of the act referred to are as follows: "Section 1. That in all suits pending, or hereafter brought, in or before any court of the state, founded upon any debt or contract or cause of action made or implied before the 1st June, 1865, or upon any other debt or contract in renewal

thereof, it shall not be lawful for the plaintiff to have a verdict or judgment in his favor, unless he has made it clearly to appear before the tribunal trying the same that all legal taxes chargeable by law upon the same *have been duly paid for each year* since the making or implying of said debt or contract. Section 2. In any suit now pending, or hereafter brought, it shall be the duty of the plaintiff, within six months after the passage of this act, if the suit be pending, and at the filing of the writ, if the suit be hereafter brought, to file with the clerk of the court of justice an affidavit, if the suit was founded on any debt or contract as described in section 1, that all legal charges chargeable by law upon such debt or contract *have been duly paid*, or the income thereon *for each year since the making of the same*, and that he expects to prove the same upon the trial; and, upon failure to file such affidavit as herein required, said suit shall, on motion, be dismissed."

The fourth section declares it to be a condition precedent to a recovery that "the said debt has been *regularly given in for taxes*, and the taxes paid." The fifth section provides, in respect of judgments already rendered, that no levy or sale shall be made unless an affidavit be made that all taxes "have been duly paid from the time of making said contract to the time of attaching the affidavit." The sixth section provides that in all cases of indebtedness of this class the defendant may offset "any losses he may have suffered by, or in consequence of, the late war against the United States," whether the said losses "be from the destruction or *depreciation* of property." The seventh section declares that these damages shall not be considered as "too remote or speculative, if it appear that they were fairly and legitimately produced, *directly or indirectly, by said war or the results thereof*." The ninth section provides that these losses by the war may be offset against judgments already rendered. The fourteenth section provides that, as to such debts due to widows and minors, they are to be settled "upon the principles of equity, *taking into consideration the relative loss of property sustained by the plaintiff and defendant*." The fifteenth section provides that the provisions of the fourteenth are not to apply where the defendant is in possession of the property for the purchase of which the said contract was entered into, with this proviso: that "the defendant may elect to give up the property in his possession for which such contract was entered into, and such election shall be the full discharge of such indebtedness."

§ 1642. *A law requiring payment of taxes on antecedent contracts as a condition to a recovery is void.*

The contract here in question is within the predicate of this act. It was made more than six years before the act was passed. The act was retrospective,—denounced a penalty not before prescribed for the non-payment of taxes,—and, if such delinquency had existed for a single year, confiscated the debt by making any remedy to enforce payment impossible. The denunciation and the penalty came together. There was no warning, and there could be no escape. The purpose of the act was plainly not to collect back taxes,—that was neither asked nor permitted as a means of purgation,—but to bar the debt and discharge the debtor. The act is not an *ex post facto* law only, because that phrase, in its legal sense, is confined to *crimes* and their punishment. The constitution of the United States declares that no state shall pass any "law impairing the obligation of contracts."

These propositions may be considered consequent axioms in our jurisprudence: The laws which exist at the time and place of the making of a con-

tract, and where it is to be performed, enter into and form a part of it. This embraces alike those which affect its validity, construction, discharge and enforcement. Nothing is more material to the obligation of a contract than the means of its enforcement. The ideas of validity and remedy are inseparable, and both are parts of the obligation which is guarantied by the constitution against impairment.

§ 1643. *Obligation of contracts defined. The remedy may be changed.*

The obligation of a contract "is the law which binds the parties to perform their agreement." Any impairment of the obligation of a contract—the degree of impairment is immaterial—is within the prohibition of the constitution. The states may change the remedy, provided no substantial right secured by the contract is impaired. Whenever such a result is produced by the act in question, to that extent it is void. The states are no more permitted to impair the efficacy of a contract in this way than to attack its vitality in any other manner. Against all assaults coming from that quarter, whatever guise they may assume, the contract is shielded by the constitution. It must be left with the same force and effect, including the substantial means of enforcement, which existed when it was made. The guaranty of the constitution gives it protection to that extent. *Von Hoffman v. City of Quincy*, 4 Wall., 535. The effect of these propositions upon the judgment before us requires but a single remark. A clearer case of a law impairing the obligation of a contract, within the meaning of the constitution, can hardly occur.

The judgment of the supreme court of Georgia is reversed, and the cause will be remanded to that court with directions to enter a judgment of reversal, and then to proceed in conformity to this opinion.

GORDON v. SOUTH FORK CANAL COMPANY.

(Circuit Court for California: 1 McAllister, 513-522. 1859.)

Opinion by McALLISTER, J.

STATEMENT OF FACTS.—To the bill exhibited in this case a *demurrer* was filed; and it was sustained by the court for want of proper averments to give jurisdiction, with liberty to amend. The complainant has done so; and one of the defendants, D. K. Newell, has filed a plea which raises an issue as to the validity of the lien to enforce which is one of the objects of the bill. The first and preliminary objection to the argument of this plea is, that the issue now raised was disposed of by the decision on the *demurrer*. The court does not so consider, as its action on it was limited to the question of jurisdiction. Again, the allegation in the bill was general; it was, that notice of the lien was recorded according to law. This general averment on the argument of the *demurrer* was taken as true. The plea now filed sets forth the notice, and specifies wherein the alleged invalidity exists. The court cannot consider the decision on the *demurrer* as precluding the defendant from setting up this defense in form of a plea.

The grounds on which it rests are, 1st. That by the act of 12th April, 1850 (Comp. Laws, 808), no lien was given except upon buildings and wharves; and this was the only law in force at the date of the contract with Gordon & Kenyon. The bill in this case seeks to enforce a lien upon a canal.

2d. That the act of 17th May, 1853 (Comp. Laws, 811), was passed subsequent to the date of the contract, and after most of the work done by the complainant had been performed. This act was prospective, and could not

retroact so as to confer a lien where none existed at the date of the contract. By these objections it is apparent that the date of the contract is made the point of time which is to limit the operation of the act, and beyond which it could create no right. The conclusion drawn in the brief of defendants' counsel is, that "the legislature had no power to incorporate a new element into the contract, and create a lien on a canal where none existed at the date of the contract." With a view to sustain the theory that the lien affects the contract, it is urged that the labor performed and materials furnished could only have been done and furnished under a contract. This is true; for no cause of action can arise *ex contractu* that is not founded on contract; but that may be verbal, in writing or implied.

The case of *Houghton v. Blake*, 5 Cal., 240, cited by defendants, simply affirms the principle that the materials furnished must have been so by the express terms of the contract. A reference to the case of *Bottomly v. Grace Church*, adopted and relied on in the former case, will show that all that was decided is that the statute never contemplated that a person should have the right of following the materials which he had sold in general terms, and obtain a lien upon any building to which the materials had been applied: The materials must have been furnished to the particular building on which the lien was to be enforced by the terms of the contract in pursuance of which it was constructed.

With a view to ascertain whether the lien, under the law which creates it, operates upon the contract in this case, it is necessary to examine the legislation of this state in relation to the liens of mechanics and other operatives. The act of the legislature of 12th April, 1850 (Comp. Laws, 808), created a lien on buildings and wharves in favor of two classes of laborers.

1st. The first were master builders, mechanics, and all other persons furnishing labor or materials by contract with the owner himself. By the seventh section of this act, this class, to secure their lien, must file in the recorder's office of the county in which the building or wharf is situated, before the expiration of sixty days from the completion of the work or repairs, notice of an intention to hold a lien upon the property declared by the act liable to the lien, specifically setting forth the amount claimed. It is also provided that suit shall be brought to enforce the same within one year after the work is done or materials furnished, or within one year after the expiration of any credit which may have been given; but no lien shall continue for a longer term than two years from the time the work is completed, or the materials furnished, by any agreement to give credit.

The second class of persons in favor of whom a lien is created are contractors, journeymen, etc., performing labor or furnishing by contract with the masters or contractors, and between whom and the owner there is no privity of contract. This second class of persons, in order to fix their lien, are to pursue the course prescribed by the second, third and fourth sections of the act. By these, they are required first to look to their employer, next to the owner, which latter is only liable in cases where notices have been served upon him in conformity with the statute. No period of notice to the owner, by this second class, is prescribed; and the construction which has been placed, by the supreme court of this state, upon this portion of the statute is that it intended to provide for the first class an actual lien, existing *from the commencement of the work* (in this construction this court coincides), until sixty days after its completion, leaving the second class their remedy by notice to the owner; and no

time being fixed when such notice shall be given, that their lien attaches only upon the service thereof,—that this mode of proceeding was intended to prevent litigation by substituting a proceeding in the nature of an attachment; and they put this class of cases on the same footing as ordinary attachments, in which the rule “*qui prior est in tempore potior est in jure*” obtains. *Cahoon v. Levy*, 6 Cal., 295.

The next act of the legislature of this state upon the subject of a mechanic's lien is that of 17th May, 1853 (Comp. Laws, 811). It extends the lien for all labor done and materials furnished to “bridges, flumes, or aqueducts constructed to create hydraulic power or for mining purposes; and gives such to all persons performing labor or furnishing materials for, or employment in, the construction of any such bridge, etc., subjecting it to the provisions and regulations as in and by said act of 12th April, 1850 (Comp. Laws, 811), are provided for buildings and wharves.

§ 1644. *All statutes in pari materia must be construed together.*

It is a rule in the interpretation of statutes, that all in “*pari materia*” must be construed together. *A fortiori*, such should be the rule where, as in this case, the “provisions and regulations of the previous law are expressly incorporated into the more recent statute.” The effect in such case is to make all the provisions of the old law part and parcel of the new, which are not repugnant, and which form portions of the provisions and regulations which regulate the lien.

The complainant rests his claim to a lien under the act of 17th May, 1853, for until the passing of that act no lien on a canal existed; but to sustain his claim he must show he complied with that law, and if he does so, he can be required to do no more. It is true that the legislature of this state, on the 27th April, 1855 (Pam. Laws, 1855, p. 156), passed an act repealing the law of 12th April, 1850; but at the same time it expressly enacts that “nothing herein contained in this act shall be deemed to apply to or affect any lien heretofore acquired,” etc. By this latter act it is required that the notice of lien to be given shall contain a *correct* description of the property on which the lien is intended to be enforced. The act of 12th April, 1850, required a description of the property without using the word “correct.” But this omission in the older act can give rise to no different construction in the interpretation of the two statutes. When the previous act prescribed a description of the property it is to be deemed that a correct one was as much required by its language as when the legislature, in the subsequent law, used the word correct. It is only important to construe the language used in both acts with a view to enable us to arrive at the true intention of the law. To this comparison we will come hereafter when the objection made to the description of property given in this case in the notice of lien is to be considered.

Both acts, that of 12th April, 1850, and that of 17th May, 1853, annex the liens created by them to no contract, but to labor done and materials furnished. Whatever the nature of the contract, the character of the lien is not affected. The law does not alter or impair the obligation of any contract; the lien is founded upon the labor and materials. Going upon the idea that “the laborer is worthy of his hire,” the legislature make the result of his work the sole meritorious ground of the lien. If the act operated upon the contract made prior to the passing of it, and divested a vested right, it would be obnoxious to the objection made to it on the ground that it is unconstitutional. To sustain that proposition, the case of *People v. City of San Francisco*, 4 Cal., 127, has

been cited. That case was decided on two grounds. 1st. That by the terms of the act under consideration the act was not to take effect until July following, and consequently was by its saving clause to take effect *in futuro*.

2d. That previous to the passing of the act, the right had vested in the party, as purchaser from the sheriff, to receive an absolute deed for the property of which he had been divested by the subsequent law giving the right of redemption. The principle decided in the latter proposition is embodied in the case of *McCracken v. Hayward*, 2 How., 608 (§§ 1656-58, *infra*).

§ 1645. *The legislatures of the states may pass laws which go to the remedy on past as well as future contracts, provided they do not impair their obligation. Case cited.*

The act under consideration does not attach to the contract; it goes exclusively to the remedy. It may indirectly affect the contract; but it does not impair it, nor does it divest a vested interest under it. Most legislation as to the remedy more or less affects the contract, though it may not to such extent as to invalidate the law. In *McCracken v. Hayward*, above cited, the supreme court of the United States say: "It is, however, not to be understood that, by that or any former decision of this court, all state legislation on existing contracts is repugnant to the constitution." As legitimate instances of the exercise of this power, they allude to the right of the legislatures of the states to pass recording acts, by which the elder grant shall be postponed to a younger, if the prior deed is not recorded within the limited time; and the power is the same whether the deed is dated before or after the passage of the recording act. Though the effect of such a law is to render the prior deed fraudulent and void against a subsequent purchaser, it is not a law impairing the obligation of contracts. The power to limit a remedy by barring the right of action, being remedial legislation, although it affects the contract, is constitutional. *Id.*

In *Bronson v. Kinzie*, 1 How., 315 (§§ 1650-55, *infra*), the same court say: "Undoubtedly a state may regulate at pleasure the modes of proceeding in its courts in relation to past contracts as well as future. It may shorten the period of time within which claims shall be barred by the statute of limitations." Now, each of foregoing instances in which it is admitted the state legislatures have a right to legislate, affect the contract to as great extent as does the act under consideration, which gives to a party to a contract an additional remedy,—a lien upon his work.

In the case of *Bronson v. Kinzie*, 1 How., 316, the court further say: "And although a new remedy may be deemed less convenient than the old one, and may, in some degree, render the recovery of debts more tardy and difficult, yet it will not follow that the law will be unconstitutional. Whatever belongs merely to the remedy may be altered according to the will of the state, *provided* the alteration does not impair the obligation of the contract."

§ 1646. *A law giving an additional remedy does not impair the obligation of the contract.*

It is difficult to perceive how an act which gives an additional remedy to the holder of a contract can be said to impair its obligation. Of what vested right does it deprive the party? The obligation imposed upon him by its terms was to pay for the work. It vested in him no right not to pay. Can the law, which from motives of policy gives an additional remedy and security, be said to divest a right from him which he never possessed? The true distinction is, that what belongs to the *remedy*, if it does not impair the obligation of the con-

tract, is within the legitimate limits of state legislation. The court cannot consider the law under consideration as unconstitutional, or having divested a vested right. Whether the law should be deemed to create a lien on any labor or materials done and furnished subsequent to the passage of it, is a question not now to be determined. That it does create a lien on all labor and materials done and furnished prior to the passing of it, there can be little doubt; and the plea admits that some portion of the labor and materials are in that category. Whatever be that portion is matter of proof on the trial of the case.

Another objection to the validity of the lien is, that the notice of lien filed by complainant was insufficient, on two grounds: 1. The description of the property in the notice of lien is inaccurate. 2. That if the complainant ever had a valid lien, he has lost it by a failure to bring suit in time. The act of 12th April, 1850, requires that the suit should be brought within one year after the work was done, which was not done in this case.

As to the description of the property, we have seen that the act of 12th April, 1850, requires that notice of the intention to hold a lien on the property declared by that act shall be recorded, specifically stating the amount claimed. The act of 27th April, 1855, requires a correct description of the property to be given. No form is prescribed. Under the latter law the case of *Montrose v. Conner*, 8 Cal., 344, cited by defendant's counsel, was decided. The description of the property in the notice of lien in that case was in these words: "As a dwelling-house lately erected by me for J. W. Connor, situated on Bryant street, between Second and Third streets, in the city of San Francisco, on lot —." In relation to such description the court say: "There are a number of lots on Bryant street between Second and Third streets, to any one of which it would apply as well as to the one in question." That description of an individual object which was so inaccurate as to apply equally well to a number of objects was decided not to be a correct description of the individual object which it was intended to identify.

§ 1647. *What is a correct description of land upon which a lien is claimed.*

What is meant by a correct description? Does it mean a description by metes and bounds, and require the particularity demanded in a deed? The word "correct" is not a technical one. Its obvious meaning in a statute is, such description which identifies the individual object intended to be designated. Such object is accomplished in this case; the subject on which a lien is sought are "the works known as the South Fork Canal, near Placerville, in El Dorado county." If there was no object in existence at the time which answered to that description, the rule, "*de non apparentibus et de non existentibus eadem est ratio*," must apply, and the description must be deemed sufficiently "correct."

§ 1648. *Notice of lien, when sufficient.*

The next objection to the validity of the lien is, that the notice, after giving the information that it was intended to hold a lien on the specific work, does not state that the labor was done on, and the materials were furnished to, that work, but "that the same were for the use of the South Fork Company." The fact that they were so used is not required to be inserted in the notice, nor does it constitute a part of the description of the property. That is matter of allegation and proof, without which no recovery can be had. To that extent goes the case of *Houghton v. Blake*, cited by defendant's counsel.

§ 1649. *Lien, how lost.*

The last objection to the validity of the lien is, that, if it ever existed, it has

been lost by failure to bring a suit to enforce the lien within a year from the time the work was done. Now, there is a conflict as to the time when the work was done; and inasmuch as a plea is not, like an answer, deemed evidence, and the matter is one of avoidance, and as such, if embodied in an answer, must have been proved on the final hearing, it must be submitted to proofs on both sides.

After a careful review of this case, the court has come to the conclusion that the plea must be overruled, and it is ordered accordingly.

BRONSON v. KINZIE.

(1 Howard, 311-332. 1843.)

Opinion by TANEY, C. J.

STATEMENT OF FACTS.— This case comes before the court upon a division of opinion in the circuit court of the United States for the district of Illinois, upon certain questions which arose in the case, and which have been certified to this court according to the act of congress. It appears from the record, that, on the 13th of July, 1838, John H. Kinzie executed a bond to Arthur Bronson, conditioned for the payment of \$4,000 on the 1st of July, 1842, with interest thereon, to be paid semi-annually; and, in order to secure the payment of the said sum of money and interest, Kinzie and wife, on the same day, conveyed to the said Bronson, in fee simple, by way of mortgage, one undivided half part of certain houses and lots in the town of Chicago, with the usual proviso that the deed should be null and void if the said principal and interest were duly paid; and Kinzie, among other things, covenanted that if default should be made in the payment of the principal or interest, or any part thereof, it should be lawful for Bronson or his representatives to enter upon and sell the mortgaged premises at public auction, and, as attorney of Kinzie and wife, to convey the same to the purchaser; and out of the moneys arising from such sale, to retain the amount that might then be due him on the aforesaid bond, with the costs and charges of sale, rendering the overplus, if any, to Kinzie. The interest not having been paid, Bronson, on the 27th of March, 1841, filed his bill to foreclose the mortgage. In the mean time, after the mortgage was made, and before the bill was filed, the legislature of Illinois, on the 19th of February, 1841, passed a law, the eighth section of which provided that mortgagors and judgment creditors should have the same right to redeem mortgaged premises sold by the decree of a court of chancery, that had been given to the debtors and judgment creditors by a previous law, passed in 1825, in cases where lands were sold under execution. The law of 1825 authorized the party whose lands should be sold by execution, after that law took effect, to redeem them within twelve months from the day of sale, by repaying the purchase money with interest at the rate of ten per cent.; and if the debtor did not redeem it within the time limited, any judgment creditor was authorized to do so upon the like terms within fifteen months from the sale. This act, which took effect on the 1st of May, 1825, was held, it seems, not to extend to sales of mortgaged premises under a decree of foreclosure; and the act of February 19, 1841, above mentioned, was passed to embrace them.

By another act of the legislature of Illinois, approved the 27th of February, 1841, it was directed that "when any execution should be issued out of any of the courts of the state, and be levied on any property, real or personal, or both, it should be the duty of the officer levying such execution to summon three

householders of the proper county, one of whom should be chosen by such officer, one by the plaintiff and one by the defendant in the execution; or, in default of the parties making such choice, the officer should choose for them; which householders, after being duly sworn by such officer so to do, should fairly and impartially value the property upon which such execution was levied, having reference to its cash value, and that they should indorse the valuation thereof upon the execution, or upon a piece of paper thereunto attached, signed by them; and when such property should be offered for sale, it should not be struck off unless two-thirds of the amount of such valuation should be bid therefor." It further provided, among other things, that all sales of mortgaged property should be made according to the provisions of that act, whether the foreclosure of said mortgage was by judgment at law or decree in chancery. It also directed that the provisions of this law should extend to all judgments rendered prior to the 1st of May, 1841, and to all judgments that might be rendered on any contract or cause of action accruing prior to that day, and not to any other judgments than as before specified. These are, in substance, the provisions of these acts, as far as they are material to the present controversy.

On the 19th of June, 1841, after the laws above mentioned had been passed, the circuit court of the United States for the district of Illinois adopted the following rules: "Ordered, that when the marshal shall levy an execution upon real estate, he shall have it appraised and sold under the provisions of the law of this state, entitled 'An act regulating the sale of property,' approved February 27, 1841, if the case come within the provisions of that law; and any two or three householders selected under the law, agreeing, may make the valuation of the premises required. Before the sale of any real estate on execution, the marshal shall give notice thirty days in a newspaper published in the county where the land lies; and if there be no paper published in the county, then the notice shall be given thirty days before the sale, by notice, as the statute requires. The court adopt the eighth section of the act of this state, to amend the act concerning judgments, etc., passed 19th of February, 1841, which regulates the sale of mortgaged premises, etc., except where special direction shall be given in the decree of sale."

After these rules were adopted — that is to say at December term, 1841 — the bill filed by Bronson, as hereinbefore mentioned, came on for final hearing in the circuit court; and thereupon the complainant moved the court for a final decree of strict foreclosure of said mortgage, or that the mortgaged premises should be sold to the highest bidder, without being subject to said rule and the act referred to. This motion was resisted on part of defendants, who moved that the decree should direct the sale according to said rule and act. And the judges being opposed in opinion on the following points, to wit: 1. Whether the decree in this case should be so entered as to direct the sale of the said mortgaged premises according to the said statute of the state of Illinois above mentioned, or whether the same premises should be sold at public auction, to the highest bidder, without regard to the said law. 2. Whether the decree in this case shall or shall not direct the sale of the mortgaged premises, without being first valued by three householders, and without requiring two-thirds of the amount of the said valuation to be bid, according to the said act of the state of Illinois. 3. Whether the terms of the mortgage in this case do or do not require it to be excepted from the operation of the rule above recited.

On motion of the complainant, it was ordered and directed that this cause, with said points, be certified to the supreme court in pursuance of the act of

congress. And it is upon these questions, thus certified, that the case is now before us; and the eighth section of the act of February 19th, and the entire act of February 27th, are set forth at large in the record, as the laws referred to in the above mentioned rules of the circuit court. The case has been submitted to the court, for decision, by a written agreement between the counsel on both sides. On the part of the complainant a printed argument has been filed, but none has been offered on behalf of the defendant. As the case involves a constitutional question of great importance, we should have preferred a full argument at the bar. But the parties are entitled, by the rules of the court, to bring it before us in the manner they have adopted; and it being our duty to decide the questions certified to us by the circuit court, we have bestowed upon the subject the careful and deliberate consideration which its importance demands.

§ 1650. *Courts of the United States, how far bound by rules of process in the state courts.*

Upon the points certified, the question is, whether the laws of Illinois of the 19th and the 27th of February, 1841, come within that clause of the tenth section of the first article of the constitution of the United States which prohibits a state from passing a law impairing the obligation of contracts. The laws of a state regulating the process of its courts, and prescribing the manner in which it shall be executed, of course do not bind the courts of the United States, whose proceedings must be governed by the acts of congress. The act of 1792 (1 Stats. at Large, 275), however, adopted the process used in the state courts, as it stood in 1789; and, since then, the act of 1828 (4 Stats. at Large, 278), on the same subject, has been passed; and the third section of this law directs that final process issued on judgments and decrees in any of the courts of the United States, and the proceedings thereupon, shall be the same, except their style, in each state, respectively, as were then used in the courts of such state, and authorizes the courts of the United States, if they see fit, in their discretion, by rules of court, so far to alter final process as to conform the same to any change which might afterwards be adopted by the legislatures of the respective states for the state courts. Any acts of a state legislature, therefore, in relation to final process, passed since 1828, are of no force in the courts of the United States unless adopted by rules of court according to the provisions of this act of congress. And although such state laws may have been so adopted, yet they are inoperative and of no force, if in conflict with the constitution or an act of congress.

§ 1651. *Although the debt secured by mortgage is payable in a state different from that wherein the land lies, the laws of the latter state govern the mortgage.*

As concerns the allegations of the contract upon which this controversy has arisen, they depend upon the laws of Illinois as they stood at the time the mortgage deed was executed. The money due was indeed to be paid in New York. But the mortgage given to secure the debt was made in Illinois for real property situated in that state, and the rights which the mortgagee acquired in the premises depended upon the laws of that state. In other words, the existing laws of Illinois created and defined the legal and equitable obligations of the mortgage contract.

§ 1652. *A state law impairing the obligation of a contract, whether it act upon the remedy or directly upon the contract, is prohibited by the constitution.*

If the laws of the state passed afterwards had done nothing more than change the remedy upon contracts of this description, they would be liable to

no constitutional objection. For, undoubtedly, a state may regulate at pleasure the modes of proceeding in its courts in relation to past contracts as well as future. It may, for example, shorten the period of time within which claims shall be barred by the statute of limitations. It may, if it thinks proper, direct that the necessary implements of agriculture, or the tools of the mechanic, or articles of necessity in household furniture, shall, like wearing apparel, not be liable to execution on judgments. Regulations of this description have always been considered, in every civilized community, as properly belonging to the remedy, to be exercised or not by every sovereignty, according to its own views of policy and humanity. It must reside in every state to enable it to secure its citizens from unjust and harassing litigation, and to protect them in those pursuits which are necessary to the existence and well-being of every community. And although a new remedy may be deemed less convenient than the old one, and may in some degree render the recovery of debts more tardy and difficult, yet it will not follow that the law is unconstitutional. Whatever belongs merely to the remedy may be altered according to the will of the state, provided the alteration does not impair the obligation of the contract. But if that effect is produced, it is immaterial whether it is done by acting on the remedy or directly on the contract itself. In either case it is prohibited by the constitution. This subject came before the supreme court in the case of *Green v. Biddle*, decided in 1823, and reported in 8 Wheat., 1 (§§ 191-206, *supra*). It appears to have been twice elaborately argued by counsel on both sides, and deliberately considered by the court. On the part of the demandant in that case, it was insisted that the laws of Kentucky passed in 1797 and 1812, concerning occupying claimants of land, impaired the obligation of the compact made with Virginia in 1789. On the other hand, it was contended that these laws only regulated the remedy, and did not operate on the right to the lands. In deciding the point the court say: "It is no answer that the acts of Kentucky now in question are regulations of the remedy, and not of the right to the lands. If these acts so change the nature and extent of existing remedies as materially to impair the rights and interests of the owner, they are just as much a violation of the compact as if they directly overturned his rights and interests." And in the opinion delivered by the court after the second argument, the same rule is reiterated in language equally strong. See pages 75, 76 and 84. This judgment of the court is entitled to the more weight, because the opinion is stated in the report of the case to have been unanimous; and Judge Washington, who was the only member of the court absent at the first argument, delivered the opinion of the second.

We concur entirely in the correctness of the rule above stated. It is difficult, perhaps, to draw a line that would be applicable in all cases between legitimate alterations of the remedy, and provisions which, in the form of remedy, impair the right. But it is manifest that the obligation of the contract, and the rights of a party under it, may, in effect, be destroyed by denying a remedy altogether; or may be seriously impaired by burdening the proceedings with new conditions and restrictions, so as to make the remedy hardly worth pursuing. And no one, we presume, would say that there is any substantial difference between a retrospective law declaring a particular contract or class of contracts to be abrogated and void, and one which took away all remedy to enforce them, or incumbered it with conditions that rendered it useless or impracticable to pursue it. Blackstone, in his Commentaries on the Laws of England, 1 vol., 55, after having treated of the declaratory and directory parts

of the law, defines the remedial in the following words: "The remedial part of the law is so necessary a consequence of the former two, that laws must be very vague and imperfect without it. For, in vain would rights be declared, in vain directed to be observed, if there were no method of recovering and asserting those rights when wrongfully withheld or invaded. This is what we mean properly when we speak of the protection of the law. When, for instance, the declaratory part of the law has said that the field or inheritance which belonged to Titius' father is vested by his death in Titius; and the directory part has forbidden any one to enter on another's property without the leave of the owner; if Gaius, after this, will presume to take possession of the land, the remedial part of the law will then interpose its office, will make Gaius restore the possession to Titius, and also pay him damages for the invasion."

We have quoted the entire paragraph, because it shows, in a few plain words, and illustrates by a familiar example, the connection of the remedy with the right. It is the part of the municipal law which protects the right, and the obligation by which it enforces and maintains it. It is this protection which the clause in the constitution now in question mainly intended to secure. And it would be unjust to the memory of the distinguished men who framed it, to suppose that it was designed to protect a mere barren and abstract right, without any practical operation upon the business of life. It was undoubtedly adopted as a part of the constitution for a great and useful purpose. It was to maintain the integrity of contracts, and to secure their faithful execution throughout this Union, by placing them under the protection of the constitution of the United States. And it would but ill become this court, under any circumstances, to depart from the plain meaning of the words used, and to sanction a distinction between the right and the remedy, which would render this provision illusive and nugatory; mere words of form, affording no protection, and producing no practical result.

§ 1653. *A mortgagee holds the legal title, but in trust to secure the payment of money. Upon its payment there is a resulting trust in favor of the mortgagor.*

We proceed to apply these principles to the case before us. According to the long-settled rules of law and equity in all of the states whose jurisprudence has been modeled upon the principles of the common law, the legal title to the premises in question vested in the complainant upon the failure of the mortgagor to comply with the conditions contained in the proviso; and at law, he had a right to sue for and recover the land itself. But in equity, this legal title is regarded as a trust estate, to secure the payment of the money; and, therefore, when the debt is discharged, there is a resulting trust for the mortgagor. *Conard v. Atlantic Ins. Co.*, 1 Pet., 441. It is upon this construction of the contract that courts of equity lend their aid either to the mortgagor or mortgagee, in order to enforce their respective rights. The court will, upon the application of the mortgagor, direct the reconveyance of the property to him, upon the payment of the money; and, upon the application of the mortgagee, it will order a sale of the property to discharge the debt. But, as courts of equity follow the law, they acknowledge the legal title of the mortgagee, and never deprive him of his right at law until his debt is paid; and he is entitled to the aid of the court to extinguish the equitable title of the mortgagor, in order that he may obtain the benefit of his security. For this purpose, it is his absolute and undoubted right, under an ordinary mortgage deed, if the money is not paid at the appointed day, to go into the court of chancery, and

obtain its order for the sale of the whole mortgaged property (if the whole is necessary), free and discharged from the equitable interest of the mortgagor. This is his right, by the law of the contract; and it is the duty of the court to maintain and enforce it, without any unreasonable delay.

When this contract was made, no statute had been passed by the state changing the rules of law or equity in relation to a contract of this kind. None such, at least, has been brought to the notice of the court; and it must, therefore, be governed, and the rights of the parties under it measured, by the rules above stated. They were the laws of Illinois at the time; and, therefore, entered into the contract, and formed a part of it, without any express stipulation to that effect in the deed. Thus, for example, there is no covenant in the instrument giving the mortgagor the right to redeem, by paying the money after the day limited in the deed, and before he was foreclosed by the decree of the court of chancery. Yet no one doubts his right or his remedy; for, by the laws of the state then in force, this right and this remedy were a part of the law of the contract, without any express agreement by the parties. So, also, the rights of the mortgagee, as known to the laws, required no express stipulation to define or secure them. They were annexed to the contract at the time it was made, and formed a part of it; and any subsequent law, impairing the rights thus acquired, impairs the obligations which the contract imposed.

§ 1654. *The law allowing twelve months to redeem property sold under a mortgage impairs the obligation of contracts entered into before its passage.*

This brings us to examine the statutes of Illinois which have given rise to this controversy. As concerns the law of February 19, 1841, it appears to the court not to act merely on the remedy, but directly upon the contract itself, and to engraft upon it new conditions injurious and unjust to the mortgagee. It declares that, although the mortgaged premises should be sold under the decree of the court of chancery, yet that the equitable estate of the mortgagor shall not be extinguished, but shall continue for twelve months after the sale; and it moreover gives a new and like estate, which before had no existence, to the judgment creditor, to continue for fifteen months. If such rights may be added to the original contract by subsequent legislation, it would be difficult to say at what point they must stop. An equitable interest in the premises may, in like manner, be conferred upon others; and the right to redeem may be so prolonged as to deprive the mortgagee of the benefit of his security, by rendering the property unsalable for anything like its value. This law gives to the mortgagor, and to the judgment creditor, an equitable estate in the premises, which neither of them would have been entitled to under the original contract; and these new interests are directly and materially in conflict with those which the mortgagee acquired when the mortgage was made. Any such modification of a contract by subsequent legislation, against the consent of one of the parties, unquestionably impairs its obligations, and is prohibited by the constitution.

§ 1655. *A statute forbidding sales of land under execution, unless they bring a certain proportion of their appraised value, is unconstitutional and void, so far as it applies to antecedent contracts.*

The second point certified arises under the law of February 27, 1841. The observations already made in relation to the other act apply with equal force to this. It is true that this law apparently acts upon the remedy, and not directly upon the contract. Yet its effect is to deprive the party of his pre-existing right to foreclose the mortgage by a sale of the premises, and to im-

pose upon him conditions which would frequently render any sale altogether impossible. And this law is still more objectionable, because it is not a general one, and prescribing the mode of selling mortgaged premises in all cases, but is confined to judgments rendered, and contracts made, prior to the 1st of May, 1841. The act was passed on the 27th of February in that year; and it operates mainly on past contracts, and not on future. If the contracts intended to be affected by it had been specifically enumerated in the law, and these conditions applied to them, while other contracts of the same description were to be enforced in the ordinary course of legal proceedings, no one would doubt that such a law was unconstitutional. Here a particular class of contracts is selected, and incumbered with these new conditions; and it can make no difference, in principle, whether they are described by the names of the parties, or by the time at which they were made.

In the case before us, the conflict of these laws with the obligations of the contract is made the more evident by an express covenant contained in the instrument itself, whereby the mortgagee, in default of payment, was authorized to enter on the premises, and sell them at public auction; and to retain out of the money thus raised, the amount due, and to pay the overplus, if any, to the mortgagor. It is impossible to read this covenant, and compare it with the laws now under consideration, without seeing that both of these acts materially interfere with the express agreement of the parties contained in this covenant. Yet, the right here secured to the mortgagee is substantially nothing more than the right to sell, free and discharged of the equitable interest of Kinzie and wife, in order to obtain his money. Now, at the time this deed was executed, the right to sell, free and discharged of the equitable estate of the mortgagor, was a part of every ordinary contract of mortgage in the state without the aid of this express covenant, and the only difference between the right annexed by law and that given by the covenant consists in this: that in the former case the right of sale must be exercised under the direction of the court of chancery, upon such terms as it shall prescribe, and the sale made by an agent of the court; in the latter the sale is to be made by the party himself. But, even under this covenant, the sale made by the party is so far subject to the supervision of the court that it will be set aside and a new one ordered, if reasonable notice is not given, or the proceedings be regarded, in any respect, as contrary to equity and justice. There is, therefore, in truth but little material difference between the rights of the mortgagee with or without this covenant. The distinction consists rather in the form of the remedy than in the substantial right; and as it is evident that the laws in question invade the right secured by this covenant, there can be no sound reason for a different conclusion where similar rights are incorporated by law into the contract and form a part of it at the time it is made.

Mortgages made since the passage of these laws must undoubtedly be governed by them; for every state has the power to prescribe the legal and equitable obligations of a contract to be made and executed within its jurisdiction. It may exempt any property it thinks proper from sale for the payment of a debt; and may impose such conditions and restrictions upon the creditor as its judgment and policy may dictate. And all future contracts would be subject to such provisions; and they would be obligatory upon the parties in the courts of the United States as well as in those of the state. We speak, of course, of contracts made and to be executed in the state. It is a case of that description that is now before us, and we do not think it proper to go beyond it.

Upon the questions presented by the circuit court we therefore answer: 1. That the decree should direct the premises to be sold at public auction to the highest bidder, without regard to the law of February 19, 1841, which gives the right of redemption to the mortgagor for twelve months, and to the judgment creditor for fifteen. 2. That the decree should direct the sale of the mortgaged premises, without being first valued by three householders, and without requiring two-thirds of the amount of the said valuation to be bid according to the law of February 27, 1841.

The decision of these two questions disposes of the third. And we shall direct these answers to be certified to the circuit court.

MR. JUSTICE M'LEAN dissented.

McCRACKEN v. HAYWARD.

(2 Howard, 608-618. 1844.)

CERTIFICATE OF DIVISION from the U. S. Circuit Court, District of Illinois.

STATEMENT OF FACTS.—In this case the validity of an act of the Illinois legislature of February 27, 1841, is drawn in question. The act provided that when any execution should be levied on real or personal property, the officer should have the property appraised, and that the property should not be struck off unless it brought two-thirds of its appraised value. The United States circuit court adopted the provisions of this law by a rule of court.

Opinion by MR. JUSTICE BALDWIN.

It appears from the record in this case that the plaintiff obtained a judgment against the defendant in June, 1840, on which a *pluries fi. fa.* issued at May term, 1842; real property was levied on; appraised according to the provisions of a law of Illinois, passed on the 27th February, 1841, and the rule of the circuit court of that state, adopted in June of the same year, which law and rule are inserted in the statement of the case by the reporter. The property levied on was advertised for sale by the marshal in August, 1842, but was not sold, as no one bid two-thirds of the appraised value. In March, 1843, the plaintiff sued out a *venditioni exponas*, with directions to the marshal to sell the property, regardless of the state law, which the marshal refused to obey, conceiving himself bound by the aforesaid rule of court. Whereupon the plaintiff moved the court for an order directing the marshal to sell to the highest bidder, without valuation, or any regard to the state law.

"1. The plaintiff, by Arnold, his attorney, comes and moves the court to set aside the return of the *pluries* execution issued in this cause, dated 16th day of May, 1842, under which the property levied upon was appraised, and not sold, because no one would bid two-thirds of appraised value.

"2. That the court direct the marshal to sell said property to the highest bidder, without regard to the valuation already made, and without having valued it again.

"3. That the marshal proceed to sell said property without regard to the provisions of the laws regulating the sale of property, passed since the rendition of the judgment, but that he execute the process of the court, enforcing the judgment according to the remedy existing at the time of the rendition of the judgment and the making of the contract between the parties.

"4. That the marshal be directed to proceed and sell the property levied upon, without regard to the provisions of the act of February, 1841, of the

legislature of Illinois, and of January, 1843, regulating the sale of property above referred to."

On the argument of this motion, the court were divided in opinion on the points mentioned in the statement. These questions must be considered in two aspects: 1. In reference to the constitution. 2. The laws of the United States, as the tests of the validity of the law of Illinois and the rule of court, which, it is said, affect only the remedy, but not the right of the plaintiff arising on the contract between the parties, and the judgment rendered upon it.

§ 1656. *Obligation of contracts defined.*

In placing the obligation of contracts under the protection of the constitution, its framers looked to the essentials of the contract more than to the forms and modes of proceeding by which it was to be carried into execution; annulling all state legislation which impaired the obligation, it was left to the states to prescribe and shape the remedy to enforce it. The obligation of a contract consists in its binding force on the party who makes it. This depends on the laws in existence when it is made; these are necessarily referred to in all contracts, and forming a part of them as the measure of the obligation to perform them by the one party, and the right acquired by the other. There can be no other standard by which to ascertain the extent of either, than that which the terms of the contract indicate, according to their settled legal meaning; when it becomes consummated, the law defines the duty and the right, compels one party to perform the thing contracted for, and gives the other a right to enforce the performance by the remedies then in force. If any subsequent law affect to diminish the duty, or to impair the right, it necessarily bears on the obligation of the contract, in favor of one party, to the injury of the other; hence, any law, which in its operation amounts to a denial or obstruction of the rights accruing by a contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the constitution.

§ 1657. *A state law prohibiting the sale of property, unless it brings two-thirds of its appraised value, impairs the obligation of prior contracts.*

This principle is so clearly stated and fully settled in the case of *Bronson v. Kinzie*, decided at the last term, 1 How., 311 (§§ 1650-55, *supra*), that nothing remains to be added to the reasoning of the court, or requires a reference to any other authority, than what is therein referred to; it is, however, not to be understood that by that, or any former decision of this court, all state legislation on existing contracts is repugnant to the constitution. "It is within the undoubted power of state legislatures to pass recording acts, by which the elder grantee shall be postponed to a younger, if the prior deed is not recorded within the limited time, and the power is the same whether the deed is dated before or after the passage of the recording act. Though the effect of such a law is to render the prior deed fraudulent and void as against a subsequent purchaser, it is not a law impairing the obligation of contracts; such, too, is the power to pass acts of limitation and their effect. Reasons of sound policy have led to the general adoption of laws of both descriptions, and their validity cannot be questioned. The time and manner of their operation, the exceptions to them, and the acts from which the time limited shall begin to run, will generally depend on the sound discretion of the legislature, according to the nature of the titles, the situation of the country, and the emergency which leads to their enactment. Cases may occur where the provisions of a law may be so unreasonable as to amount to the denial of a right, and call for the interposition of the court." 8 Pet., 290.

The obligation of the contract between the parties, in this case, was to perform the promises and undertakings contained therein; the right of the plaintiff was to damages for the breach thereof, to bring suit and obtain a judgment, to take out and prosecute an execution against the defendant till the judgment was satisfied, pursuant to the existing laws of Illinois. These laws giving these rights were as perfectly binding on the defendant, and as much a part of the contract, as if they had been set forth in its stipulations in the very words of the law relating to judgments and executions. If the defendant had made such an agreement as to authorize a sale of his property, which should be levied on by the sheriff, for such price as should be bid for it at a fair public sale on reasonable notice, it would have conferred a right on the plaintiff, which the constitution made inviolable; and it can make no difference whether such right is conferred by the terms or law of the contract. Any subsequent law which denies, obstructs or impairs this right by superadding a condition that there shall be no sale for any sum less than the value of the property levied on, to be ascertained by appraisement, or any other mode of valuation than a public sale, affects the obligation of the contract as much in the one case as the other, for it can be enforced only by a sale of the defendant's property, and the prevention of such sale is the denial of a right. The same power in a state legislature may be carried to any extent, if it exists at all; it may prohibit a sale for less than the whole appraised value, or for three-fourths, or nine-tenths, as well as for two-thirds; for if the power can be exercised to any extent, its exercise must be a matter of uncontrollable discretion, in passing laws relating to the remedy which are regardless of the effect on the right of the plaintiff. This was the ruling principle of the case of *Bronson v. Kinzie*, 1 How., 311, which arose on a mortgage containing a covenant, that, in default of payment, the mortgagee might enter upon, sell and convey the mortgaged premises, as the attorney of the mortgagor; yet the case was not decided on the effect and obligation of that covenant, but on the broad and general principle that a state law, which professedly provided a remedy for enforcing the contract of mortgage, effectually impaired the rights incident to and attached to it by the laws in force at its date, was void. No agreement or contract can create more binding obligations than those fastened by the law, which the law creates and attaches to contracts; the express power which a mortgagor confers on the mortgagee to sell as his agent is not more potent than that which the law delegates to the marshal to sell and convey the property levied on under an execution. He is the constituted agent of the defendant, invested with all his powers for these purposes. The marshal can do under the authority of the law whatever he could do under the fullest power of attorney from the execution debtor, and no state law can prohibit it. It follows that the law of Illinois now under consideration, so far as it prohibits a sale for less than two-thirds of the appraised value of the property levied on, is unconstitutional and void.

§ 1658. *How far the process laws of the states are adopted by federal laws.*

The second aspect in which this case must be considered is with reference to the acts of congress relating to process and proceedings in the courts of the United States in cases at common law. All the early laws on this subject were carefully and most ably reviewed by this court, in *Wayman v. Southard*, and *Bank of United States v. Halstead*, in which it was held that the proceedings in the courts of the United States should be the same as they were in the several states at the time of passing the acts of congress, subject to be altered by

the circuit courts or regulations of the supreme court. That the proceedings on executions were to be governed by such laws until final satisfaction was obtained, regardless of any subsequent changes by state legislation. 10 Wheat., 20, 51. Prior to 1828 congress had passed no process acts applicable to the states admitted into the Union after 1789. To remedy this defect, and to confirm the decisions in the above cases, the act of May, 1828, directed that writs of execution and other final process issued on judgments and decrees, and the proceedings thereupon, shall be the same in each state as are now used in the courts of such state, etc.; thus adopting the same principles which had been established by this court in the construction of the acts of 1789 (1 Stats. at Large, 93) and 1792 (*id.*, 275). Consequently no state law passed since May, 1828, can have any effect on the proceedings on executions issued from the courts of the United States, unless such laws are adopted by those courts under the proviso in the third section of the act.

The rule adopted by the circuit court of Illinois does not fall within this proviso, which declares "that it shall be in the power of the courts, if they see fit in their discretion, so far to alter final process in said courts as to conform the same to any change which may be adopted by the legislatures of the respective states for the state courts." This authorizes the court to adopt the change so made by a state law, but not to adopt it only in part or alter it in any respect. The law directs the appraisement to be made by three householders, one to be selected by the defendant, one by the officer and one by the plaintiff, without any authority to any two to make it, and, consequently, requiring the concurrence of all. The rule of court adopting this law provides: "That any two of the three householders selected under the law, agreeing, may make the valuation required;" such an adoption is not warranted by the act of 1828; it is legislation, in effect, by prescribing a new rule unknown to any act of congress, or the state law professedly adopted. But had the adoption been in the terms of the law, it could not be recognized, inasmuch as the appraisement therein directed, with the prohibition to sell at less than two-thirds of the valuation, is repugnant to the constitution of the United States. It also conflicts with the process acts, as construed in *Wayman v. Southard*, and *Bank of United States v. Halstead*, and the repeated decisions of this court in later cases, that no state law can be adopted under the act of 1828, which is in collision with any act of congress. 16 Pet., 94, 312-314.

It must therefore be certified to the circuit court that the motion made by the plaintiff's counsel ought to be granted, and that the directions to the marshal prayed for by the plaintiff ought to be given in the manner stated in the second, third, fourth and fifth points certified.

GUNN v. BARRY.

(15 Wallace, 610-624. 1872.)

ERROR to the Supreme Court of Georgia.

Opinion by MR. JUSTICE SWAYNE.

STATEMENT OF FACTS.—On the 12th of May, 1866, the plaintiff in error recovered in the superior court of Randolph county a judgment against W. R. Hart for the sum of \$402.30 principal, and \$129.60 interest up to the date of the judgment, and costs. An execution was issued upon the judgment, and placed in the hands of the defendant in error as sheriff of that county. He was thereby commanded to make the sums above mentioned and further interest

upon the principal from the 12th of May, 1866, and the costs. The plaintiff in error requested him to levy upon a tract of land of two hundred and seventy-two and a half acres, belonging to Hart, the defendant in the judgment. Barry refused. He assigned as the only reason for his refusal that the premises had been set off to Hart under the provisions of the act passed by the general assembly of the state, and approved October 3, 1869, entitled "An act to provide for setting apart a homestead of realty and personalty, and for the valuation of said property, and for the full and complete protection and security of the same to the sole use and benefit of families, as required by section 1 of article 7 of the constitution, and for other purposes." Gunn thereupon petitioned the superior court of the county for a writ of *mandamus* to compel the sheriff to make the levy. The petition set forth that the land in question was the only property known to him subject to the lien of his judgment, except a tract of twenty-eight acres, of the value of \$100, situated in the county of Stuart, which was also included in the homestead so set apart; that the premises in question were worth the sum of \$1,300, and that they embraced a much larger number of acres than the real estate exempt from levy and sale by the laws in force when the judgment was recovered and when the debt on which it was founded was contracted. It does not appear that these allegations were denied, and we do not understand that there is any controversy upon the subject. After a full hearing the court affirmed the validity of the act in its retrospective aspect, and gave judgment against the petitioner. The supreme court of the state affirmed this judgment.

§ 1659. *The Georgia exemption law of 1868.*

The first section of the seventh article of the constitution of Georgia of 1868 provides that "each head of a family, or guardian or trustee of a family of minor children, shall be entitled to a homestead of realty to the value of \$2,000 in specie, and personal property to the value of \$1,000 in specie, to be valued at the time they are set apart, and no court or ministerial officer in this state shall ever have jurisdiction or authority to enforce any judgment, decree or execution against said property so set apart, including such improvement as may be made thereon from time to time, except for taxes, money borrowed or expended in the improvement of the homestead or for the purchase money of the same, and for labor done thereon or material furnished therefor or removal of incumbrances thereon." The first section of the act of the 3d October, 1868, is in the same terms.

It may well be doubted whether both these provisions were not intended to be wholly prospective in their effect. But as we understand the supreme court of the state has come to a different conclusion, we shall not consider the question.

§ 1660. — *the prior exemption law.*

The statute in force when the judgment was rendered declared that the following property belonging to a debtor who was the head of a family should be exempt from levy and sale, to wit: "Fifty acres of land and five additional ones for each of his children under the age of sixteen years, the land to include the dwelling-house, if the same and improvements do not exceed two hundred dollars; one farm horse or mule, one cow and calf, ten head of hogs, and fifty dollars' worth of provisions, and five dollars' worth additional for each child; beds, bedding and common bedsteads sufficient for the family; one loom, one spinning-wheel, and two pairs of cards, and one hundred pounds of lint cotton; common tools of trade for himself and his wife; equipments and arms of a

militia soldier and trooper's horse; ordinary cooking utensils and table crockery; wearing apparel of himself and family; family Bible, religious works and school books; family portraits; the library of a professional man in actual practice or business, not exceeding three hundred dollars in value, to be selected by himself." No one can cast his eyes over the former and later exemptions, without being struck by the greatly increased magnitude of the latter.

§ 1661. *A state constitution which increases exemptions, and thus destroys the lien of a judgment, impairs the obligation of a contract.*

Section 10 of article 1 of the constitution of the United States declares that "no state shall pass any law impairing the obligation of contracts." If the remedy is a part of the obligation of the contract, a clearer case of impairment can hardly occur than is presented in the record before us. The effect of the act in question, under the circumstances of this judgment, does not indeed merely impair, it annihilates the remedy. There is none left. But the act reaches still further. It withdraws the land from the lien of the judgment, and thus destroys a vested right of property which the creditor had acquired in the pursuit of the remedy to which he was entitled by the law as it stood when the judgment was recovered. It is in effect taking one person's property and giving it to another without compensation. This is contrary to reason and justice, and to the fundamental principles of the social compact. *Calder v. Bull*, 3 Dal., 388 (§§ 582-599, *supra*). But we must confine ourselves to the constitutional aspect of the case. A few further remarks will be sufficient to dispose of it. It involves no question which has not been more than once fully considered by this court.

§ 1662. *Congress cannot, by authorization or ratification, give the slightest effect to a state law or constitution in conflict with the federal constitution.*

Georgia, since she came into the Union as one of the original thirteen states, has never been a state out of the Union. Her constitutional rights were, for a time, necessarily put in abeyance, but her constitutional disabilities and obligations were in nowise affected by her rebellion. The same view is to be taken of the provision in her organic law and of the statute in question, as if she had been in full communion with her sister states when she gave them being. Though her constitution was sanctioned by congress, this provision can in no sense be considered an act of that body. The sanction was only permissive as a part of the process of her rehabilitation, and involved nothing affirmative or negative beyond that event. If it were express and unequivocal, the result would be the same. Congress cannot, by authorization or ratification, give the slightest effect to a state law or constitution in conflict with the constitution of the United States. That instrument is above and beyond the power of congress and the states, and is alike obligatory upon both.

§ 1663. *A state can no more impair the obligation of an existing contract by a constitutional provision than by a legislative act.*

A state can no more impair an existing contract by a constitutional provision than by a legislative act; both are within the prohibition of the national constitution. The legal remedies for the enforcement of a contract, which belong to it at the time and place where it is made, are a part of its obligation. A state may change them, provided the change involve no impairment of a substantial right. If the provision of the constitution, or the legislative act of a state, fall within the category last mentioned, they are to that extent utterly void. They are, for all the purposes of the contract which they impair, as if they had never existed. The constitutional provision and statute here in ques-

tion are clearly within that category, and are, therefore, void. The jurisdictional prohibition which they contain with respect to the courts of the state can, therefore, form no impediment to the plaintiff in error in the enforcement of his rights touching this judgment, as those rights are recognized by this court. *White v. Hart*, 13 Wall., 646; *Von Hoffman v. City of Quincy*, 4 id., 535.

The judgment is reversed, and the cause will be remanded to the supreme court of Georgia with directions to enter a judgment of reversal, to reverse the judgment of the superior court of Randolph county, and thereafter to proceed in conformity to this opinion.

EDWARDS v. KEARZEY.

(6 Otto, 595-611. 1877.)

ERROR to the Supreme Court of North Carolina.

Opinion by MR. JUSTICE SWAYNE.

STATEMENT OF FACTS.—The constitution of North Carolina of 1868 took effect on the 24th of April in that year. Sections 1 and 2 of article 10 declare that personal property of any resident of the state, of the value of \$500, to be selected by such resident, shall be exempt from sale under execution or other final process issued for the collection of any debt; and that every homestead, and the buildings used therewith, not exceeding in value \$1,000, to be selected by the owner, or, in lieu thereof, at the option of the owner, any lot in a city, town or village, with the buildings used thereon, owned and occupied by any resident of the state, and not exceeding in value \$1,000, shall be exempt in like manner from sale for the collection of any debt under final process. On the 22d of August, 1868, the legislature passed an act which prescribed the mode of laying off the homestead, and setting off the personal property so exempted by the constitution. On the 7th of April, 1869, another act was passed, which repealed the prior act, and prescribed a different mode of doing what the prior act provided for. This latter act has not been repealed or modified.

Three several judgments were recovered against the defendant in error: one on the 15th of December, 1868, upon a bond dated the 25th of September, 1865; another on the 10th of October, 1868, upon a bond dated February 27, 1866; and the third on the 7th of January, 1868, for a debt due prior to that time. Two of these judgments were docketed and became liens upon the premises in controversy on the 16th of December, 1868. The other one was docketed and became such lien on the 18th of January 1869. When the debts were contracted for which the judgments were rendered, the exemption laws in force were the acts of January 1, 1854, and of February 16, 1859. The first-named act exempted certain enumerated articles of inconsiderable value, and "such other property as the freeholders appointed for that purpose might deem necessary for the comfort and support of the debtor's family, not exceeding in value \$50, at cash valuation." By the act of 1859, the exemption was extended to fifty acres of land in the county, or two acres in a town, of not greater value than \$500.

On the 22d of January, 1869, the premises in controversy were duly set off to the defendant in error, as a homestead. He had no other real estate, and the premises did not exceed \$1,000 in value. On the 6th of March, 1869, the sheriff, under executions issued on the judgments, sold the premises to the plaintiff in error, and thereafter executed to him a deed in due form. The reg-

ularity of the sale is not contested. The act of August 22, 1868, was then in force. The acts of 1854 and 1859 had been repealed. *Wilson v. Sparks*, 72 N. C., 208. No point is made upon these acts by the counsel upon either side. We shall, therefore, pass them by without further remark.

The plaintiff in error brought this action in the superior court of Granville county to recover possession of the premises so sold and conveyed to him. That court adjudged that the exemption created by the constitution and the act of 1868 protected the property from liability under the judgments, and that the sale and conveyance by the sheriff were, therefore, void. Judgment was given accordingly. The supreme court of the state affirmed the judgment. The plaintiff in error thereupon brought the case here for review. The only federal question presented by the record is, whether the exemption was valid as regards contracts made before the adoption of the constitution of 1868. The counsel for the plaintiff in error insists upon the negative of this proposition. The counsel upon the other side, frankly conceding several minor points, maintains the affirmative view. Our remarks will be confined to this subject.

§ 1664. *The obligation of contracts defined.*

The constitution of the United States declares that "no state shall pass any . . . law impairing the obligation of contracts." A contract is the agreement of minds, upon a sufficient consideration, that something specified shall be done, or shall not be done. The lexical definition of "impair" is "to make worse; to diminish in quantity, value, excellence or strength; to lessen in power; to weaken; to enfeeble; to deteriorate." Webster's Dict. "Obligation" is defined to be "the act of obliging or binding; that which obligates; the binding power of a vow, promise, oath or contract," etc. Id. "The word is derived from the Latin word *obligatio*, tying up; and that from the word *obligo*, to bind or tie up; to engage by the ties of a promise or oath, or form of law; and *obligo* is compounded of the verb *ligo*, to tie or bind fast, and the preposition *ob*, which is prefixed to increase its meaning." *Blair v. Williams*, and *Lapsley v. Brashears*, 4 Litt. (Ky.), 65.

§ 1665. *The ideas of right and remedy inseparable.*

The obligation of a contract includes everything within its obligatory scope. Among these elements nothing is more important than the means of enforcement. This is the breath of its vital existence. Without it, the contract, as such, in the view of the law, ceases to be, and falls into the class of those "imperfect obligations," as they are termed, which depend for their fulfillment upon the will and conscience of those upon whom they rest. The ideas of right and remedy are inseparable. "Want of right and want of remedy are the same thing." 1 Bac. Abr., tit. Actions in General, letter B. In *Von Hoffman v. City of Quincy*, 4 Wall., 535 (§§ 1877-82, *infra*), it was said: "A statute of frauds embracing pre-existing parol contracts not before required to be in writing would affect its validity. A statute declaring that the word 'ton' should, in prior as well as subsequent contracts, be held to mean half or double the weight before prescribed, would affect its construction. A statute providing that a previous contract of indebtedment may be extinguished by a process of bankruptcy would involve its discharge; and a statute forbidding the sale of any of the debtor's property, under a judgment upon such a contract, would relate to the remedy."

§ 1666. *The law existing at the time a contract is made enters into it.*

It cannot be doubted, either upon principle or authority, that each of such laws would violate the obligation of the contract, and the last not less than the

first. These propositions seem to us too clear to require discussion. It is also the settled doctrine of this court, that the laws which subsist at the time and place of making a contract enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This rule embraces alike those which affect its validity, construction, discharge and enforcement. *Von Hoffman v. City of Quincy*, *supra*; *McCracken v. Hayward*, 2 How., 508 (§§ 1656-58, *supra*).

In *Green v. Biddle*, 8 Wheat., 1 (§§ 191-206, *supra*), this court said, touching the point here under consideration: "It is no answer that the acts of Kentucky now in question are regulations of the remedy, and not of the right to the lands. If these acts so change the nature and extent of existing remedies as materially to impair the rights and interests of the owner, they are just as much a violation of the compact as if they overturned his rights and interests." "One of the tests that a contract has been impaired is that its value has by legislation been diminished. It is not by the constitution to be impaired at all. This is not a question of degree or manner or cause, but of encroaching in any respect on its obligation,—dispensing with any part of its force." *Planters' Bank v. Sharp*, 6 How., 301 (§§ 2177-87, *infra*). It is to be understood that the encroachment thus denounced must be material. If it be not material, it will be regarded as of no account. These rules are axioms in the jurisprudence of this court. We think they rest upon a solid foundation. Do they not cover this case; and are they not decisive of the question before us?

§ 1667. *Stay laws and exemption laws equally impair the obligation of pre-existing contracts.*

We will, however, further examine the subject. It is the established law of North Carolina that stay laws are void, because they are in conflict with the national constitution. *Jacobs v. Smallwood*, 63 N.C., 112; *Jones v. Crittenden*, 1 Law Repos. (N. C.), 385; *Barnes v. Barnes*, 8 Jones (N. C.) L., 366. This ruling is clearly correct. Such laws change a term of the contract by postponing the time of payment. This impairs its obligation by making it less valuable to the creditor. But it does this solely by operating on the remedy. The contract is not otherwise touched by the offending law. Let us suppose a case. A party recovers two judgments,—one against A., the other against B.,—each for the sum of \$1,500, upon a promissory note. Each debtor has property worth the amount of the judgment, and no more. The legislature thereafter passes a law declaring that all past and future judgments shall be collected "in four equal annual instalments." At the same time, another law is passed, which exempts from execution the debtor's property to the amount of \$1,500. The court holds the former law void and the latter valid. Is not such a result a legal solecism? Can the two judgments be reconciled? One law postpones the remedy, the other destroys it; except in the contingency that the debtor shall acquire more property,—a thing that may not occur, and that cannot occur if he die before the acquisition is made. Both laws involve the same principle and rest on the same basis. They must stand or fall together. The concession that the former is invalid cuts away the foundation from under the latter. If a state may stay the remedy for one fixed period, however short, it may for another, however long. And if it may exempt property to the amount here in question, it may do so to any amount. This, as regards the mode of impairment we are considering, would annul the inhibition of the constitution, and set at naught the salutary restriction it was intended to impose. The power to tax involves the power to destroy. *McCulloch v. State of Maryland*,

4 Wheat., 416 (§§ 380–398, *supra*). The power to modify at discretion the remedial part of a contract is the same thing.

§ 1668. *Imprisonment for debt may be abolished even for past debts.*

But it is said that imprisonment for debt may be abolished in all cases, and that the time prescribed by a statute of limitations may be abridged. Imprisonment for debt is a relic of ancient barbarism. Cooper's Justinian, 658; 12 Tables, Tab. 3. It has descended with the stream of time. It is a punishment rather than a remedy. It is right for fraud, but wrong for misfortune. It breaks the spirit of the honest debtor, destroys his credit, which is a form of capital, and dooms him, while it lasts, to helpless idleness. Where there is no fraud, it is the opposite of a remedy. Every right-minded man must rejoice when such a blot is removed from the statute-book. But upon the power of a state, even in this class of cases, see the strong dissenting opinion of Mr. Justice Washington, in *Mason v. Haile*, 12 Wheat., 370.

§ 1669. *Statutes of limitation do not impair the obligation of contracts.*

Statutes of limitation are statutes of repose. They are necessary to the welfare of society. The lapse of time constantly carries with it the means of proof. The public as well as individuals are interested in the principle upon which they proceed. They do not impair the remedy, but only require its application within the time specified. If the period limited be unreasonably short, and designed to defeat the remedy upon pre-existing contracts, which was part of their obligation, we should pronounce the statute void. Otherwise, we should abdicate the performance of one of our most important duties. The obligation of a contract cannot be substantially impaired in any way by a state law. This restriction is beneficial to those whom it restrains, as well as to others. No community can have any higher public interest than in the faithful performance of contracts and the honest administration of justice. The inhibition of the constitution is wholly prospective. The states may legislate as to contracts thereafter made, as they may see fit. It is only those in existence when the hostile law is passed that are protected from its effect.

In *Bronson v. Kinzie*, 1 How., 311 (§§ 1650–55, *supra*), the subject of exemptions was touched upon, but not discussed. There a mortgage had been executed in Illinois. Subsequently, the legislature passed a law giving the mortgagor a year to redeem after sale under a decree, and requiring the land to be appraised, and not to be sold for less than two-thirds of the appraised value. The law was held to be void in both particulars as to pre-existing contracts. What is said as to exemptions is entirely *obiter*; but, coming from so high a source, it is entitled to the most respectful consideration. The court, speaking through Mr. Chief Justice Taney, said: A state “may, if it thinks proper, direct that the necessary implements of agriculture, or the tools of the mechanic, or articles of necessity in household furniture, shall, like wearing apparel, not be liable to execution on judgments. Regulations of this description have always been considered in every civilized community as properly belonging to the remedy, to be executed or not by every sovereignty, according to its own views of policy and humanity.” He quotes with approbation the passage which we have quoted from *Green v. Biddle*. To guard against possible misconstruction, he is careful to say further: “Whatever belongs merely to the remedy may be altered according to the will of the state, provided the alteration does not impair the obligation of the contract. But, if that effect is produced, it is immaterial whether it is done by acting on the remedy, or directly on the contract itself. In either case, it is prohibited by the constitu-

tion." The learned chief justice seems to have had in his mind the maxim "*de minimis*," etc. Upon no other ground can any exemption be justified. "Policy and humanity" are dangerous guides in the discussion of a legal proposition. He who follows them far is apt to bring back the means of error and delusion. The prohibition contains no qualification, and we have no judicial authority to interpolate any. Our duty is simply to execute it.

Where the facts are undisputed, it is always the duty of the court to pronounce the legal result. *Merchants' Bank v. State Bank*, 10 Wall., 604. Here there is no question of legislative discretion involved. With the constitutional prohibition, even as expounded by the late chief justice, before us on one hand, and on the other the state constitution of 1868, and the laws passed to carry out its provisions, we cannot hesitate to hold that both the latter do seriously impair the obligation of the several contracts here in question. We say, as was said in *Gunn v. Barry*, 15 Wall., 622 (§§ 1659-63, *supra*), that no one can cast his eyes upon the new exemptions thus created without being at once struck with their excessive character, and hence their fatal magnitude. The claim for the retrospective efficacy of the constitution or the laws cannot be supported. Their validity as to contracts subsequently made admits of no doubt. *Bronson v. Kinzie*, *supra*.

§ 1670. *The history of the contract clause.*

The history of the national constitution throws a strong light upon this subject. Between the close of the war of the Revolution and the adoption of that instrument, unprecedented pecuniary distress existed throughout the country. "The discontents and uneasiness, arising in a great measure from the embarrassment in which a great number of individuals were involved, continued to become more extensive. At length, two great parties were formed in every state, which were distinctly marked, and which pursued distinct objects with systematic arrangement." 5 Marshall's *Life of Washington*, 85. One party sought to maintain the inviolability of contracts, the other to impair or destroy them. "The emission of paper money, the delay of legal proceedings, and the suspension of the collection of taxes, were the fruits of the rule of the latter, wherever they were completely dominant." *Id.*, 86. "The system called justice was, in some of the states, iniquity reduced to elementary principles." . . . "In some of the states, creditors were treated as outlaws. Bankrupts were armed with legal authority to be persecutors, and, by the shock of all confidence, society was shaken to its foundations." Fisher Ames' *Works* (ed. of 1809), 120. "Evidences of acknowledged claims on the public would not command in the market more than one-fifth of their nominal value. The bonds of solvent men, payable at no very distant day, could not be negotiated but at a discount of thirty, forty or fifty per cent. per annum. Landed property would rarely command any price; and sales of the most common articles for ready money could only be made at enormous and ruinous depreciation. State legislatures, in too many instances, yielded to the necessities of their constituents and passed laws by which creditors were compelled to wait for the payment of their just demands, on the tender of security, or to take property at a valuation, or paper money falsely purporting to be the representative of specie." 3 Ramsey's *Hist. U. S.*, 77. "The effects of these laws interfering between debtors and creditors were extensive. They destroyed public credit and confidence between man and man, injured the morals of the people, and in many instances insured and aggravated the ruin of the unfortunate debtors for

whose temporary relief they were brought forward." 2 Ramsey's Hist. South Carolina, 429.

Besides the large issues of continental money, nearly all the states issued their own bills of credit. In many instances the amount was very large. Phillips' Historical Sketches of American Paper Currency, 2d Series, 29. The depreciation of both became enormous. Only one per cent. of the "continental money" was assumed by the new government. Nothing more was ever paid upon it. *Id.*, 194; Act of August 4, 1790, sec. 4 (1 Stat., 140). It is needless to trace the history of the emissions by the states. The treaty of peace with Great Britain declared that "the creditors on either side shall meet with no lawful impediment to the recovery of the full amount in sterling money of all *bona fide* debts heretofore contracted." The British minister complained earnestly to the American secretary of state of violations of this guaranty. Twenty-two instances of laws in conflict with it in different states were specifically named. 1 Amer. State Papers, pp. 195, 196, 199 and 237. In South Carolina, "laws were passed in which property of every kind was made a legal tender in payment of debts, although payable according to contract in gold and silver. Other laws installed the debt, so that of sums already due only a third, and afterwards only a fifth, was securable in law." 2 Ramsey's Hist. S. C., 429. Many other states passed laws of a similar character. The obligation of the contract was as often invaded after judgment as before. The attacks were quite as common and effective in one way as in the other. To meet these evils in their various phases, the national constitution declared that "no state should emit bills of credit, make anything but gold and silver coin a legal tender in payment of debts, or pass any law . . . impairing the obligation of contracts." All these provisions grew out of previous abuses. 2 Curtis' Hist. of the Const., 366. See, also, The Federalist, Nos. 7 and 44. In the number last mentioned, Mr. Madison said that such laws were not only forbidden by the constitution, but were "contrary to the first principles of the social compact, and to every principle of sound legislation."

The treatment of the malady was severe, but the cure was complete. "No sooner did the new government begin its auspicious course than order seemed to arise out of confusion. Commerce and industry awoke, and were cheerful at their labors, for credit and confidence awoke with them. Everywhere was the appearance of prosperity, and the only fear was that its progress was too rapid to consist with the purity and simplicity of ancient manners." Fisher Ames' Works (ed. of 1809), 122. "Public credit was reanimated. The owners of property and holders of money freely parted with both, well knowing that no future law could impair the obligation of the contract." 2 Ramsey's History of South Carolina, 433.

Mr. Chief Justice Taney, in *Bronson v. Kinzie*, *supra*, speaking of the protection of the remedy, said: "It is this protection which the clause of the constitution now in question mainly intended to secure." The point decided in *Dartmouth College v. Woodward*, 4 Wheat., 518 (§§ 2099-2117, *infra*), had not, it is believed, when the constitution was adopted, occurred to any one. There is no trace of it in the Federalist, nor in any other contemporaneous publication. It was first made and judicially decided under the constitution in that case. Its novelty was admitted by Mr. Chief Justice Marshall, but it was met and conclusively answered in his opinion.

§ 1671. *The remedy for a breach of a contract is a part of its obligation, and a law or constitutional provision which abridges the remedy impairs the obligation.*

We think the views we have expressed carry out the intent of contracts and the intent of the constitution. The obligation of the former is placed under the safeguard of the latter. No state can evade it; and congress is incompetent to authorize such invasion. Its position is impregnable, and will be so while the organic law of the nation remains as it is. The trust touching the subject with which this court is charged is one of magnitude and delicacy. We must always be careful to see that there is neither non-feasance nor misfeasance on our part.

The importance of the point involved in this controversy induces us to restate succinctly the conclusions at which we have arrived, and which will be the ground of our judgment. The remedy subsisting in a state when and where a contract is made and is to be performed is a part of its obligation, and any subsequent law of the state which so affects that remedy as substantially to impair and lessen the value of the contract is forbidden by the constitution, and is, therefore, void.

The judgment of the supreme court of North Carolina will be reversed, and the cause will be remanded with directions to proceed in conformity to this opinion; and it is so ordered.

MR. JUSTICE HARLAN dissented.

§ 1672. In general.—The prohibition upon the states passing laws impairing the obligation of contracts was contemplated merely to embrace contracts respecting property, or some object of value, and conferring rights which may be asserted in a court of justice. *Dartmouth College v. Woodward*, 4 Wheat., 518 (§§ 2099-2117).

§ 1673. A contract is an agreement in which a party undertakes to do, or not to do, a particular thing. The law binds him to perform his undertaking, and this is the obligation of his contract. *Sturges v. Crowninshield*, 4 Wheat., 122 (§§ 1987-39).

§ 1674. Obligation defined.—The obligation of a contract, in the constitutional sense, is the means provided by law by which it can be enforced,—by which the parties can be obliged to perform it. Whatever legislation lessens the efficacy of these means impairs the obligation. If it tend to postpone or retard the enforcement of the contract, the obligation of the latter is to that extent weakened. *Louisiana v. New Orleans*,* 12 Otto, 203. See § 1615.

§ 1675. The obligation of a contract, in the sense in which those words are used in the constitution, is that duty of performance which is recognized and enforced by the laws. This includes the remedy, and if the law is so changed that the means of legally enforcing this duty are materially impaired, the obligation of the contract no longer remains the same, and the law making the change is unconstitutional. *Curran v. State of Arkansas*, 15 How., 819 (CORPORATIONS, §§ 1316-29); *Louisiana v. New Orleans*,* 12 Otto, 203; *Ogden v. Saunders*, 12 Wheat., 213 (§§ 1940-2003).

§ 1676. Impairing the remedy.—A creditor by contract has a vested right to the remedies for the recovery of the debt which existed at law when the contract was made, and the state legislature cannot take them away without impairing the obligation of the contract, though it may modify them, and even substitute others, if a sufficient remedy be left, or another sufficient one be provided. The law is in effect a part of the contract. So where a new remedy is given by law after a contract has been made, it cannot be taken away if the creditor has acquired vested rights thereunder, and the repeal of the statute cannot affect his rights. *Memphis v. United States*, 7 Otto, 295 (§§ 1888-94); *Ogden v. Saunders*, 12 Wheat., 213 (§§ 1940-2003); *Von Hoffman v. City of Quincy*, 4 Wall., 535 (§§ 1877-82). See §§ 1614, 1615, 1622, 1629.

§ 1677. The act of the legislature of Missouri of March 8, 1879, known as the "Cottey Act," if it applies to judgments on county aid bonds issued prior to its passage, is in conflict with the clause of the constitution of the United States forbidding states to pass any law impairing the obligation of a contract, for the reason that it makes the remedy of the holder of such bonds less certain and direct. *United States v. Lincoln County*, 5 Dill., 204.

§ 1678. Any change in the remedy which practically cuts off a portion of the cause of action, or renders the contract of less available worth, is as much within the constitutional

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inhibition against the passage by a state of a law impairing the obligation of a contract, as a law which strikes directly at the contract itself. The remedy existing at the time the contract is made is a part of the obligation of the contract, as entering into the contemplation of the parties at the time, and it should be no more in the power of the legislature to impair that in such a way as to render the contract of less value, than it is to impair the contract itself. *Burton v. Town of Koshkonong*, 4 Fed. R., 377.

§ 1679. A law enabling banks to sue upon paper made payable to their cashiers merely affects the remedy, and in no wise impairs the obligation of the contract contained in promissory notes executed prior to its passage. *Crawford v. Branch Bank of Mobile*,* 7 How., 279.

§ 1680. Power of congress.—The inhibition of the constitution against the passage of a law impairing the obligation of a contract applies to the states and not to the general government. *Bloomer v. Stolley*, 5 McL., 165; *Evans v. Eaton*, Pet. C. C., 322; *Buckner v. Street*, 1 Dill., 249; *Fowler v. Dillon*, 1 Hughes, 236; *Legal Tender Cases*, 12 Wall., 437. In the last case cited, FIELD, J. (at page 662), dissents, holding that congress cannot impair the obligation of contracts, in the exercise of an implied power. And see his dissenting opinion in the *Sinking Fund Cases*, as well as those of JUSTICES STRONG and BRADLEY, 9 Otto, 700 (CORPORATIONS, §§ 1624-69). Also, *Territory of Kansas v. Reyburn*, McCahon, 141.

§ 1681. Statutes of limitation.—A statute which repeals the provision of the statute of limitations relating to the absence of the defendant from the state, and thereby takes from the plaintiff all remedy upon his contract, without affording him any, even the shortest, time in which to bring suit after the return of the defendant to the state, is unconstitutional, as impairing the obligation of the contract. *Johnson v. Bond*,* Hemp., 533.

§ 1682. Statutes of limitation affecting existing rights are not unconstitutional if a reasonable time is given for the commencement of an action before the bar takes effect. Whether the time limited is reasonable or not is primarily a question for the legislature, and the courts cannot overrule the decision of the legislature unless a palpable error has been committed. In judging of the reasonableness of the time, the surrounding circumstances must be considered, for what is reasonable in a particular case depends upon its particular facts. *Terry v. Anderson*, 5 Otto, 632; *Samples v. The Bank*, 1 Woods, 523; *Koshkonong v. Burton*, 14 Otto, 674; *Barker v. Jackson*, 1 Paine, 559.

§ 1683. The time fixed by a state statute within which actions must be brought upon causes of action accruing before the passage of the act is not conclusive, but is subject to be reviewed by the courts, and if they deem it unreasonably short, it is their duty to disregard such statute as being in violation of the constitutional inhibition against passing laws violating the obligation of contracts. A statute prescribing an unreasonably short time is not a statute of limitation, but an unlawful destruction of a right, whatever it may purport to be by its terms. That the legislature are the sole judges of what is a reasonable time is inferentially conceding to them the power of impairing, and even destroying, the obligation of a contract. *Perelles v. City of Watertown*, 6 Biss., 84.

§ 1684. Retroactive laws.—A retroactive statute may be constitutional, provided it is remedial in its nature, and does not impair the obligation of contracts, or disturb absolute vested rights, and goes only to confirm rights already existing, and in furtherance of the remedy by curing defects and adding to the means of enforcing existing obligations. *In re Kirkland*,* 12 Am. L. Reg. (N. S.), 302; *Thompson v. Phillips*, Bald., 284; *Peay v. Schenck*, 1 Woolw., 175; *Albee v. May*, 2 Paine, 78; *Griffing v. Gibb*, McAl., 220; *Schenck v. Peay*, 1 Dill., 267; *Blount v. Windley*, 5 Otto, 180 (McLEAN, J., dissenting, 6 McL., 441); *Satterlee v. Matthewson*, 2 Pet., 880 (§§ 1630-35); *Watson v. Mercer*, 8 Pet., 98 (§§ 1849-51); *Curtiss v. Whitney*, 13 Wall., 68 (§ 1821). See sub-title V, *supra*; also § 20, 638.

§ 1685. Courts should give changes of judicial construction in statutes the same effect, in their operation on contracts and existing contract rights, that they would give to a legislative enactment; that is to say, make them prospective, but not retrospective. After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is to all intents and purposes the same in its effects on contracts as an amendment of the law by means of a legislative enactment. *Douglass v. County of Pike*, 11 Otto, 686; *In re Dunham*,* 9 Phil., 471.

§ 1686. State decisions.—The construction given by the courts of the states to state legislation and state constitutions is not conclusive upon the supreme court of the United States when it is called upon to interpret the contracts of states, though they may have been made in the forms of law, or by the instrumentality of a state's authorized functionaries, in conformity with state legislation. It may revise the judgment of the supreme court of a state, whenever such court shall adjudge that not to be a contract which has been alleged, in the forms of legal proceedings, by a litigant, to be one, within the meaning of the constitutional

inhibition against the impairing of contracts. *Jefferson Branch Bank v. Skelly*,* 1 Black, 436. See XIII, 7, *infra*; also § 293.

§ 1687. In a case involving the question as to what was the statute of Michigan on a certain subject, and in which the interests of citizens of other states came directly in conflict with those of the citizens of Michigan; where the law in question had been received and acted upon for thirty years in the words of the published statute, and had received a settled construction by the courts of the United States as well as those of the state, and had entered as an element in the contracts and business of men, it was held that the United States courts were not bound to follow a decision of the supreme court of Michigan declaring the statute to be correctly contained in a newly discovered manuscript which read differently from the published statute, the law as newly promulgated having the effect to destroy the vested rights of citizens of other states, and protect the citizens of Michigan from the payment of admitted debts. *Pease v. Peck*,* 18 How., 595.

§ 1688. Where one indicted in a state court for keeping a gaming table claimed in the supreme court of the United States that he was permitted to keep such a table by a state statute which constituted a contract protected by the federal constitution, which statute had been repealed and the contract thus impaired, and the supreme court of the state had decided that the act claimed as a contract was unwarranted by the state constitution, and also that it did not permit the keeping of a gaming table, the court held this construction of the statute authoritative. *Aicardi v. The State*,* 19 Wall., 635.

§ 1689. The decision of a state court construing its own statutes, which decides as to the existence of a contract, which, if valid, has been impaired, is reviewable in the United States supreme court. *Wright v. Nagle*,* 11 Otto, 791.

§ 1690. The decisions of a state court upon the character of an act under which county bonds are issued, made subsequent to the issue of the bonds, cannot affect the question of their validity. *Havemeyer v. Iowa County*,* 3 Wall., 294.

§ 1691. If a contract when made was valid under the constitution and laws of the state, as they had been previously expounded by its judicial tribunals, and as they were understood at the time, no subsequent action by the legislature or the judiciary will be regarded by the supreme court of the United States as establishing its invalidity. *Olcott v. The Supervisors*,* 16 Wall., 678.

§ 1692. Neither legislation nor contrary judicial determination can impair the obligation of a contract whose validity was recognized by the legislature and courts at the time it was made. *Chicago v. Sheldon*, 9 Wall., 50 (§§ 2812-15); *Louisiana v. Pilsbury*, 15 Otto, 278 (§§ 1869-76); *Olcott v. The Supervisors*,* 16 Wall., 678; *County of Livingston v. Darlington*,* 11 Otto, 407; *Havemeyer v. Iowa Co.*,* 3 Wall., 294; *Thomson v. Lee County*, 3 Wall., 327; *Gelpcke v. City of Dubuque*, 1 Wall., 175; *Butz v. City of Muscatine*, 8 Wall., 575; *Mitchell v. Burlington*, 4 Wall., 270.

§ 1693. Upon an indictment for the offense of maintaining a lottery, a decision of the state supreme court, holding a statute authorizing the defendant to maintain a lottery upon making a yearly payment into the treasury to be a contract which a subsequent repealing act could not impair, is not conclusive upon the same court as to the constitutionality of the act authorizing the lottery, in a subsequent case of like kind against the same defendant for a subsequent offense, the constitutionality of the act not having been passed upon in the former case, although it might have been if presented. *Boyd v. Alabama*,* 4 Otto, 645.

§ 1694. Contracts for sale of slaves.—A judgment rendered by a court of the state of Georgia, in November, 1861, for the purchase money and price of slaves, the contract being valid by the laws of the state at the time it was made and at the time of the judgment, may be enforced since the close of the rebellion, notwithstanding the provision in the constitution of that state of 1868, which declares that "no court or officer shall have, nor shall the general assembly give, jurisdiction or authority to try or give judgment on or enforce any debt, the consideration of which was a slave or slaves, or the hire thereof." *French v. Tumlin*,* 10 Am. L. Reg. (N. S.), 641; S. C., 14 Int. Rev. Rec., 141. See §§ 1592-94, 1619.

§ 1695. The plaintiff, in an action instituted in 1866, declared on a note executed to him by the defendant in 1859. The defendant pleaded, successfully, in abatement, that the consideration of the note was a slave, and that by the constitution of the state (Georgia) of 1868, made and adopted since the last pleadings in the case, it was provided that no court or officer should have jurisdiction, nor should the general assembly give jurisdiction, to try or give judgment on, or enforce any debt, the consideration of which was a slave or the hire thereof. It was held in the supreme court of the United States that this provision impaired the obligation of the contract, and was therefore void. *White v. Hart*,* 13 Wall., 647.

§ 1696. Discriminating against taxes levied to pay judgments on bonds.—The law of Iowa of 1863, which discriminates specially against taxes levied to pay judgments on railroad bonds, is, in view of the laws in force when the bonds were issued, unconstitutional and void,

under the provision of the national constitution prohibiting the states from passing laws impairing the obligation of contracts. *Lansing v. County Treasurer*, 1 Dill., 523; *United States v. Treasurer of Muscatine County*,* 12 Int. Rev. Rec., 58.

§ 1697. Limiting tolls of canal.—A law of congress is void which limits the tolls of a canal, if it thereby divests a vested right of the bondholders to have such tolls applied to the payment of the bonds. *United States v. Louisville & Portland Canal Co.*, 1 Flap., 371.

§ 1698. Confederate-money contracts.—A provision in a state constitution declaring all contracts "the consideration of which was Confederate money," etc., void, is, so far as it affects a contract made when Confederate money was recognized in that state, unconstitutional, as impairing the obligation of the contract. *Delmas v. Insurance Co.*,* 14 Wall., 661. See § 1705.

§ 1699. The decision of a state court, holding promissory notes and a mortgage nullities, on the ground that the "Confederate currency" which constituted their consideration was illegal according to the law of the state at the time the contract was made, is not repugnant to the constitution. *Bethell v. Demaret*, 10 Wall., 537.

§ 1700. A state statute which provided that, in actions on a certain class of contracts made in the Confederate States during the war in Confederate currency, the jury shall take into consideration the consideration for the contract, and determine the value of the contract in the existing currency of the particular locality in which the contract was to be performed, regardless of the value stipulated by the parties, is unconstitutional and void as impairing the obligation of a contract. Contracts not illegal must be enforced as made by the parties, even as against state legislation interfering with their terms. *Wilmington & Weldon R'y Co. v. King*, 1 Otto, 4.

§ 1701. To correct a judgment rendered by default upon a Confederate contract made with reference to a depreciated currency, so as to make it correspond in the amount recovered to the intention of the parties, and render it consistent with justice and equity, is not to impair a contract in the sense that is forbidden by the constitution. *Fowler v. Dillon*, 1 Hughes, 236.

§ 1702. New remedy.—An act giving a new remedy in the nature of a bill of review is not unconstitutional though retrospective in its operation. *Sampeyreac v. United States*, 7 Pet., 240.

§ 1703. Judgments.—Though a judgment may be considered as a contract for some purposes, yet it is rather the evidence of a pre-existing contract, and is a higher evidence of such contract, because it has the sanction of judicial determination; and in deciding, in view of the constitutional prohibition against state legislation impairing the obligation of contracts, how such judgment is affected by state legislation, courts must look mainly to the original contract. *Blount v. Windley*, 5 Otto, 176.

§ 1704. Change in law after judgment for land taken.—The legislature of New York passed an act providing for the widening and straightening of Broadway in the city of New York, and that all the acts of the legislature then in force relating to the opening, improving and widening of streets in the city should apply to Broadway thus laid out. There was an act in force at the time which made the report of the commissioners in the assessment and award of damages for injury to property, when confirmed by the court, final and conclusive upon all parties; and giving to the owner the right to receive the damages awarded within four months after the confirmation of the report. Within two months after the confirmation of the commissioners' report in the case of Broadway, the legislature passed an act authorizing an appeal from the order of confirmation, and also providing for the correcting or vacating this order on motion in behalf of the city to any of the judges of the supreme court, for fraud or irregularity. It was decided that this act did not impair the obligation of any contract between the city and property owners to whom the commissioners had awarded damages. There was no contract within the meaning of the constitutional provision against the impairing of contracts. *Garrison v. City of New York*, 21 Wall., 196.

§ 1705. Proof that bills were not used in aid of rebellion.—That provision in the constitution of Georgia which throws the burden of proof on the plaintiff, in an action on bills, to show that the bills have never been used in the rebellion, if only the defendant will swear that he has reason to believe they were so used, is held to impose upon the plaintiff an impossibility, and is tantamount to destroying the contract on the simple oath of the defendant as to his belief, and therefore unconstitutional. *Marsh v. Burrows*, 1 Woods, 463. See § 1698.

§ 1706. Legal tender acts.—The obligation of a contract to pay money is to pay that which the law shall recognize as money when the payment is to be made. Every contract for the payment of money, simply, is necessarily subject to the constitutional power of the government over the currency, whatever that power may be, and the obligation of the parties is assumed with reference to that power. An act of congress, making treasury notes a legal tender for the payment of debts already contracted, does not therefore impair the obligation of contracts. *Legal Tender Cases*, 12 Wall., 457. See MONEY.

§ 1707. Acts affecting liens.— A lien given by a state law upon a vessel may be divested by that law. A person taking such a lien is subject to all the provisions for divesting it contained in statutes passed anterior to his lien. *Ashbrook v. The Steamer Golden Gate*, Newb., 307.

§ 1708. A lien given by the maritime law of the United States is as much a vested right as a mortgage, and it is a contract which the legislature of a state can pass no law to impair. *Ibid.*

§ 1709. A state, by acts of its legislature, pledged the revenue of certain public works to the payment of bonds issued by the state in aid of such public works. *Held*, that these acts created a lien on the public work and its revenues, and as the lien was one which arose on contract, it was one which could not be impaired by subsequent legislation. *Trustees of the Wabash & Erie Canal Co. v. Beers*, 2 Black, 452.

§ 1710. Remission by legislature of penalty of contract.— A state law remitting a penalty or forfeiture, imposed as a condition of a breach of a contract, is constitutional. So where the state of Maryland agreed, by act of the legislature, to give a railway company a certain sum of money, and made it the duty of the company to build the road through certain towns, and provided that if it did not it should forfeit a certain sum to the state for the use of a certain county, it was held that an act of the legislature, remitting the penalty incurred by reason of the failure of the company to build its line through the towns in question, and for which suit was brought, was constitutional, and was not void as impairing the obligation of a contract. The penalty was not due as a part of the contract, but as a punishment for its breach. *State of Maryland v. Baltimore & Ohio Railroad Co.*, 3 How., 548.

§ 1711. Betterment acts— Due process— Trial by jury.— The Betterment Act of Connecticut (R. S. 1853, p. 362, § 17), which in effect gives the defendant in ejectment a lien on the land of the plaintiff for the excess of improvements made by him in good faith over the rents and profits, is not in violation of the constitution of the United States, as impairing the obligation of contracts, or as depriving a person of his property without due process of law, or as depriving him of the right of trial by jury. *Griswold v. Bragg*, 18 Blatch., 204.

§ 1712. Trespassers on Indian lands.— A band of Indians had, by treaty with the United States, surrendered title to lands held by them to certain private parties. The consideration had been paid, but possession had not been given, and the Indians had not been removed by the United States. *Held*, that a state statute authorizing the summary removal of white persons intruding on such lands was not unconstitutional as impairing the obligation of a contract, even as against grantees of the original grantees, who entered under them, because they could have no right of possession till the Indians were lawfully removed. *State of New York v. Dibble*, 21 How., 370.

§ 1713. Effect of tax deed.— The legislature of a state has an unquestionable right to prescribe what shall be the effect of a tax sale and deed. It may prescribe that such tax deed shall not support an action to recover the land after five years from the time of its being recorded. Such a law is not invalid, as depriving the purchaser of his property without due process of law, or as impairing the obligation of his contract of purchase, even though some obstacle existed which prevented him from bringing his suit within the five years. The risk of such an occurrence was assumed by the purchaser in making the purchase. *Barrett v. Holmes*, 12 Otto, 656.

§ 1714. Confiscation by Confederate States.— A law of the Confederate States confiscated debts due from citizens of such states to citizens of the United States, and such law was enforced in the states of such confederation. *Held*, that such a law, considered as a law of the confederacy, was void, as being the act of an illegal organization; that considered as the law of a state it was void as impairing the obligation of a contract, and also as violating that provision of the constitution which secures to the citizens of each state the rights and privileges of the citizens of the several states. *Williams v. Bruffy*, 6 Otto, 188.

§ 1715. Winding up insolvent bank.— A law by which the officers of an insolvent bank owned by the state are directed to collect its assets and pay them out in the following order: (1) to the holders of certain stock which is not a debt of the bank but of the state; (2) to the holders of certain bonds owing by the state and guaranteed by the bank, but not yet due; and (3) to the holders of the notes of the bank, being in violation of the pledges by which the capital of the bank, though derived from state resources or state obligations, was set apart and appropriated as the basis of the independent credit of the bank, impairs the obligation of the contracts held by the creditors of the bank. *Barings v. Dabney*, * 19 Wall., 1. See, also, *Curran v. Arkansas*, 15 How., 304 (CORPORATIONS, §§ 1316-29). See § 1731.

§ 1716. An act requiring the officers of an insolvent state bank to collect its assets and appropriate them in payment of certain specified debts, creates, if valid, a trust for the benefit of the holders of such debts, and a contract with them which cannot, constitutionally, be impaired. (STRONG, MILLER and DAVIS, JJ., dissenting.) *Barings v. Dabney*, * 19 Wall., 1.

§ 1717. A state law which deprives creditors of a dissolved corporation from following its effects into the hands of those who hold them subject to a trust for the benefit of such creditors, and appropriates the property to other uses than the discharge of its debts, impairs the obligation of contracts with the corporation, and is unconstitutional and void as to such creditors. *Curran v. State of Arkansas*, 15 How., 810.

§ 1718. Discharging trustee in will.—Private acts of a legislature, discharging the trustees named in a will, at their request, and appointing new ones, and authorizing a sale of a part of the estate without the consent of the minors, who were entitled to the remainder in fee after the termination of the life estate, with the assent of the chancellor, do not impair any contract. There is no matter of contract involved in the substitution of new trustees, unless some vested right of the trustees is infringed. *Williamson v. Suydam*, 6 Wall., 723.

§ 1719. The right of administrators in the real estate of their intestate, as trustees for the creditors of the estate, is not such a vested right that they may not be deprived of it by a repeal of the law giving them authority to sell. *Bank of Hamilton v. Dudley*, 2 Pet., 523.

§ 1720. Vested rights may be acquired under a law enacted after the making of a contract. *Memphis v. United States*, 7 Otto, 293 (§§ 1883-94). See §§ 74, 1613, 1618.

§ 1721. Though the divesting of vested rights of property by state legislation is no violation *per se* of the constitution of the United States, yet when those rights are vested by a contract its obligation cannot be impaired by a state law. *Bonaparte v. Camden & Amboy R'y Co.*, Bald., 220; *Holyoke Co. v. Lyman*, 15 Wall., 500 (§§ 2170-76).

§ 1722. Debts.—It seems that the provision of the constitution of the United States prohibiting laws impairing the obligation of contracts does not extend its protection to the obligation of an ordinary debt. *Sawyer v. Parish of Concordia*, 12 Fed. R., 753.

§ 1723. Marriage is not within the meaning of the clause in the constitution of the United States forbidding the states to pass any law impairing the obligation of contracts. *Ex rel. Hobbs*, 1 Woods, 537; *Ex parte Kinney*, 3 Hughes, 9 (§§ 883-895); *Starr v. Hamilton*, Deady, 278. See §§ 746, 854, 857, 859.

§ 1724. Where persons of different races intermarry, and go into a state whose laws forbid such marriages, they are not protected by the constitution of the United States. *Ex parte Kinney*, 3 Hughes, 9 (§§ 883-895).

§ 1725. Marriage is, in its inception, a contract, but when established it becomes a relation. This relation is in no sense a contract. It is rather a civil institution, beyond the caprice or control of the parties to it, to be governed and regulated by law. This law, and not contract, regulates and prescribes the rights of the parties in the property of each other, and until these become vested interests, the legislative power may modify them from time to time, to suit the convenience and wants of society, or to promote the relation, or to protect the parties to it. *Starr v. Hamilton*, Deady, 278.

§ 1726. Authorizing aid to a railroad.—A law authorizing a county to borrow money to make a railroad on the credit of the county, and to be paid by the imposition of a tax on the citizens thereof, does not infringe that article of the constitution forbidding the state from passing any law impairing the obligation of contracts. Nor is such a law void as taking the property of the citizen without his consent for a mere private purpose. *McCoy v. Washington County*,* 7 Am. L. Reg., 192.

§ 1727. The charter of a railway company provided that counties through which it should pass might become subscribers to its capital stock. After a vote to subscribe, but before the subscription was actually made by the proper officers of the county, a new constitution of the state went into operation, which provided that no county should subscribe for stock in an incorporated company unless it was paid for at the time of the subscription, or should loan its credit to such a company or borrow money for the purpose of taking stock therein. Held, that there was no contract with the railway company at the time the new constitution went into effect, in the sense of that term as used in the constitution of the United States in the clause forbidding states to pass any law impairing the obligation of contracts, and that the bonds of a county, issued after the new constitution went into effect, in payment of the subscription voted previously, are void. *Aspinwall v. Board of Commissioners of Daviess County*, 22 How., 375.

§ 1728. Right to an office.—If a person holds an office in a college under a lawful contract that he is to retain it during good behavior, at a certain salary, and with certain fees annexed, the obligation of this contract cannot, consistently with the constitution, be impaired by the legislature. An act of the legislature which removes the person from this office is unconstitutional, where he is removable only by the board in the manner pointed out by the charter. *Allen v. McKeen*, 1 Sumn., 276.

§ 1729. A compact between two states, made with the consent of congress, is a contract the obligation of which neither can impair. *Green v. Biddle*, 8 Wheat., 1 (§§ 191-206). But in *Pool v. Fleeger*, 11 Pet., 185, the court gave no opinion on the question raised, whether the

inhibition against laws impairing the obligation of contracts is not to be understood as necessarily subject to the exception of the right of the states to make compacts with each other, in order to settle boundaries and other disputed rights of territory and jurisdiction.

§ 1730. The seventh article of the compact between Virginia and Kentucky provided: "That all private rights and interests of lands within the said district, derived from the laws of Virginia, shall remain valid and secure under the laws of the proposed state, and shall be determined by the laws now existing in this state." Subsequently the legislature of Kentucky passed an act relieving the occupant of land from the payment of damages for unlawful detention of the land before suit, and requiring the lawful owner to pay the occupant for improvements. *Held*, that this law violated the obligation of the above provision of the compact. *Green v. Biddle*, 8 Wheat., 1 (§§ 191-206).

§ 1731. Sale of property of insolvents — Rights of mortgagee. — The constitution of New Jersey having carefully limited the powers of the legislature and separated them from those of the judiciary, and having adopted the prohibition of the constitution of the United States against impairing the obligation of contracts, and prohibited any laws "depriving a party of any remedy for enforcing a contract which existed when the contract was made," it is held that an act authorizing a sale, free from incumbrance, of the property of an insolvent manufacturing corporation, which property is already mortgaged, and directing the payment of all costs and the distribution of the residue of the proceeds among the creditors in the order of their priority, is unconstitutional, because it defeats the estate of the mortgagee, without payment or tender of his whole debt, and gives a preference to indefinite costs, and deprives the mortgagee of his remedy given by the covenants of his contract and by the law of the land. *Martin v. Somerville Co.*,* 3 Wall. Jr., 206. See § 1715.

§ 1732. Authorizing action on void bills. — Where a library association had assumed banking powers and issued bills which circulated as bank paper, but under the statute such unauthorized banking was unlawful, and no action could be sustained on the bills, it was held that a subsequent statute authorizing the holders to maintain an action on the bills of the association did not impair the obligation of contracts. *Milne v. Huber*,* 3 McL., 212. See § 1616.

§ 1733. Act allowing abatement of interest. — From a period long anterior to the adoption of the national constitution, the general assembly of Virginia having reserved to itself the power of intrusting the allowance of interest, even the rate permitted to be taken by law, to the discretion of the jury, this express reservation of power has entered into every contract that has been made between her citizens, and the act of the general assembly of 1872, allowing the abatement of interest which accrued during the civil war, does not impair the obligation of contracts. *Harmanson v. Wilson*,* 1 Hughes, 207.

§ 1734. Confining levy of tax to real estate. — A state law authorizing a city to issue its bonds in aid of a railroad, and providing for the payment of the same by an annual levy of a tax on all the taxable property of the city, is not a contract with the bondholders the obligation of which is violated by a subsequent law requiring the levy to be made on real estate only. Although the state might make such a contract, the fact that it did is not to be assumed. *Gilman v. City of Sheboygan*, 2 Black, 510.

§ 1735. Degree of impairment not material. — If, by the legislative act, the obligation of contracts is in any degree impaired, or weakened, or rendered less operative, the constitution is violated. *National Bank v. Sebastian County*, 5 Dil., 414 (§§ 1903, 1904). See § 1614.

§ 1736. The prohibition against impairing the obligation of contracts has no reference to degrees of impairment. The largest and least are alike forbidden. *Von Hoffman v. Quincy*, 4 Wall., 535 (§§ 1877-82).

§ 1737. One of the tests that a contract has been impaired is that its value has by legislation been diminished. It is not a question of degree or manner. *Planters' Bank v. Sharp*, 6 How., 301 (§§ 2177-87).

§ 1738. Law in force before contract was made. — A provision of a state constitution cannot be complained of as impairing the obligation of a contract when it was in force before the contract was made. *Railroad Co. v. McClure*,* 10 Wall., 511.

§ 1739. Act passed prior to adoption of constitution. — The constitution of the United States did not begin to operate before the first Wednesday in March, 1789, and the clause forbidding the states to pass any law impairing the obligation of contracts does not apply to an act passed before that date. *Owings v. Speed*,* 5 Wheat., 420.

§ 1740. State constitution a law. — The constitution of a state is a law within the meaning of the clause in the constitution which declares that no state shall pass any law "impairing the obligation of contracts." *Railroad Co. v. McClure*,* 10 Wall., 511. See §§ 1627, 1628.

§ 1741. A state cannot impair the obligation of a contract by a constitutional provision any more than by an act of its legislature. *Gray v. Davis*,* 1 Woods, 420; *Gunn v. Barry*, 15 Wall., 610 (§§ 1659-63); *White v. Hart*,* 13 Wall., 647; *Railroad Co. v. McClure*,* 10 Wall.,

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511; *Woolsey v. Dodge*, 6 McL., 145; *Merchants' Nat. Bank v. Jefferson County*, 1 McC., 362; *Marsh v. Burrows*, 1 Woods, 463; *Williams v. Bruffy*, 6 Otto, 184.

§ 1742. *Constitution adopted under the Reconstruction Acts.*—It cannot be contended that the constitution of Georgia of 1868, adopted while the state was under the government of the Reconstruction Acts, was adopted under the coercion and dictation of congress, and that therefore it is the act of congress rather than of the state, and that its provisions cannot be objected to for the reason that they impair the obligation of any contracts. *White v. Hart*,* 13 Wall., 647.

§ 1743. The state of Georgia was within the pale of the Union during her rebellion. And after her rebellion, and before her representation was restored, she had no more right to pass a law impairing the obligation of contracts, than she had before the rebellion or after her restoration to her normal position in the Union. *Ibid*.

§ 1744. *Exemption from liability for acts done during war.*—The fourth section of the constitution of Missouri of 1865 provides that no person shall be prosecuted in any civil action for any act done after the 1st of January, 1861, by virtue of military authority vested in him either by the state or the United States, or in pursuance to orders from any person vested with such authority; and that "if any action or proceeding shall have heretofore been, or shall hereafter be, instituted against any person for the doing of any such act, the defendant may plead this section in bar thereof." In 1854, T. leased to D. a house and lot for twenty years, the lessor covenanting to keep D. in lawful possession. In 1860, T. sold the fee to S. In 1861, S., as "colonel of the Home Guards," pursuant to an order of his military superior, took possession of the lot, removed all the buildings and used the property for his own private purposes. In 1868, D. brought an action of forcible entry and detainer against S. to recover possession, before a justice of the peace, and obtained judgment. An appeal was taken, and while the case was pending the above section of the constitution passed into force. S. pleaded it successfully in the circuit court. It was held, in the supreme court of the United States, that no contract was impaired by this section, the proceeding having no relation to the rights of property of the parties, but turning entirely on the facts of lawful possession by the plaintiff and unlawful entry by the defendant, the local statute providing that the merits of the title should not be inquired into in such an action, and this remedy not having therefore entered into the contract between the lessor and lessee. *Drehman v. Stifle*,* 8 Wall., 595.

§ 1745. *Settling disputes concerning land titles — Jury trial.*—The act of New York of March 24, 1797, entitled "An act to settle disputes concerning titles to land in the county of Onondaga," providing for the appointment of commissioners who shall sit, hear and determine all disputes relating to such titles, and that their award shall, if not dissented from in two years, and sought to be set aside within three years from its rendition, be final, and a perpetual bar to any suit brought for the recovery of such lands, does not contravene either of those provisions of the New York constitution by which it is declared that trial by jury shall "be inviolate forever," and that no new court shall be instituted "but such as shall proceed according to the course of the common law," and that no person shall be deprived of his rights except "by the law of the land or the judgment of his peers." Such act is but a statute of limitations; the award of the commissioners is of no effect, if dissented from; the act created no new court, the commissioners lacking all the ordinary powers of courts; it deprives no one of trial by jury, but expressly recognizes it; and the mere fact that the act relates to but one county does not make it any less the law of the land. It does not impair any contract obligations, and is not open to the objection of destroying vested rights. *Barker v. Jackson*,* 1 Paine, 559.

§ 1746. *Exemption laws.*—The power in congress to pass a bankrupt law authorizes it to adopt, for bankruptcy proceedings, the exemption laws of the state, exempting property as against debts contracted before the grant of such exemption. And where congress, after proceedings in bankruptcy had been commenced against a debtor, and his property had been sold by order of the court, enacted, by the act of June 8, 1873, that every bankrupt should have the exemptions allowed him by the laws of his state in force in the year 1871, the assignee was held bound to turn over to the bankrupt a sum of money equal to the value of the estate to which he would have been entitled under the state law had it not been sold. It is also held that the provisions of the state constitution of North Carolina, giving a homestead and other exemptions, apply to pre-existing contracts, as well as to such as were entered into afterwards, and do not thereby violate the provisions of the constitution of the United States in regard to the obligation of contracts. *In re Vogler*,* 2 Hughes, 297. See §§ 1625, 1626, 1628.

§ 1747. *Church property.*—The statutes of the state of Virginia of 1776 and 1784, confirming the rights of the church to the property acquired by it before the Revolution, and creating it into a new corporation, were not infringements of any rights secured by the constitution, either civil, political or religious. *Terrett v. Taylor*, 9 Cr., 43.

§ 1748. The act of Virginia of 1786, repealing the act incorporating the Episcopal churches; and the act of 1788, providing for the appointment of trustees to take charge of the property of the churches; and the act of 1801, asserting a right in the state to all the property of the churches, and authorizing the overseers of the poor to sell their vacant lands, could not, upon principles of justice and under the constitution of the United States, operate to divest the churches of the property acquired by them previous to the Revolution. *Ibid.*

§ 1749. Deed of married woman.—The act of the legislature of Ohio of March 9, 1835, providing "that any deed, mortgage, or other instrument of writing heretofore executed in pursuance of law by husband and wife," shall convey dower, although the magistrate "shall not have certified that he read or made known the contents of such deed" as required by a former act, does not impair any contract or violate any constitutional right, where the wife has consented to a *bona fide* sale, and acknowledged the deed before a magistrate and relinquished her dower, and the magistrate so certifies. *Raverty v. Fridge*, 3 McL., 230. See § 1616.

§ 1750. Legalizing conveyances.—The act of the territorial legislature of Minnesota of 1857, validating conveyances of lands theretofore made under joint power of attorney from husband and wife, such conveyances before that time being ineffectual, is constitutional when applied to a case where, on account of the existence of the husband at the time of the passage of the act, the dower interest of the wife was inchoate and contingent. Such an interest, while inchoate, is under the absolute control of the legislature. *Randall v. Kreiger*, 2 Dill., 444. See § 1616.

§ 1751. Recovery of lands.—The act of the legislature of New York of 1788, declaring that, after the year 1800, no action for the recovery of lands shall be maintained, unless on a seizin or a possession within twenty-five years next before such action brought, is valid when applied to a seizin existing prior to its passage. It is a statute of limitations applying to the remedy. *Bockee v. Crosby*, 2 Paine, 432.

§ 1752. Taxes to be paid in coin.—It does not impair the obligation of any contract to authorize assessments and taxes on lands, imposed for the improvement of the same, to be paid in gold coin, when, by the charter of the district set off for the purpose of improvements, they may be paid in lawful money. *Reclamation District v. Hagar*,* 6 Saw., 567.

§ 1753. Foreign laws.—In a suit brought in the United States circuit court in New York, upon bonds issued by a railroad company in Canada, but payable in New York, it was held that a subsequent act of the parliament of the Dominion, authorizing the substitution by the company of new bonds bearing a lower rate of interest, and declaring the assent of the holders of the first bonds to the substitution presumed, the plaintiff not having in fact assented, impaired the obligation of the contract, was contrary to the fundamental principles of the *lex fori*, and would not be allowed to have any effect. *Gebhard v. Canada So. R'y Co.*, 17 Blatch., 416. This decision was reversed (HARLAN, J., dissenting) in *Canada So. R'y Co. v. Gebhard*, 109 U. S., 527, upon the ground that the act was valid in Canada, as binding the minority of the bondholders by the assent of the majority; and that those who took the bonds of the Canada corporation took them subject to the law of that Dominion; and upon the further ground that the reorganization of the affairs of the embarrassed corporation, under this act, was in harmony with the spirit of the bankrupt laws of all civilized nations, and was not in conflict with our constitution, which, although forbidding the impairing of contracts, authorizes uniform laws on the subject of bankruptcies.

§ 1754. Sale of mortgaged premises.—The act of the legislature of Indiana of February 13, 1841, requiring that mortgaged premises shall not be sold to satisfy the debt unless they are first valued, and one-half of that value is bid for them, impairs the obligation of the contract, when applied to an existing mortgage, foreclosable by sale, and of which a decree of foreclosure has been rendered. *Gantly v. Ewing*, 3 How., 707. See § 1623.

§ 1755. Laws which prescribe the mode of enforcing a contract, which are in existence when it is made, are so far a part of the contract that no change in these laws, which seriously interferes with that enforcement, is valid, because it impairs the obligation. A right of redemption, after a sale under a decree of foreclosure, is a part of the contract of mortgage, which cannot be impaired where the law giving the right exists when the contract is made. *Brine v. Insurance Co.*, 6 Otto, 727.

§ 1756. It is held that an act authorizing a judgment creditor of a mortgagor, at any time within two years after the sale under the mortgage, to redeem the land from the purchase on paying the purchase money, with a certain per cent. interest, besides charges, impairs the obligation of the mortgage contract, when applied to a mortgage executed before its passage. *Howard v. Bugbee*,* 24 How., 461.

§ 1757. Sale of property on execution.—The act of the legislature of Arkansas, approved December 23, 1840, entitled "An act to regulate the sale of property on execution," providing that the property taken on execution shall not be sold within one year unless two-thirds of

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its appraised value is offered, is not void as impairing the obligation of contracts. *United States v. Conway*,* *Hemp.*, 813. See § 1624.

§ 1758. A state law providing that a sale shall not be made of property levied on under execution, unless it will bring two-thirds of its valuation, according to the opinion of three householders, is unconstitutional when applied to contracts made before its passage, but not so as to those made afterwards. *Moore v. Fowler*,* *Hemp.*, 536.

§ 1759. The laws of a state relating to executions become a part of a contract entered into while they are in force, and they cannot be changed so that its obligation is impaired. *Rue v. Decker*, 3 *McL.*, 575.

§ 1760. A state statute providing that, for a time, no executions should issue, or sales be made, under decrees or deeds of trust, is invalid, as impairing the obligation of contracts. *Daniels v. Tearney*, 12 *Otto*, 419.

§ 1761. **Limiting lien of judgment.**—The obligation of a contract is not impaired by a law regulating and limiting the remedy. So a law which provides that the lien of a judgment creditor shall cease at the expiration of one year, if execution is not levied within that time, is valid. *Bank of United States v. Longworth*, 1 *McL.*, 36; *Beard v. Federy*, 3 *Wall.*, 478.

§ 1762. **Set-off of obligation obtained since judgment.**—A state legislature has the power to provide that a judgment debtor may set off against the judgment an obligation of the judgment creditor which has become his property since the rendition of the judgment. So, in the absence of rights of creditors which might be affected thereby, a statute is valid which provides that a judgment debtor of a bank may set off against a judgment recovered by it the circulating notes of the bank, though he may have acquired them subsequently to the rendition of the judgment. Such act is not within the provisions of the constitution prohibiting the enactment by a state of a law impairing the obligation of a contract. *Blount v. Windley*, 5 *Otto*, 177.

§ 1763. **Bills of review — Forged titles.**—The act of congress of May 8, 1830, giving to the superior court of the territory of Arkansas power to entertain bills for review in certain land cases, and to reverse the former decrees of the court where it appeared that such decrees were founded upon forged title papers, was held not to be unconstitutional when applied to causes of action existing at the time the law was passed, as it provided a remedy only. *United States v. Samperyac*, *Hemp.*, 118.

2. Contracts by the State.

SUMMARY — *Power of a state to make a contract*, §§ 1764, 1766, 1786. — *What contracts are protected*, § 1765. — *Public law not a contract*, §§ 1766, 1769. — *Law locating county seat not a contract*, § 1767. — *Grant by the legislature; corrupt influences*, § 1768. — *Power of legislature to repeal laws*, § 1769. — *Making bank notes receivable for taxes*, § 1770. — *Requiring notice of tax sale*, § 1771. — *Permitting recovery of money on void tax sales*, § 1772. — *Right to an office*, §§ 1773, 1774. — *Laws of Texas passed prior to her admission*, § 1775. — *Grant of lands by the state; sale to satisfy debts due the state*, § 1776. — *Contract as to remedies*, § 1777. — *Recording laws; effect on state grants*, §§ 1778, 1779. — *Legalizing void deeds*, § 1780. — *License to draw a lottery*, § 1781. — *Limitation upon taxing power*, §§ 1782, 1783, 1785, 1788. — *Scheme for funding state indebtedness*, § 1784. — *The constitutional inhibition applies to contracts by the state*, § 1786. — *Affecting the remedy*, §§ 1786, 1787, 1791, 1794, 1795, 1796. — *Limiting taxing power of municipality*, §§ 1785, 1788. — *Exempting certain wards from taxation for street improvements*, § 1789. — *Acts under void laws*, § 1790. — *Law authorizing suits against the state; repeal*, §§ 1792, 1793. — *Right to sue in federal courts*, § 1797. — *Changing mode of service of process on corporations*, § 1798.

§ 1764. A state may, by legislative enactment, make a contract the obligation of which cannot be impaired by subsequent legislation. *Corbin v. Board of County Commissioners*, §§ 1822-26. See § 1907.

§ 1765. The contracts protected by the constitution are those by which perfect rights — certain definite, fixed private rights of property — are vested, and not measures or engagements adopted or undertaken by the body politic for the benefit of all, to be varied or discontinued as the public good may require. *Butler v. Pennsylvania*, §§ 1827-29.

§ 1766. There are cases in which a state may lay aside its sovereignty and contract like an individual, and be bound accordingly; but a public law, relating to a public subject, is not such a contract. *Newton v. Commissioners*, §§ 1799-1804. See § 1907.

§ 1767. An act providing that the county seat of a county should be "permanently established" at a certain town, provided the citizens thereof should subscribe a certain sum

towards the erection of public buildings, is not a contract with such town, but a public law upon a public object, involving the public rights and welfare, and, being but a temporary surrender of the police power, may be repealed at any time without violating any contract obligation. *Ibid.*

§ 1768. A grant by a state legislature is a contract, and cannot be rescinded after the land has been conveyed by the grantee to other persons; and this, although the grant was obtained by corrupting certain members of the legislature. *Fletcher v. Peck*, §§ 1905-12.

§ 1769. So far as general legislation is concerned, one legislature can repeal any act which a former legislature has passed; but when a law is in the nature of a contract, and rights have vested under it, its repeal cannot divest those rights. *Ibid.*

§ 1770. A clause in the charter of a bank, providing that its notes shall be received in payment of taxes, is a contract which cannot be impaired by a repealing act. The guaranty is not personal, but attaches to each note, and protects the paper in the hands of persons acquiring it after the passage of the repealing act. *Furman v. Nichol*, §§ 1818-20. See § 1927.

§ 1771. A law requiring a purchaser at a tax sale to give notice of the sale to the owner does not impair the obligation of the contract by which a purchase prior to the enactment of that law entitled the purchaser to a deed of the land at the expiration of three years, without giving notice. *Curtis v. Whitney*, § 1821.

§ 1772. A law permitting all purchasers of defective tax titles to recover back the money paid by them is an absolute contract, which cannot be impaired by vesting discretion in any officer to decide upon the propriety of repayment; but they may be required to execute quitclaim deeds of the land as a condition precedent to such repayment. *Corbin v. Washington County*, §§ 1822-26.

§ 1773. An act creating a board of canal commissioners for the state, to be appointed annually, and to receive a stated compensation, is not a contract with such officers as may be appointed thereunder, but a mere regulation of government, subject to change according to the policy of the state or sentiment of the people. Therefore, where an amendatory law was passed vesting in the people the direct choice of such commissioners, and reducing their compensation, the incumbents lost their offices, and had no claim for salary from and after the date of the new law. *Butler v. Pennsylvania*, §§ 1827-29. See § 1728.

§ 1774. A contract between the governor of a state and an individual, by which the latter agrees to act as commissioner of a geological survey, for a certain compensation and for a certain time, is, when acted upon by such commissioner, a contract, the obligation of which cannot be impaired by the repeal of the law under which it was made. *Hall v. Wisconsin*, §§ 1830-32. See § 1728.

§ 1775. The constitutional prohibition of laws impairing the obligation of contracts is not applicable to the acts of the law-making power of independent republics, such as Texas, before their admission into the Union. *League v. De Young*, §§ 1833-34.

§ 1776. An act authorizing the sale of lands to satisfy debts due the state does not impair the obligation of any contract implied in the grant of the land by the state to the owner thereof. *Livingston v. Moore*, §§ 1835-44. See § 1918.

§ 1777. In an act giving a lien to the state, or in the mere confession of a judgment, there is no contract that no remedy, in the enforcement of either, will be resorted to except by judicial process. *Ibid.*

§ 1778. There is no implied contract in a state grant that the grantee shall enjoy the land free from any future legislative regulations, or that the priority of title thereto shall depend solely upon the principles of the common law. Therefore, a law enacted after such grant, vesting priority of right in him who has priority of record, does not impair the obligation of the contract. *Jackson v. Lamphire*, §§ 1845-48.

§ 1779. Where a state grant was made before the passage of any recording act, and by the terms of the act the usual priority of title was given to *bona fide* purchasers obtaining priority of record, this act did not impair the obligation of the contract, although its effect as to that particular grant was to deprive one of the land who was entitled thereto at common law, and vest it in him who had priority under the recording act. *Ibid.*

§ 1780. A law which provides that no deed of a married woman made before its passage shall be deemed to be invalid because of the neglect of the officer taking her acknowledgment to state the necessary facts in his certificate, although its effect was to render valid void deeds, impairs the obligation of no contract. *Watson v. Mercer*, §§ 1849-51.

§ 1781. Where a license to raise money for public purposes by means of a lottery granted by the legislature of a state had become obsolete by non-user, a subsequent law limiting the period within which it must be exercised is not a law impairing the obligation of contracts, but a *quasi* statute of limitations intended to promote vigilance. *Phalen v. Virginia*, §§ 1852-53. See § 1920.

§ 1782. The constitutional provision against impairing contract obligations is a limitation

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upon the taxing power, and no municipality of a state can, by its own ordinances, under the guise of taxation, relieve itself from performing all it has expressly promised to its creditors. *Murray v. Charleston*, §§ 1854-61.

§ 1783. And an ordinance of a city, taxing city stock, and directing that the tax be retained out of the interest due the holders of the stock, is a law impairing the obligation of the contract. *Ibid*.

§ 1784. In 1869 the legislature of Louisiana provided for the issue of bonds. In 1874 it provided for funding the obligations of the state. In 1875 it provided that no bonds should be funded until they had been declared valid by decree of court. In a proceeding by a holder of bonds, the court decided that the bonds were not entitled to the benefit of the funding scheme. *Held*, that no contract obligation was impaired. *Guaranty Co. v. Board of Liquidation*, § 1862.

§ 1785. So long as a municipality continues to exist, the control of the legislature over the power of taxation delegated to it is restrained to cases where such control does not impair the obligation of contracts made upon the pledge, expressly or impliedly given, that that power shall be exercised for their fulfillment. *Wolff v. New Orleans*, §§ 1863-64; *Louisiana v. Pillsbury*, §§ 1869-76.

§ 1786. The prohibition of the constitution against the passage of laws impairing the obligation of contracts applies to the contracts of the state, and to those of its agents acting under its authority, as well as to contracts between individuals. And the obligation is impaired by legislation operating directly on the means of enforcing the contract. *Ibid*. See § 1907.

§ 1787. Where bonds of a city, authorized by an act which ordered a special tax to be levied for the payment of the interest accruing on the bonds, and for a contingent fund to be accumulated for their ultimate payment, were sold at a time when the writ of *mandamus*, to compel the performance of that duty, was in vogue; and the legislature afterwards passed an act limiting the powers of taxation of the city, providing for a new indebtedness, in the form of "premium bonds," the whole series of which was to be twice a year placed in a wheel, and those drawn to be paid within three months after the drawing, and forbidding the issue of any writ of *mandamus* to compel the levy of any tax other than that to pay such drawn bonds, and postponing the payment of all interest until the drawing of the numbers of the bonds, when principal and interest were to be paid together,—*held*, to be a glaring case of impairment of the obligation of the contract expressed in the original bonds, and void. *Ibid*.

§ 1788. Where a municipality issues bonds under authority from the state, with full power to levy taxes to pay them, the taxing power cannot be withdrawn until the bonds are paid. *Von Hoffman v. Quincy*, §§ 1877-82.

§ 1789. A city entered into contracts for the improvement of streets. Afterwards, and after a part of the work was completed, two additional wards were added to the city, but these wards received no benefit from the street improvements. *Held*, that an act exempting these wards from liability to taxation to pay for the improvements did not impair the obligation of any contract. *United States v. Memphis*, §§ 1838-37.

§ 1790. Where a legislature induces a contractor to lay out large sums of money in making city improvements under contract, in reliance upon an unconstitutional act, which he believed to be valid, such inducement is a sufficient consideration for a subsequent act of the legislature, amounting to a contract. *Memphis v. United States*, §§ 1838-94.

§ 1791. Where a judgment creditor has sued out *mandamus* against a city to compel it to levy a tax to pay a judgment against it, the repeal by the legislature of the law authorizing such remedy is void as impairing the obligation of the contract. *Ibid*.

§ 1792. A state law authorizing suits against the state is not a contract. Hence, where suit was brought on state bonds, pursuant to a state law, and subsequently a law was passed requiring the bonds to be filed in court before any judgment should be entered in the case, it was held that no contract obligation was impaired. *Beers v. State of Arkansas*, §§ 1895-97. See § 1911.

§ 1793. Where a state law permits suits against a state, but provides no means for enforcing the judgment, its repeal does not impair the obligation of contracts. *Railroad Co. v. Tennessee*, §§ 1898-99.

§ 1794. The remedy which is protected by the constitution is something more than a right to have a claim adjudicated; there must be a means of enforcing the results of the inquiry. *Ibid*.

§ 1795. A law of a state authorizing a proceeding by *mandamus* to compel a tax collector to receive certain funds in payment of taxes was repealed, and it was provided that the taxpayer might pay his taxes under protest and bring suit against the collector. *Held*, that an adequate remedy was afforded. *Tennessee v. Sneed*, §§ 1900-1902.

§ 1796. The remedy may be altered or modified without impairing the obligation of the contract; but the law must not deny a remedy, or so embarrass it with restrictions and conditions as seriously to impair the value of the right. *Ibid.*

§ 1797. At the time certain county warrants were issued the holder could sue the county in the federal courts. Subsequently, and after suit was brought, the state attempted to defeat this right by a state law. *Held*, that such law impaired the obligation of the contract. *National Bank v. Sebastian County*, §§ 1908-1906.

§ 1798. Although the charter of a corporation authorizes a particular mode for the service of process on the corporation, a law changing the prescribed mode will not impair the obligation of the contract between the company and the state. *Railroad Co. v. Hecht*, §§ 1905, 1906.

[NOTES.— See §§ 1907-1933.]

NEWTON v. COMMISSIONERS.

(10 Otto, 548-563. 1879.)

ERROR to the Supreme Court of Ohio.

STATEMENT OF FACTS.— An act of the Ohio legislature of 1846 established the county seat of Mahoning county at Canfield, but it was provided that the county seat should be considered permanently established only on the execution of a bond by the citizens of Canfield in the sum of \$5,000, to be applied in erecting county buildings. The bond was executed and accepted, a court-house was erected, accepted in satisfaction of the bond, and used for public purposes. In 1874 a law was passed providing for the removal of the county seat to Youngstown, the act to take effect on its adoption by a majority of the electors of Mahoning county. The necessary vote was obtained, and a bill was filed praying for an injunction to restrain the removal.

Opinion by MR. JUSTICE SWAYNE.

It is claimed in behalf of the plaintiffs in error that the act of the 16th of February, 1846, and what was done under it, constituted an executed contract which is binding on the state; and that the act of April 9, 1874, and the steps taken pursuant to its provisions, impair the obligation of that contract, and bring the case within the contract clause of the constitution of the United States. Art. 1, sec. 10. These allegations are the ground of our jurisdiction. They present the only question argued before us, and our remarks will be confined to that subject.

§ 1799. *A state legislature may bind the state by a contract.*

The case may be properly considered under two aspects: Was it competent for the state to enter into such a contract as is claimed to have been made? And if such a contract were made, what is its meaning and effect? Undoubtedly, there are cases in which a state may, as it were, lay aside its sovereignty and contract like an individual, and be bound accordingly. *Curran v. State of Arkansas*, 15 How., 304 (CORPORATIONS, §§ 1316-29); *Davis v. Gray*, 16 Wall., 203. The cases in which such contracts have been sustained and enforced are very numerous. Many of them are cases in which the question was presented whether a private act of incorporation, or one or more of its clauses, is a contract within the meaning of the constitution of the United States. There is no such restraint upon the British parliament. Hence the adjudications of that country throw but little light upon the subject. The Dartmouth College Case (4 Wheat., 518; §§ 2099-2117, *infra*) was the pioneer in this field of our jurisprudence.

§ 1800. *Where an act of a legislature is a public law, relating to a public object, it is not a contract that binds subsequent legislatures.*

The principle there laid down, and since maintained in the cases which have followed and been controlled by it, has no application where the statute in

question is a *public law* relating to a *public subject* within the domain of the general legislative power of the state, and involving the *public rights* and *public welfare* of the entire community affected by it. The two classes of cases are separated by a broad line of demarcation. The distinction was forced upon the attention of the court by the argument in the Dartmouth College Case. Mr. Chief Justice Marshall said: "That anterior to the formation of the constitution, a course of legislation had prevailed in many, if not in all, of the states, which weakened the confidence of man in man, and embarrassed all transactions between individuals, by dispensing with a faithful performance of engagements. To correct this mischief by restraining the power which produced it, the state legislatures were forbidden 'to pass any law impairing the obligation of contracts;' that is, of contracts respecting property, under which some individual could claim a right to something beneficial to himself; and that since the clause in the constitution must, in construction, receive some limitation, it may be confined, and ought to be confined, to cases of this description,—to cases within the mischief it was intended to remedy.

"The general correctness of these observations cannot be controverted. That the framers of the constitution did not intend to restrain the states in the regulation of their civil institutions, adopted for internal government, and that the instrument they have given us is not to be so construed, may be admitted. The provision of the constitution never has been understood to embrace other contracts than those which respect property, or some object of value, and confer rights which may be asserted in a court of justice. It never has been understood to restrict the general right of the legislature to legislate on the subject of divorces. . . . If the act of incorporation be a grant of political power, if it create a civil institution to be employed in the administration of the government, or if the funds of the college be public property, or if the state of New Hampshire, as a government, be alone interested in its transactions, the subject is one in which the legislature of the state may act according to its own judgment, unrestrained by any limitation of its power imposed by the constitution of the United States." The judgment of the court in that case proceeded upon the ground that the college was "a private eleemosynary institution, endowed with a capacity to take property for purposes *unconnected with the government*, whose funds are bestowed by individuals on the faith of the charter."

In the later case of *East Hartford v. Hartford Bridge Company*, 10 How., 511 (§§ 2083–86, *infra*), this court further said: "But it is not found necessary for us to decide finally on this first and most doubtful question, as our opinion is clearly in favor of the defendant in error on the other question; namely, that the parties to this grant did not, by their charter, stand in the attitude towards each other of making a contract by it, such as is contemplated in the constitution, and so could not be modified by subsequent legislation. The legislature was acting here on the one part, and public municipal corporations on the other. They were acting, too, in relation to a *public object*, being virtually a highway across the river, over another highway up and down the river. From this standing and relation of these parties, and from the *subject-matter* of their action, we think that the doings of the legislature as to this ferry must be considered rather as *public laws* than as *contracts*. They related to *public interests*. They changed as those interests demanded. The grantees likewise, the towns being mere organizations for *public purposes*, were liable to have their public powers, rights and duties *modified* or *abolished* at any

moment by the legislature. . . . It is hardly possible to conceive the grounds on which a different result could be vindicated, without destroying all legislative sovereignty, and checking most legislative improvements and amendments, as well as *supervision over its subordinate public bodies.*"

§ 1801. *Powers that the state cannot relinquish.*

The legislative power of a state, except so far as restrained by its own constitution, is at all times absolute with respect to all offices within its reach. It may at pleasure create or abolish them, or modify their duties. It may also shorten or lengthen the term of service. And it may increase or diminish the salary or change the mode of compensation. *Butler v. Pennsylvania*, 10 How., 402 (§§ 1827-29, *infra*). The police power of the states, and that with respect to municipal corporations, and to many other things that might be named, are of the same absolute character. *Cooley, Const. Lim.*, pp. 232, 342; *The Regents v. Williams*, 4 Gill & J. (Md.), 321. In all these cases, there can be no contract and no irrepealable law, because they are "governmental subjects," and hence within the category before stated. They involve *public interests*, and legislative acts concerning them are necessarily *public laws*. Every succeeding legislature possesses the same jurisdiction and power with respect to them as its predecessors. The latter have the same power of repeal and modification which the former had of enactment,—neither more nor less. All occupy, in this respect, a footing of perfect equality. This must necessarily be so in the nature of things. It is vital to the public welfare that each one should be able at all times to do whatever the varying circumstances and present exigencies touching the subject involved may require. A different result would be fraught with evil.

All these considerations apply with full force to the times and places of holding courts. They are both purely public things, and the laws concerning them must necessarily be of the same character. If one may be bargained about, so may the other. In this respect there is no difference in principle between them.

§ 1802. *An act providing for the location of a county seat at a certain town is not a contract, and its repeal is valid.*

The same reasoning, pushed a step farther in the same direction, would involve the same result with respect to the seat of government of a state. If a state capital were sought to be removed under the circumstances of this case with respect to the county seat, whatever the public exigencies, or the force of the public sentiment which demanded it, those interested, as are the plaintiffs in error, might, according to their argument, effectually forbid and prevent it; and this result could be brought about by means of a bill in equity and a perpetual injunction. It is true a state cannot be sued without its consent, but this would be a small obstacle in the way of the assertion of so potent a right. Though the state cannot be sued, its officers, whose acts were illegal and void, may be. *Osborne v. Bank of United States*, 9 Wheat., 738 (§§ 2363-87, *infra*); *Davis v. Gray*, 16 Wall., 203. A proposition leading to such consequences must be unsound. The parent and the offspring are alike. *Armstrong v. The Commissioners*, 4 Blackf. (Ind.), 208, was in some of its features not unlike the case before us. The act declared that "so soon as the public buildings are completed in the manner aforesaid, *at the place designated*, the same shall be forever thereafter the permanent seat of justice of said county of Dearborn." Certain private individuals there, as here, had stipulated to build a court-house, and their compliance was a condition precedent. The condition

had been performed. It was held that "the act did not create a contract." The subject was fully considered. It was held further that a subsequent legislature might competently pass an act for the removal of the county seat so established. In that case, both had been done and both were sustained. The reasoning of the court was substantially the same with ours touching the eighth section of the act of 1846 here in question. *Elwell v. Tucker*, 1 id., 285, was also a case arising out of the removal of a county seat. The court said, "the establishment of the time and place of holding courts is a *matter of general legislation*, respecting which the act of one session of the general assembly cannot be binding on another." See, also, *Adams v. County of Logan*, 11 Ill., 336, and *Bass v. Fontleroy*, 11 Tex., 698. They are to the same effect.

§ 1803. *The rules by which legislative contracts must be construed.*

Secondly. But conceding, for the purposes of this opinion, that there is here a contract, as claimed by the plaintiffs in error, then the question arises, What is the contract; or, in other words, to what does it bind the state? The rules of interpretation touching such contracts are well settled in this court. In *Tucker v. Ferguson*, 22 Wall., 527, we said: "But the contract must be shown to exist. There is no presumption in its favor. Every reasonable doubt should be resolved against it. Where it exists, it is to be rigidly scrutinized, and never permitted to extend, *either in scope or duration*, beyond what the terms of the concession clearly require." There must have been a deliberate intention, clearly manifested, on the part of the state to grant what is claimed. Such a purpose cannot be inferred from equivocal language. *Providence Bank v. Billings*, 4 Pet., 514 (§§ 2321-24, *infra*); *Gilman v. City of Sheboygan*, 2 Black, 510. It must not be a mere gratuity. There must be a sufficient consideration, or, no matter how long the alleged right has been enjoyed, it may be resumed by the state at its pleasure. *Christ Church v. Philadelphia*, 24 How., 300 (§2288, *infra*). No grant can be raised by mere inference or presumption, and the right granted must be clearly defined. *Charles River Bridge v. Warren Bridge*, 11 Pet., 420 (§§ 2058-82, *infra*). "The rule of construction in this class of cases is that it shall be most strongly against the corporation. Every reasonable doubt is to be resolved adversely. Nothing is to be taken as conceded but what is given in unmistakable terms or by an implication equally clear. The affirmative must be shown. Silence is negation, and doubt is fatal to the claim. This doctrine is vital to the public welfare. It is axiomatic in the jurisprudence of this court." *Fertilizing Co. v. Hyde Park*, 97 U. S., 659.

§ 1804. *Meaning of the word "permanently," referring to the establishment of a county seat.*

The eighth section of the act of 1846 declares, "That before the seat of justice shall be considered permanently established at the town of Canfield, the proprietors or citizens thereof shall" do certain things,—all of which, it is admitted, were done in due time. This is the whole case of the plaintiffs in error. It will be observed that there is nothing said about the county seat *remaining* or being *kept* at Canfield *forever*, or *for any specified time*, or "*permanently*." At most, the stipulation is that it shall be *considered as permanently established there* when the conditions specified are fulfilled. If the legislature had intended to assume an obligation that it should be *kept there* in perpetuity, it is to be presumed it would have said so. - We cannot—certainly not in this case—interpolate into the statute a thing so important, which it does not contain. The most that can be claimed to have been intended by the state is, that when the conditions prescribed were complied with, the county seat should

be then and thereupon "permanently established" at the designated place. We are, therefore, to consider what is the meaning of the phrase "permanently established." Domicile is acquired by residence and the *animus manendi*, the intent to remain. A *permanent residence* is acquired in the same way. In neither case is the idea involved that a change of domicile or of residence may not thereafter be made. But this in no wise affects the pre-existing legal *status* of the individual in either case while it continues. So the county seat was permanently established at Canfield when it was placed there with the *intention* that it should remain there. This fact, thus complete, was in no wise affected by the further fact that thirty years later the state changed its mind and determined to remove, and did remove, the same county seat to another locality. It fulfilled at the outset the entire obligation it had assumed. It did not stipulate to *keep* the county seat at Canfield perpetually, and the plaintiffs in error have no right to complain that it was not done. *Keeping it there* is another and a distinct thing, in regard to which the eighth section of the act is wholly silent. In *Mead v. Ballard*, 7 Wall., 290, land was conveyed on the 9th of August, 1848, "upon the express understanding and condition" that a certain institution of learning then incorporated "shall be permanently located on said land," between the date of the deed and the same day in the succeeding year. The trustees passed a resolution, within the year, locating the institution on the premises, and at once contracted for the erection of the necessary buildings. The buildings were completed, and the institution was in full operation by November, 1849.

In the year 1857 the buildings were destroyed by fire and were not rebuilt. A part of the land was sold by the grantee. The heir of the grantor sued in ejectment to recover the premises. This court, speaking by Mr. Justice Miller, said: "It is clear to us . . . that when the trustees passed their resolution locating the buildings on the land, with the intention that it should be the permanent place of conducting the business of the corporation, they had permanently located the institution, within the true construction of the contract. Counsel for the plaintiff attach to the word 'permanent' a meaning inconsistent with the obvious intent of the parties,—that the condition was one which might be fully performed within a year. Such a construction is something more than a condition to locate. It is a covenant to build and rebuild; a covenant against removal at any time; a covenant to keep up an institution of learning on that land forever, or for a very indefinite time. This could not have been the intention of the parties."

In *Harris v. Shaw*, 13 Ill., 463, land was conveyed on condition that the county seat should be "permanently located" upon it. The location was made accordingly with that intent, but some years later the county seat was removed. The grantor sued to recover the land. The court said it was no part of the contract that the county seat should *remain forever* on the premises; that the grantor must be presumed to have known that the legislature had the power to remove it at pleasure, and that he must be held to have had in view at least the probability of such a change when he made the deed.

There is no point arising under either the former or the present constitution of Ohio which in our judgment requires any remark. The results of the elaborate research of one of the counsel for the defendants in error show that the phrase "permanently established" is a formula in long and frequent use in Ohio, with respect to county seats established otherwise than temporarily. Yet it is believed this is the first instance in the juridical history of the state in

which such a claim as is here made has been set up. This practical interpretation of the meaning of the phrase, though by no means conclusive, is entitled to grave and respectful consideration.

Judgment affirmed.

FLETCHER v. PECK.

(6 Cranch, 87-148. 1810.)

ERROR to U. S. Circuit Court, District of Massachusetts.

Opinion by MARSHALL, C. J.

STATEMENT OF FACTS.— The pleadings being now amended, this cause comes on again to be heard on sundry demurrers, and on a special verdict. This suit was instituted on several covenants contained in a deed made by John Peck, the defendant in error, conveying to Robert Fletcher, the plaintiff in error, certain lands which were part of a large purchase made by James Gunn and others, in the year 1795, from the state of Georgia, the contract for which was made in the form of a bill passed by the legislature of that state.

The first count in the declaration set forth a breach in the second covenant contained in the deed. The covenant is, "that the legislature of the state of Georgia, at the time of passing the act of sale aforesaid, had good right to sell and dispose of the same in manner pointed out by the said act." The breach assigned is, that the legislature had no power to sell.

The plea in bar sets forth the constitution of the state of Georgia, and avers that the lands sold by the defendant to the plaintiff were within that state. It then sets forth the granting act, and avers the power of the legislature to sell and dispose of the premises as pointed out by the act. To this plea the plaintiff below demurred, and the defendant joined in demurrer.

§ 1805. *The court will not declare a law to be unconstitutional unless the opposition between the constitution and law be plain and clear.*

That the legislature of Georgia, unless restrained by its own constitution, possesses the power of disposing of the unappropriated lands within its own limits, in such manner as its own judgment shall dictate, is a proposition not to be controverted. The only question, then, presented by this demurrer for the consideration of the court, is this: Did the then constitution of the state of Georgia prohibit the legislature to dispose of the lands which were the subject of this contract, in the manner stipulated by the contract? The question whether a law be void for its repugnancy to the constitution is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station, could it be unmindful of the solemn obligations which that station imposes. But it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other. In this case the court can perceive no such opposition. In the constitution of Georgia, adopted in the year 1789, the court can perceive no restriction on the legislative power which inhibits the passage of the act of 1795. They cannot say that, in passing that act, the legislature has transcended its powers and violated the constitution. In overruling the demurrer, therefore, to the first plea, the circuit court committed no error.

§ 1806. *In a contest between two individuals claiming under an act of a legislature, the court cannot inquire into the motives which actuated the members of that legislature.*

The third covenant is that all the title which the state of Georgia ever had in the premises had been legally conveyed to John Peck, the grantor. The second count assigns, in substance, as a breach of this covenant, that the original grantees from the state of Georgia promised and assured divers members of the legislature, then sitting in general assembly, that if the said members would assent to, and vote for, the passing of the act, and if the said bill should pass, such members should have a share of, and be interested in, all the lands purchased from the said state by virtue of such law. And that divers of the said members, to whom the said promises were made, were unduly influenced thereby, and under such influence did vote for the passing of the said bill; by reason whereof the said law was a nullity, etc., and so the title of the state of Georgia did not pass to the said Peck, etc. The plea to this count, after protesting that the promises it alleges were not made, avers that until after the purchase made from the original grantees by James Greenleaf, under whom the said Peck claims, neither the said James Greenleaf, nor the said Peck, nor any of the mesne vendors between the said Greenleaf and Peck, had any notice or knowledge that any such promises or assurances were made by the said original grantees, or either of them, to any of the members of the legislature of the state of Georgia. To this plea the plaintiff demurred generally, and the defendant joined in the demurrer.

That corruption should find its way into the governments of our infant republics, and contaminate the very source of legislation, or that impure motives should contribute to the passage of a law, or the formation of a legislative contract, are circumstances most deeply to be deplored. How far a court of justice would, in any case, be competent, on proceedings instituted by the state itself, to vacate a contract thus formed, and to annul rights acquired, under that contract, by third persons having no notice of the improper means by which it was obtained, is a question which the court would approach with much circumspection. It may well be doubted how far the validity of a law depends upon the motives of its framers, and how far the particular inducements, operating on members of the supreme sovereign power of a state, to the formation of a contract by that power, are examinable in a court of justice. If the principle be conceded that an act of the supreme sovereign power might be declared null by a court, in consequence of the means which procured it, still would there be much difficulty in saying to what extent those means must be applied to produce this effect. Must it be direct corruption, or would interest or undue influence of any kind be sufficient? Must the vitiating cause operate on a majority, or on what number of the members? Would the act be null, whatever might be the wish of the nation, or would its obligation or nullity depend upon the public sentiment? If the majority of the legislature be corrupted, it may well be doubted whether it be within the province of the judiciary to control their conduct, and, if less than a majority act from impure motives, the principle by which judicial interference would be regulated is not clearly discerned.

Whatever difficulties this subject might present, when viewed under aspects of which it may be susceptible, this court can perceive none in the particular pleadings now under consideration. This is not a bill brought by the state of Georgia to annul the contract, nor does it appear to the court, by this count, that the state of Georgia is dissatisfied with the sale that has been made. The

case, as made out in the pleadings, is simply this: One individual who holds lands in the state of Georgia, under a deed covenanting that the title of Georgia was in the grantor, brings an action of covenant upon this deed, and assigns, as a breach, that some of the members of the legislature were induced to vote in favor of the law which constituted the contract, by being promised an interest in it, and that therefore the act is a mere nullity. This solemn question cannot be brought thus collaterally and incidentally before the court. It would be indecent in the extreme, upon a private contract between two individuals, to enter into an inquiry respecting the corruption of the sovereign power of a state. If the title be plainly deduced from a legislative act, which the legislature might constitutionally pass, if the act be clothed with all the requisite forms of the law, a court, sitting as a court of law, cannot sustain a suit brought by one individual against another founded on the allegation that the act is a nullity in consequence of the impure motives which influenced certain members of the legislature which passed the law. The circuit court, therefore, did right in overruling this demurrer.

§ 1807. *A repeal of a law in the nature of a contract cannot divest vested rights.*

The fourth covenant in the deed is that the title to the premises has been in no way constitutionally or legally impaired by virtue of any subsequent act of any subsequent legislature of the state of Georgia. The third count recites the undue means practiced on certain members of the legislature, as stated in the second count, and then alleges that in consequence of these practices and of other causes a subsequent legislature passed an act annulling and rescinding the law under which the conveyance to the original grantees was made, declaring that conveyance void, and asserting the title of the state to the lands it contained. The count proceeds to recite at large this rescinding act, and concludes with averring that by reason of this act the title of the said Peck in the premises was constitutionally and legally impaired and rendered null and void. After protesting, as before, that no such promises were made as stated in this count, the defendant again pleads that himself and the first purchaser under the original grantees, and all intermediate holders of the property, were purchasers without notice. To this plea there is a demurrer and joinder.

The importance and the difficulty of the questions presented by these pleadings are deeply felt by the court. The lands in controversy vested absolutely in James Gunn and others, the original grantees, by the conveyance of the governor, made in pursuance of an act of assembly to which the legislature was fully competent. Being thus in full possession of the legal estate, they, for a valuable consideration, conveyed portions of the land to those who were willing to purchase. If the original transaction was infected with fraud, these purchasers did not participate in it and had no notice of it. They were innocent. Yet the legislature of Georgia has involved them in the fate of the first parties to the transaction, and, if the act be valid, has annihilated their rights also.

The legislature of Georgia was a party to this transaction, and for a party to pronounce its own deed invalid, whatever cause may be assigned for its invalidity, must be considered as a mere act of power which must find its vindication in a train of reasoning not often heard in courts of justice. But the real party, it is said, are the people, and when their agents are unfaithful, the acts of those agents cease to be obligatory.

It is, however, to be recollected that the people can act only by these agents,

and that while within the powers conferred on them, their acts must be considered as the acts of the people. If the agents be corrupt, others may be chosen, and if their contracts be examinable, the common sentiment, as well as common usage, of mankind points out a mode by which this examination may be made and their validity determined.

If the legislature of Georgia was not bound to submit its pretensions to those tribunals which are established for the security of property and to decide on human rights, if it might claim to itself the power of judging in its own case, yet there are certain great principles of justice whose authority is universally acknowledged that ought not to be entirely disregarded. If the legislature be its own judge in its own case, it would seem equitable that its decision should be regulated by those rules which would have regulated the decision of a judicial tribunal. The question was in its nature a question of title, and the tribunal which decided it was either acting in the character of a court of justice, and performing a duty usually assigned to a court, or it was exerting a mere act of power in which it was controlled only by its own will.

If a suit be brought to set aside a conveyance obtained by fraud, and the fraud be clearly proved, the conveyance will be set aside, as between the parties; but the rights of third persons, who are purchasers without notice, for a valuable consideration, cannot be disregarded. Titles which, according to every legal test, are perfect, are acquired with that confidence which is inspired by the opinion that the purchaser is safe. If there be any concealed defect, arising from the conduct of those who had held the property long before he acquired it, of which he had no notice, that concealed defect cannot be set up against him. He has paid his money for a title good at law; he is innocent, whatever may be the guilt of others, and equity will not subject him to the penalties attached to that guilt. All titles would be insecure, and the intercourse between man and man would be very seriously obstructed, if this principle be overturned. A court of chancery, therefore, had a bill been brought to set aside the conveyance made to James Gunn and others, as being obtained by improper practices with the legislature, whatever might have been its decision as respected the original grantees, would have been bound, by its own rules, and by the clearest principles of equity, to leave unmolested those who were purchasers without notice for a valuable consideration. If the legislature felt itself absolved from those rules of property which are common to all the citizens of the United States, and from those principles of equity which are acknowledged in all our courts, its act is to be supported by its power alone, and the same power may divest any other individual of his lands, if it shall be the will of the legislature so to exert it.

It is not intended to speak with disrespect of the legislature of Georgia, or of its acts. Far from it. The question is a general question, and is treated as one. For although such powerful objections to a legislative grant as are alleged against this may not again exist, yet the principle, on which alone this rescinding act is to be supported, may be applied to every case to which it shall be the will of any legislature to apply it. The principle is this: that a legislature may, by its own act, divest the vested estate of any man whatever, for reasons which shall, by itself, be deemed sufficient. In this case the legislature may have had ample proof that the original grant was obtained by practices which can never be too much reprobated, and which would have justified its abrogation so far as respected those to whom crime was imputable. But the grant, when issued, conveyed an estate in fee simple to the grantee,

clothed with all the solemnities which law can bestow. This estate was transferable; and those who purchased parts of it were not stained by that guilt which infected the original transaction. Their case is not distinguishable from the ordinary case of purchasers of a legal estate without knowledge of any secret fraud which might have led to the emanation of the original grant. According to the well known course of equity, their rights could not be affected by such fraud. Their situation was the same, their title was the same, with that of every other member of the community who holds land by regular conveyances from the original patentee.

Is the power of the legislature competent to the annihilation of such title, and to a resumption of the property thus held? The principle asserted is, that one legislature is competent to repeal any act which a former legislature was competent to pass; and that one legislature cannot abridge the powers of a succeeding legislature. The correctness of this principle, so far as respects general legislation, can never be controverted. But if an act be done under a law, a succeeding legislature cannot undo it. The past cannot be recalled by the most absolute power. Conveyances have been made, those conveyances have vested legal estates, and, if those estates may be seized by the sovereign authority, still that they originally vested is a fact, and cannot cease to be a fact. When, then, a law is in its nature a contract, when absolute rights have vested under that contract, a repeal of the law cannot divest those rights; and the act of annulling them, if legitimate, is rendered so by a power applicable to the case of every individual in the community.

It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power; and if any be prescribed, where are they to be found if the property of an individual, fairly and honestly acquired, may be seized without compensation. To the legislature all legislative power is granted; but the question whether the act of transferring the property of an individual to the public be in the nature of the legislative power is well worthy of serious reflection. It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments. How far the power of giving the law may involve every other power, in cases where the constitution is silent, never has been, and perhaps never can be, definitely stated.

§ 1808. *A grant is a contract executed, and a law annulling it impairs the obligation of the contract.*

The validity of this rescinding act, then, might well be doubted were Georgia a single sovereign power. But Georgia cannot be viewed as a single, unconnected, sovereign power, on whose legislature no other restrictions are imposed than may be found in its own constitution. She is a part of a large empire; she is a member of the American Union; and that Union has a constitution, the supremacy of which all acknowledge, and which imposes limits to the legislatures of the several states, which none claim a right to pass. The constitution of the United States declares that no state shall pass any bill of attainder, *ex post facto* law or law impairing the obligation of contracts. Does the case now under consideration come within this prohibitory section of the constitution? In considering this very interesting question we immediately ask ourselves, what is a contract? Is a grant a contract? A contract is a compact between two or more parties, and is either executory or executed. An executory contract is one in which a party binds himself to do or not to do a partic-

ular thing; such was the law under which the conveyance was made by the governor. A contract executed is one in which the object of contract is performed; and this, says Blackstone, differs in nothing from a grant. The contract between Georgia and the purchasers was executed by the grant. A contract executed, as well as one which is executory, contains obligations binding on the parties. A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right. A party is, therefore, always estopped by his own grant. Since, then, in fact, a grant is a contract executed, the obligation of which still continues, and since the constitution uses the general term contract, without distinguishing between those which are executory and those which are executed, it must be construed to comprehend the latter as well as the former. A law annulling conveyances between individuals, and declaring that the grantors should stand seized of their former estates, notwithstanding those grants, would be as repugnant to the constitution as a law discharging the vendors of property from the obligation of executing their contracts by conveyances. It would be strange if a contract to convey was secured by the constitution, while an absolute conveyance remained unprotected.

If, under a fair construction of the constitution, grants are comprehended under the term contracts, is a grant from the state excluded from the operation of the provision? Is the clause to be considered as inhibiting the state from impairing the obligation of contracts between two individuals, but as excluding from that inhibition contracts made with itself? The words themselves contain no such distinction. They are general, and are applicable to contracts of every description. If contracts made with the state are to be exempted from their operation, the exception must arise from the character of the contracting party, not from the words which are employed. Whatever respect might have been felt for the state sovereignties, it is not to be disguised that the framers of the constitution viewed, with some apprehension, the violent acts which might grow out of the feelings of the moment; and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed. The restrictions on the legislative power of the states are obviously founded in this sentiment; and the constitution of the United States contains what may be deemed a bill of rights for the people of each state.

§ 1809. *Limitations upon the states.*

No state shall pass any bill of attainder, *ex post facto* law or law impairing the obligation of contracts. A bill of attainder may affect the life of an individual or may confiscate his property, or may do both. In this form the power of the legislature over the lives and fortunes of individuals is expressly restrained. What motive, then, for implying, in words which import a general prohibition to impair the obligation of contracts, an exception in favor of the right to impair the obligation of those contracts into which the state may enter?

§ 1810. *The act of the Georgia legislature in annulling the grant by the state was an ex post facto law.*

The state legislatures can pass no *ex post facto* law. An *ex post facto* law is one which renders an act punishable in a manner in which it was not punishable when it was committed. Such a law may inflict penalties on the person, or may inflict pecuniary penalties which swell the public treasury. The legisla-

ture is then prohibited from passing a law by which a man's estate, or any part of it, shall be seized for a crime which was not declared, by some previous law, to render him liable to that punishment. Why, then, should violence be done to the natural meaning of words for the purpose of leaving to the legislature the power of seizing, for public use, the estate of an individual in the form of a law annulling the title by which he holds that estate? The court can perceive no sufficient grounds for making that distinction. This rescinding act would have the effect of an *ex post facto* law. It forfeits the estate of Fletcher for a crime not committed by himself, but by those from whom he purchased. This cannot be effected in the form of an *ex post facto* law or bill of attainder; why, then, is it allowable in the form of a law annulling the original grant? The argument in favor of presuming an intention to except a case, not excepted by the words of the constitution, is susceptible of some illustration from a principle originally ingrafted in that instrument, though no longer a part of it. The constitution, as passed, gave the courts of the United States jurisdiction in suits brought against individual states. A state, then, which violated its own contract, was suable in the courts of the United States for that violation. Would it have been a defense in such a suit to say that the state had passed a law absolving itself from the contract? It is scarcely to be conceived that such a defense could be set up. And yet, if a state is neither restrained by the general principles of our political institutions, nor by the words of the constitution, from impairing the obligation of its own contracts, such a defense would be a valid one. This feature is no longer found in the constitution; but it aids in the construction of those clauses with which it was originally associated.

It is, then, the unanimous opinion of the court, that, in this case, the estate having passed into the hands of a purchaser for a valuable consideration, without notice, the state of Georgia was restrained, either by general principles which are common to our free institutions, or by the particular provisions of the constitution of the United States, from passing a law whereby the estate of the plaintiff in the premises so purchased could be constitutionally and legally impaired and rendered null and void. In overruling the demurrer to the third plea, therefore, there is no error.

§ 1811. *The proclamation of the king of Great Britain in 1763 did not alter the boundaries of Georgia.*

The first covenant in the deed is, that the state of Georgia, at the time of the act of the legislature thereof, entitled as aforesaid, was legally seized in fee of the soil thereof, subject only to the extinguishment of part of the Indian title thereon. The fourth count assigns, as a breach of this covenant, that the right to the soil was in the United States, and not in Georgia. To this count the defendant pleads that the state of Georgia was seized; and tenders an issue on the fact in which the plaintiff joins. On this issue a special verdict is found. The jury find the grant of Carolina, by Charles II., to the Earl of Clarendon, and others, comprehending the whole country, from thirty-six degrees, thirty minutes, north latitude, to twenty-nine degrees north latitude, and from the Atlantic to the South Sea. They find that the northern part of this territory was afterwards erected into a separate colony, and that the most northern part of the thirty-fifth degree of north latitude was the boundary line between North and South Carolina. That seven of the eight proprietors of the Carolinas surrendered to George II., in the year 1729, who appointed a governor of South Carolina. That in 1732, George II. granted to the Lord Viscount Percival, and others, seven-eighths of the territory between the Savannah and the

Alatamaha, and extending west to the South Sea, and that the remaining eighth part, which was still the property of the heir of Lord Carteret, one of the original grantees of Carolina, was afterwards conveyed to them. This territory was constituted a colony, and called Georgia. That the governor of South Carolina continued to exercise jurisdiction south of Georgia. That, in 1752, the grantees surrendered to the crown. That, in 1754, a governor was appointed by the crown, with a commission describing the boundaries of the colony. That a treaty of peace was concluded between Great Britain and Spain, in 1763, in which the latter ceded to the former Florida, with Fort St. Augustin, and the Bay of Pensacola. That, in October, 1763, the king of Great Britain issued a proclamation, creating four new colonies, Quebec, East Florida, West Florida and Grenada; and prescribing the bounds of each, and further declaring that all the lands between the Alatamaha and St. Marys should be annexed to Georgia. The same proclamation contained a clause reserving, under the dominion and protection of the crown, for the use of the Indians, all the lands on the western waters, and forbidding a settlement on them, or purchase of them from the Indians. The lands conveyed to the plaintiff lie on the western waters. That, in November, 1763, a commission was issued to the governor of Georgia, in which the boundaries of that province are described, as extending westward to the Mississippi. A commission, describing boundaries of the same extent, was afterwards granted in 1764. That a war broke out between Great Britain and her colonies, which terminated in a treaty of peace, acknowledging them as sovereign and independent states. That, in April, 1787, a convention was entered into between the states of South Carolina and Georgia, settling the boundary line between them. The jury afterwards described the situation of the lands mentioned in the plaintiff's declaration, in such manner that their lying within the limits of Georgia, as defined in the proclamation of 1763, in the treaty of peace, and in the convention between that state and South Carolina, has not been questioned.

§ 1812. *The nature of the Indian title is not such as to be absolutely repugnant to seizin in fee on the part of the state.*

The counsel for the plaintiff rest their argument on a single proposition. They contend that the reservation for the use of Indians, contained in the proclamation of 1763, excepts the lands on the western waters from the colonies within whose bounds they would otherwise have been, and that they were acquired by the revolutionary war. All acquisitions during the war, it is contended, were made by the joint arms, for the joint benefit of the United States, and not for the benefit of any particular state. The court does not understand the proclamation as it is understood by the counsel for the plaintiff. The reservation for the use of the Indians appears to be a temporary arrangement, suspending, for a time, the settlement of the country reserved, and the powers of the royal governor within the territory reserved, but is not conceived to amount to an alteration of the boundaries of the colony. If the language of the proclamation be, in itself, doubtful, the commissions subsequent thereto, which were given to the governors of Georgia, entirely remove the doubt.

The question whether the vacant lands within the United States became a joint property, or belonged to the separate states, was a momentous question, which, at one time, threatened to shake the American confederacy to its foundation. This important and dangerous contest has been compromised, and the compromise is not now to be disturbed. It is the opinion of the court that the particular land stated in the declaration appears, from this special verdict, to lie

within the state of Georgia, and that the state of Georgia had power to grant it. Some difficulty was produced by the language of the covenant, and of the pleadings. It was doubted whether a state can be seized in fee of lands subject to the Indian title, and whether a decision that they were seized in fee might not be construed to amount to a decision that their grantee might maintain an ejectment for them, notwithstanding that title.

The majority of the court is of opinion that the nature of the Indian title, which is certainly to be respected by all courts until it be legitimately extinguished, is not such as to be absolutely repugnant to seizin in fee on the part of the state.

Judgment affirmed, with costs.

MR. JUSTICE JOHNSON dissented.

FURMAN v. NICHOL.

(8 Wallace, 44-64. 1863.)

· ERROR to the Supreme Court of Tennessee.

Opinion by MR. JUSTICE DAVIS.

The main question involved in this suit is of more importance than difficulty; but before we proceed to discuss it, it is necessary to consider the point of jurisdiction which is raised by the defendant in error. The circumstances under which this court is authorized to review the decisions of state tribunals have been so often considered and decided, that there is hardly anything left to do but to apply the already well-settled legal principles which govern this class of cases, to a particular record, in order to decide whether or not we have jurisdiction to hear and determine the matter in controversy. It would be useless labor to go through with the various adjudications of this court on this subject.

§ 1813. *This court has jurisdiction over a cause in a state court when a right claimed under the constitution of the United States is denied by that court.*

It is enough for the purposes of this suit to say that a cause can be removed from a state court into this court under the twenty-fifth section of the Judiciary Act of 1789, whenever some one of the questions embraced in it was relied on by the party who brings the cause here, and when the right he claimed it gave him was denied to him by the state court. It is urged that the particular provision of the constitution which the plaintiffs in error say has been violated in its application to their case should be contained in the pleadings, but this is in no case necessary. If the record shows, either by express averment or by clear and necessary intendment, that the constitutional provision did arise, and that the court below could not have reached the conclusion and judgment it did reach, without applying it to the case in hand, then the jurisdiction of this court attaches. And it need not appear that the state court erred in its judgment. It is sufficient to confer jurisdiction that the question was in the case, was decided adversely to the plaintiffs in error, and that the court was induced by it to make the judgment which it did. Testing the case at bar by these rules, it is apparent that it is properly here, and must be disposed of on its merits.

STATEMENT OF FACTS.—Furman and Green, conceiving themselves aggrieved by the conduct of the county clerk in refusing their tender of the amount due the state for taxes in the notes and issues of the Bank of Tennessee, issued prior to the 6th May, 1861, applied to the local circuit court for a *mandamus* to compel the county clerk to accept payment of the notes in discharge of Furman's

obligation, and to issue to them a license as wholesale merchants. The application for the writ proceeded on the theory that the state had, in the passage of the act creating the Bank of Tennessee, in 1838, made a contract with its people to receive these notes in payment of state taxes, and that it was not in the power of a subsequent legislature to impair the binding force of this contract. The proceeding was an effort on the part of the plaintiffs in error to test the question of the validity of the authority of a public officer of the state, exercising authority under the state, on the ground that such authority was repugnant to that provision of the federal constitution which forbids a state to pass any law impairing the obligation of a contract. The purpose of the petition, the issue which it presented and sought to have determined, were as plainly to be seen, as if the words of the particular constitutional provision relied on had been inserted in it, and the obnoxious legislation spread out at length. All courts take notice, without pleading, of the constitution of the United States, and the public laws of the state where they are exercising their functions.

It is insisted that the petition should have averred that the state had impaired, or by some act attempted to impair, the obligation of a contract; but this does sufficiently appear by necessary intendment, for it is alleged that Furman was the owner of the notes and entitled to have them received for taxes, by virtue of a contract with the state; that he had tendered them to the defendant, who refused to receive them, and that it was not in the power of the legislature to impair the validity of this contract. The *mandamus* was asked for to enforce a contract — to act directly on Nichol, the clerk and collector, who was exercising an authority under the state. What is plainer than that this proceeding impeached this authority, in its application to their case, because of legislation construed by this officer as depriving Furman of his right to pay his state taxes in notes of the Bank of Tennessee? If so, then the petitioners, insisting on the protection of the constitution, drew in question both the validity of state legislation and the authority of the state officer; and unless the record discloses that the supreme court of Tennessee denied relief on other than federal grounds, it is perfectly manifest that we are compelled to take jurisdiction of this cause.

§ 1814. *The jurisdiction of this court over cases brought from state courts does not at all depend upon the fact that such courts are in error.*

But to proceed a step further. The cause was heard on the petition and a demurrer, admitting its truth, but denying its sufficiency. There were three principal defenses to the relief asked, specified in the demurrer, as was required by the Tennessee code of practice. These were, first, that the twelfth section of the act incorporating the Bank of Tennessee did not constitute a contract. Secondly, that there was no contract, because the said twelfth section was repealed by implication by section 603 of the code of 1858, and there was no averment that the notes were issued before that time. The third and last defense was, that the petition did not show that the plaintiffs became the owners of the notes before the direct repeal of the twelfth section by the legislature, in 1865. What possible difference can it make, in deciding the question of jurisdiction, on which of these three grounds the supreme court of Tennessee based their judgment? The right and duty of this court to hear and determine this case does not depend on our ability to prove that the supreme court of Tennessee was wrong in its judgment. Whether that judgment was right or wrong, it is reviewable here, if it necessarily drew in question the validity of a state statute, or of an authority exer-

cised under it, on the ground of the repugnancy of the statute to the constitution of the United States. That it did do this there would seem to be no doubt.

The defense really amounts to this: either that the alleged contract did not exist, or, if it did, that there has been no legislation that impairs it. Whether it be true or false depends on the construction to be given the laws of the state which are claimed as proving the making of the contract and its violation. If so, this court decides for itself whether the construction which the court below gave to these different statutes was correct or incorrect; and we are required to reverse, under the twenty-fifth section of the Judiciary Act, if we find that, under an error of construction, that court has adjudged that no contract has been impaired. To do otherwise, would be to surrender to the state courts an important trust confided to this court by the constitution.

Without pursuing the subject any further, it is clear from the record that the supreme court of Tennessee, in dismissing the petition for *mandamus*, necessarily adjudged that there was not at the time such a contract as the plaintiff Furman claimed authorized him to make the tender to the clerk of the notes of the Bank of Tennessee. The jurisdiction of this court is, therefore, complete, and the case must be decided on its merits.

§ 1815. *A clause in the charter of a bank authorizing its notes to be received in payment of taxes is a contract to that effect with every holder of every note.*

The state of Tennessee, through its legislature, in 1838, thought proper to create a bank "in its name and for its benefit." It was essentially a state institution. The state owned the capital and received the profits; appointed the directors, and pledged its faith and credit for its support. This would seem to have been enough to establish the credit of the institution on a firm basis, and to inspire confidence in the value of its notes, so that they would obtain a free circulation among the people as money. But the legislature, in its anxiety to insure for these notes a still greater confidence of the community, went further, and provided that they should be receivable at the treasury of the state, and by all tax collectors and other public officers, in all payments for taxes and other moneys due the state. It will be readily seen that nothing could have been better calculated to accomplish the purpose the legislature had in view than the incorporation of this guaranty into the charter of the bank. It assured the free circulation of their notes, gave them a credit over the issues of other banks, and furnished a security to those who held them against any serious loss, if, in the vicissitudes of trade, the bank itself should become embarrassed; for, annually, they would be enabled to use the notes at their par value in the payment of their taxes. That this guaranty was, until withdrawn by the state, a contract between the state and every note-holder of the bank, obliging the state to receive the notes for taxes, cannot admit of serious question.

The state was engaged in banking, and, like other corporations engaged in the same business, desirous of using all legitimate means to increase the profits of the enterprise. The profits of a bank of issue depend in a great measure on the ability of the bank to keep its currency afloat. The longer the bills are withheld from redemption the greater the remuneration to the corporation. Every additional guaranty thrown around the bills, affecting their security and increasing the uses to which they can be put, affords necessarily additional inducements for the people in whose hands they fall to keep them, and not return them to the counter of the bank for redemption in specie. What so natural as that the intelligent legislators of 1838, knowing all this, should say

to every person discounting a note, or taking it in the ordinary transactions of life, "If you will not return this note for redemption, we will take it from you for taxes. It is true you can demand specie for the bills, and so can the state demand specie for taxes; but if you will forego your right the state will do the same, and consent to receive from you, in lieu of specie, for the taxes due her, the notes of the bank." In such a transaction the benefit is mutual between the parties. The bank gets the interest on the notes as long as they are unredeemed, and the holder of the bills has a ready and convenient mode of paying taxes. The state did, therefore, in the charter creating the Bank of Tennessee, on good consideration, contract with the bill-holders to receive from them the paper of the bank for all taxes they owed the state. Until the legislature, in some proper way, notifies the public that the guaranty thus furnished has been withdrawn, such a contract is binding on the state, and within the protection of the constitution of the United States.

§ 1816. — *such guaranty is not a personal guaranty, but attaches to each note.*

An attempt is made to restrict the operation of this guaranty to the person who, in the course of dealing with the bank, receives the note, and not to extend it further. Such an interpretation would render the guaranty of comparatively little value, and defeat the object which we have attempted to show the legislature designed to accomplish by it. The guaranty is in no sense a personal one. It attaches to the note — is part of it, as much so as if written on the back of it; goes with the note everywhere, and invites every one who has taxes to pay to take it. The quality of negotiability is annexed to the notes in words that cannot be misunderstood, and which indicate the purpose of the legislature that they should be used by every one who is indebted to the state.

§ 1817. *This guaranty was not withdrawn in 1858 by the code in that year enacted in Tennessee.*

It is contended that the promise of the state was withdrawn in 1858, by section 603 of the code of that year — not in express terms, but by necessary implication. Courts do not favor repeals by implication, and never sanction them if the two acts can stand together. The provision of the code which is deemed inconsistent with the continuance of the promise of the state directs the kind of funds which collectors shall, after that time, receive for taxes. The legislature thought fit to confer upon the people the privilege of paying their taxes in the issues of other banks that were at par. As these issues were in circulation at the time, it was doubtless thought a wise policy to allow the people to pay their taxes in them, and as long as they were at par the state could not be the loser. This policy was adopted for the convenience of the people. There are in the statute no words of negation, saying that no funds other than those specified in the section shall be received. But we are to construe the different sections of the code together in order to arrive at the meaning of the legislature. In doing this, we find that where acts of incorporation are not expressly repealed, they are, in terms, saved from repeal by section 42 of the code. As there was no attempt in the code to interfere with the charter of the Bank of Tennessee, it follows that it was saved from repeal, and, of course, that the guaranty contained in the twelfth section of the act of its incorporation was still continued. That the legislature so understood it receives additional confirmation from the consideration that this guaranty was expressly withdrawn in 1865. Why withdraw it then if it was withdrawn in 1858?

§ 1818. *No repeal of a bank charter can impair the obligation of contracts attending the notes of the bank issued before such repeal.*

The effect of the repealing act of 1865 remains to be considered. It is true the state had the right at any time to withdraw its guaranty, but it is equally true that it must be done in such manner as not to impair the obligation of its contract with the note-holders of the bank. That this repealing act operated on all the issues of the bank after its date cannot be doubted; but the question with which we have to deal is, what effect did it have on the notes of the bank issued prior to its passage? It is conceded that these plaintiffs are entitled to the relief they ask, if the defendant was obliged to receive the notes which were tendered. The tender was made in the notes of the bank, issued prior to the 6th day of May, 1861, which were in conformity to its charter, and were payable to bearer. It does not appear when the notes came to the hands of the plaintiffs—whether before or after the repealing act,—but it is a fair presumption, in the absence of any averment to the contrary, that it was after the date of that act.

§ 1819. *The presumption is that a bank having the right to issue notes for circulation issued them properly.*

It is insisted, as the bank during the rebellion was under the control of the usurping government, and was used by it for unlawful purposes, that it should have been stated that the notes tendered were the lawful issues of the bank. But it would seem the pleader had this state of things in his mind, and wished to avoid the issue it involved, for he avers that the notes were issued prior to the 6th day of May, 1861, the time when the state endeavored to sever its relations with the Union. The presumption is that the bank, before that time, issued its notes properly; and, in addition, it is stated, as we have seen, that they were issued in conformity with the twelfth section of its charter. It follows from this statement, necessarily, that they were the lawful issues of the bank. If the defendant wished to contest this point he should have answered, and not, by his pleading, admitted the truth of the petition and all legal inferences that could be drawn from it.

This case is, therefore, not embarrassed by the changed relation of the state after 1861; and the discussion of the principles which settle this case are not intended by the court to apply to the issues of this bank while under the control of the insurgents, because such a case is not before us, and it will be time enough to decide the important questions which it would present when it arises, if it ever should arise.

§ 1820. *The repealing act did not prevent any one from acquiring the notes afterwards.*

It is contended that the repealing act took from those persons who did not at the time hold the paper of the bank, the right to acquire it afterwards, and use it to discharge their debts to the state. This construction of the contract would limit the obligation to the person, and withdraw it from the paper. If, as we have endeavored to show, the guaranty attached to the paper itself, and could not be withdrawn from it, then it follows that the notes in circulation at the time of the repeal are not affected by it, and carry with them the pledge of the state to be received in payment of taxes by every *bona fide* holder.

It would seem to be unnecessary to discuss any further the principles which lie at the foundation of this case, as they were settled in *Woodruff v. Trapnall*, heretofore decided by this court. The mere statement of that case will show its similarity to this. In 1836, the state of Arkansas, in the charter of a bank (owned

and controlled by the state), declared that the notes of the institution should be received in payment of all debts due the state. Some years afterwards this provision of the charter was repealed. After its repeal, Trapnall, acting in behalf of the state, sued out an execution upon a judgment which the state had obtained against Woodruff, a defaulting treasurer. Woodruff met the demand of the writ by a tender (which was refused) of the notes of the bank, but whether he got these notes before or after the repealing act was passed did not appear. On this state of things, Woodruff, to test his right to pay his debt in the paper of the bank, applied for a writ of *mandamus* against Trapnall, which was denied him by the state court. The case was brought here, as this is, under the twenty-fifth section of the Judiciary Act, and this court held that the undertaking of the state to receive the notes of the bank constituted a contract between the state and the holders of the notes which the state was not at liberty to break; and that the tender of notes issued prior to the repealing act was good. It was also held that it made no difference whether the debtor had the notes in his possession when the repealing act was passed or not.

It will thus be seen that *Woodruff v. Trapnall* and this case, in all important features, are alike. An attempt has been made to distinguish the cases, because in the Tennessee bank trust funds were embarked in the enterprise; but if the state thought proper to use them in this manner, it took care to pledge its faith to supply any deficiency that should arise through the mismanagement of the bank. It is difficult to see how the employment of these funds made the bank any less a state institution, for it was created expressly for the benefit of the state, who had the exclusive management of it, and agreed to support it. But if we concede that the state did wrong in using these funds in banking, can that *tend* even to justify her in breaking her promise to the note-holders of the bank?

Enough has been said to show, as the result of our views, that section 28 of the charter of the Bank of Tennessee constituted a contract with the holders of the notes of the bank, and that it was not in the constitutional power of the legislature to repeal the section so as to affect the notes which at the time were in circulation. Judgment reversed, and the cause remanded, with directions to enter a judgment awarding the writ of *mandamus*.

CURTIS v. WHITNEY.

(18 Wallace, 68-72. 1871.)

ERROR to the Supreme Court of Wisconsin.

STATEMENT OF FACTS.—In 1865 Mary Curtis bought land at tax sale, and was entitled by the law as it then stood to receive a deed for it if not redeemed in three years. During that interval a law was passed requiring that notice of the tax title should be served on the persons in possession. No such notice was served in this case, but Mrs. Curtis received her deed and brought this suit to quiet her title. The decision of the court below was that her deed was void for want of the statutory notice.

Opinion by MR. JUSTICE MILLER.

Did the requirement of the statute of the 10th of April, 1867, that the holder of a certificate of tax sale should give notice to whoever might be found in possession of the land before taking a deed, impair the obligation of the contract made at the sale? It must be conceded by all who are familiar with the vast disproportion between the value of the land and the sum for which it is

usually bid off at such sales, and the frequency with which the whole proceeding is conducted to the making of the conveyance intended to pass the title without any knowledge on the part of the real owner, that the requirement is an eminently just and proper one. Nor is it one difficult to comply with, as it is only made necessary where some one is found on the land, on whom the notice can be served, and the cost of serving the notice must be paid by any party offering to redeem.

§ 1821. *Retrospective statutes do not necessarily impair the obligation of contracts.*

That a statute is not void because it is retrospective has been repeatedly held by this court, and the feature of the act of 1867, which makes it applicable to certificates already issued for tax sales, does not of itself conflict with the constitution of the United States. Nor does every statute which affects the value of a contract impair its obligation. It is one of the contingencies to which parties look now in making a large class of contracts, that they may be affected in many ways by state and national legislation. For such legislation, demanded by the public good, however it may retroact on contracts previously made, and enhance the cost and difficulty of performance, or diminish the value of such performance to the other party, there is no restraint in the federal constitution, so long as the obligation of performance remains in full force.

In the case before us the right of plaintiff to receive her deed is not taken away, nor the time when she would be entitled to it postponed. While she had a right to receive either her money or her deed at the end of three years, the owner of the land had a right to pay the money and thus prevent a conveyance. These were the coincident rights of the parties growing out of the contract by which the land was sold for taxes. The legislature, by way of giving efficacy to the right of redemption, passed a law which was just, easy to be complied with, and necessary to secure in many cases the exercise of this right. Can this be said to impair the obligation of plaintiff's contract, because it required her to give such notice as would enable the other party to exercise his rights under the contract? How does such a requirement lessen the binding efficacy of plaintiff's contract? The right to the money or the land remains, and can be enforced whenever the party gives the requisite legal notice. The authority of the legislature to frame rules by which the right of redemption may be rendered effectual cannot be questioned, and among the most appropriate and least burdensome of these is the notice required by statute.

In the case of *Jackson v. Lamphire*, 3 Pet., 290 (§§ 1845-48, *infra*), this court said: "It is within the undisputed province of state legislatures to pass recording acts by which the elder grantee shall be postponed to a younger if the prior deed is not recorded within the limited time, and the power is the same, whether the deed is dated *before* or after the recording act. Though the effect of such a law is to render the prior deed fraudulent and void against a subsequent purchaser, it is not a law impairing the obligation of contracts. Such, too, is the power to pass acts of limitations, and their effect. Reason and sound policy have led to the general adoption of laws of both descriptions, and their validity cannot be questioned." . . . "Cases may occur," says the court, "where the provisions of a law on those subjects may be so unreasonable as to amount to a denial of a right, and call for the intervention of the court; but the present is not one of them."

So we think of the case now under consideration, and we therefore affirm the judgment of the state court.

CORBIN v. BOARD OF COUNTY COMMISSIONERS OF WASHINGTON COUNTY.

(Circuit Court for Kansas: 1 McCrary, 521-528. 1890.)

Opinion by McCRARY, J.

STATEMENT OF FACTS.—1. At certain tax sales made by the authorities of Washington county, Kansas, the plaintiff bid in numerous tracts of land in that county for delinquent taxes, and, having paid the sums bid, received from the treasurer of the county certificates of sale. The plaintiff, and those under whom he claims, subsequently paid accruing taxes upon the same lands, amounting in the aggregate to a large sum. It is alleged by the plaintiff, that, for some of the lands so purchased, the county clerk, after the time for redemption had expired, refused to execute deeds, upon the ground that he had discovered that, for errors and irregularities in the sales, the said lands ought not to be conveyed. For the remainder of the lands purchased by plaintiff deeds were executed, but the complainant alleges that the sales were invalid, and that, under the statute of Kansas, to be presently mentioned, he is entitled to a return of the money paid by him, and interest, for all the lands bid in by him, whether deeded or not. The answer denies the material allegations of the petition, except as to the fact that plaintiff purchased the lands in question at tax sales. The statutory provisions to be considered are as follows: At the time of the tax sales, sections 120 and 121, Gen. Stat. 1868, were in force. These sections are as follows:

“Section 120. If the county treasurer should discover, before the sale of any land for taxes, that on the account of any irregular assessment, or from any other error, such lands ought not to be sold, he shall not offer the same for sale; and if, after any certificate shall have been granted upon such sale, the county clerk shall discover that for any error or irregularity such land ought not to be conveyed, he shall not convey the same; and the county treasurer shall, on the return of the tax certificate, refund the amount paid therefor on such sale, and all subsequent taxes and charges paid thereon by the purchaser or his assigns, out of the county treasury, with interest on the whole amount at the rate of ten per cent. per annum.

“Section 121. If, after the conveyance of any land sold for taxes, it should be discovered or adjudged that the sale was invalid, the county commissioners shall cause the money paid therefor on the sale, and all subsequent taxes and charges paid thereon by the purchaser or his assigns, to be refunded, with interest on the whole amount at the rate of ten per cent. per annum, upon the delivery of the deed to be canceled; and in all such cases, where the county treasurer shall have offered to the person entitled thereto his money as aforesaid, and such person shall refuse to receive it and cancel the deed, he shall not be entitled to receive any interest on the money so paid by him after the day of such offer and refusal, nor shall any recovery ever be had against the county on the covenants of such deed.”

These sections remained the law unchanged until 1876, when they were respectively amended as sections 145 and 146 of chapter 34, Laws of 1876, and all the old sections were repealed. Section 145 is as follows: “Section 145. If the county treasurer shall discover, before the sale of any lands for taxes, that, on account of any irregular assessment, or from any other error, such lands ought not to be sold, he shall not offer the same for sale; and if, after any certificate shall have been granted upon any sale, the county clerk shall discover that, for any error or irregularity, such land ought not to be conveyed,

he shall not convey the same. And the county treasurer shall, on the return of the tax certificate with the refusal of the county clerk indorsed thereon, refund the amount paid therefor on each sale, and all subsequent taxes and charges paid thereon by the purchaser or his assigns, out of the county treasury, with interest on the whole amount at the rate of ten per cent. per annum."

Section 146 is as follows: "Section 146. If, after the conveyance of land sold for taxes, it shall be discovered or adjudged that the sale was invalid, the county commissioners shall cause the money paid therefor on the sale, and all subsequent taxes and charges paid thereon by the purchaser or his assigns, to be refunded, with interest on the whole amount at the rate of ten per cent. per annum, upon the delivery of a *quitclaim deed from the party claiming under the tax deed, executed to such person or persons as the commissioners may direct*. In all such cases no interest shall be allowed after the person claiming under the tax deed shall have received notice that such deed has been discovered or adjudged invalid."

This remained the law until 1879, when said sections were respectively changed and repealed by chapter 40, Laws of 1879. Section 2 of that chapter is as follows: "If the county treasurer shall discover, before the sale of any lands or lots for taxes, that, on account of any irregular assessments, or from any other error, such lands ought not to be sold, he shall not offer the same for sale; and if, after any certificate shall have been granted upon any sale, *the board of county commissioners shall discover that, for any error or irregularity, such lands or lots ought not to be conveyed, they may order the county clerk not to convey the same*; and the county treasurer shall, on the return of the tax certificate with a certified copy of such order of the board of county commissioners, refund the amount paid therefor on such sale, and such of the subsequent taxes and charges paid thereon by the purchaser or his assigns as may be so ordered by the board of county commissioners, out of the county treasury, with interest on the amount so ordered refunded at the rate of ten per cent. per annum; *and in all cases in which actions shall be now pending, or may be hereafter commenced, the refusal of the county clerk to convey any lands or lots indorsed on any tax certificate shall not be deemed or held to constitute prima facie evidence of any irregular assessment or other error for which such lands or lots ought not to be conveyed, nor shall any judgment be recovered against such county, or the board of county commissioners thereof, or liability held to attach therefor, under or by virtue of the provisions of said section 145, as theretofore and hereafter existing, or of section 120, chapter 107, General Statutes, except in cases in which the board of county commissioners shall have made an order for the refunding thereof, and then only for the amount specified in the order for such refunding, and in all cases in which invalid taxes shall be included in such certificate, and only to the extent of such invalid taxes, with ten per cent. interest thereon.*"

Section 3 is as follows: "If, after the conveyance of lands or lots sold for taxes, it shall be discovered or adjudged that the sale was invalid, the board of county commissioners *may, by proper order*, cause the money paid therefor on the sale, together with *such* subsequent taxes and charges paid thereon by the purchaser or his assigns *as they may judge proper*, to be refunded, with interest on such amount at the rate of ten per cent. per annum, upon the delivery of a quitclaim deed from the party holding under the tax deed, executed to such person or persons as the commissioners may direct *in such order*. In all such cases no interest shall be allowed after the person claiming under the tax

deed shall have received notice that such tax deed has been discovered or adjudged invalid."

§ 1822. *A law providing for a repayment of purchase money where a tax sale proves to be invalid is a contract.*

Upon these facts the defendant moves for judgment on the pleadings. If the last named act (act of 1879) is valid and effectual for the purpose of depriving plaintiff of the remedy given by the pre-existing acts, then the motion must be sustained, otherwise the case must be heard upon the proofs. The decision of the present case depends upon the question whether the acts of 1868 and 1876, and what was done under them, amounted to a contract, the obligation of which was impaired by the act of 1879. The first and second acts are substantially alike. They differ only as to details, and not in any substantial matter. The former was in force at the time of the tax sales, and the latter at the expiration of the time for redemption. They each provide for refunding to the purchaser at the tax sale the money paid by him, in all cases where it is discovered, before a deed is made, that, for any error or irregularity, the land ought not to be conveyed; and in all cases where, after a deed is made, it is discovered that the sale was invalid. It is distinctly provided that in the former case the county treasurer "shall refund the amount paid therefor on such sale, and all subsequent taxes and charges paid thereon by the purchaser or his assigns, out of the county treasury, with interest on the whole amount at the rate of ten per cent. per annum;" and, in cases of the latter kind, that "the county commissioners shall cause the money paid therefor on the sale, and all subsequent taxes and charges paid thereon by the purchaser or his assigns, to be refunded, with interest on the whole amount at the rate of ten per cent. per annum," etc.

These provisions are found in the revenue law of the state. Their purpose is manifest. The state is largely interested in the prompt collection of its revenue. Where the owner of property fails to pay the taxes due thereon, it becomes a matter of interest to the state to induce others to come forward and make the payment, taking a lien upon the property, which, in default of redemption, may ripen into a title. But tax titles are very uncertain, and investments in them are often precarious, because of errors and irregularities which may not be known to the purchaser, and which may vitiate the sale. In order, therefore, to induce capitalists to come forward and invest their means in such manner as to replenish the treasury, the state of Kansas, by the acts of 1868 and 1876, said to all such, "If you will bid at tax sales and pay your money, the amount invested, with interest, shall be refunded from the county treasury in case the sale is afterwards discovered to be irregular or void." This legislation did not of itself amount to a contract, but I think it did amount to a proposition on the part of the state, which, when accepted and acted upon, became a contract binding upon the state, as well as upon the other party. In the present case, the proposition embodied in the statute was accepted by the plaintiff. Upon the faith of it he invested his money.

I know of no element of contract that is wanting. There was a stipulation, by the agreement of minds, upon a sufficient consideration, that the plaintiff, having bid off the lands at tax sale, and paid his money therefor, should be entitled to receive his money and interest from the county treasury, if, by reason of irregularity or invalidity, the sale could not be consummated. *Far-nington v. Tennessee*, 95 U. S., 679 (§§ 2276-84, *infra*). I am of the opinion,

therefore, that the acts of 1868 and 1876, and what was done under them, amounted to a contract, within the meaning of the contract clause of the constitution of the United States. Constitution, art. 1, § 10.

§ 1823. — *and a subsequent law, making the money payable at the discretion of certain officers, violates the obligation of such contract.*

It only remains to be determined whether the act of 1879, passed after this suit was brought, impairs the obligation of the pre-existing contract. Upon this point there can scarcely be a doubt. The last act repeals the former, and substitutes for it a provision which, if valid, absolutely deprives the plaintiff of his vested rights. By the law under which plaintiff invested his money, he was to have a return of his money and interest if the sale was found to be irregular or invalid. By the act of 1879 he has no right to the return of his money in any case, unless the board of supervisors shall see proper to so order. It requires no argument to show that, where a valid debt exists under a contract, an act of the legislature, declaring that it shall be paid only at the option of the debtor, is a void act.

§ 1824. *A state may, by legislative enactment, make a binding contract.*

The general doctrine that a state may, by legislative enactment, enter into a binding contract, the obligation of which cannot be impaired by subsequent legislation, is well settled. *Fletcher v. Peck*, 6 Cranch, 87 (§§ 1805-12, *supra*); *New Jersey v. Wilson*, 7 Cranch, 164, 166 (§ 2295, *infra*); *Dartmouth College Case*, 4 Wheat., 518 (§§ 2099-2117, *infra*); *State Bank of Ohio v. Knoop*, 16 How., 369 (§§ 2246-53, *infra*); *Davis v. Gray*, 16 Wall., 203; *Tennessee v. Sneed*, 96 U. S., 69 (§§ 1900-1902, *infra*); *Keith v. Clark*, 97 U. S., 454. In *Edwards v. Kearzey*, 96 U. S., 595 (§§ 1664-71, *supra*), it was held that the remedy subsisting in a state when and where the contract is made, and is to be performed, is a part of the obligation; and any subsequent law of the state, which so affects that remedy as substantially to impair and lessen the value of the contract, is forbidden by the constitution of the United States, and therefore void. The act of 1879, now under consideration, certainly impairs, substantially, if it does not absolutely destroy, the remedy given by the previous law, and it must, therefore, be held to be void in so far as it purports to apply to pending cases and to affect existing vested rights. It is competent for the legislature to modify, but not to destroy or impair the remedy. *Tennessee v. Sneed*, *supra*.

§ 1825. *A statute that is valid, being operative upon the remedy and a proper exercise of judicial power.*

2. Section 146, ch. 34, Laws 1876, quoted above, provides that if, after the conveyance of land sold for taxes, it shall be discovered or adjudged that the sale was invalid, the county commissioners shall cause the money paid therefor on the sale, and all subsequent taxes, etc., to be refunded, etc., "upon the delivery of a quitclaim deed from the party claiming under the tax deed, executed to such person or persons as the commissioners may direct." This provision, although enacted after the tax sales, is a reasonable and proper exercise of the power of the general assembly to modify without impairing the remedy; and before plaintiff can recover upon so much of his claim as is based upon sales and deeds executed, he must allege and show that he offered to quitclaim "to such persons as the commissioners might direct," and that the offer was refused. The allegation in the petition that plaintiff offered to quitclaim to defendants is not sufficient. Plaintiff may have leave to amend in this respect.

§ 1826. *After refusal to make deeds, only proof of validity of sales can defeat purchaser's claim to return of money.*

3. It is insisted by defendants' counsel that, after the refusal of the county clerk to make deeds as alleged in the first cause of action, he reconsidered his action and tendered in writing such deeds. The clerk has no power to reconsider his action in such a case, unless it can be shown that it was taken under a mistake. If the defendants can now show that the sales were regular and valid, and that the refusal of the clerk was in ignorance of the facts, then the plaintiff cannot recover, but must accept the deeds. If the clerk refused to make deeds, as alleged, then the burden is upon the defendants to show the validity and regularity of the sales. The motion for judgment for defendant on the pleading is overruled.

BUTLER v. PENNSYLVANIA.

(10 Howard, 402-419. 1850.)

Opinion by MR. JUSTICE DANIEL.

STATEMENT OF FACTS.—This is a writ of error to the supreme court of the state of Pennsylvania, under the twenty-fifth section of the Judiciary Act of 1789 (1 Stats. at Large, 85), for the purpose of revising a judgment rendered by the court above mentioned, at the May term of that court, in the year 1848, against the plaintiffs in error, in a certain action of *assumpsit* instituted against those plaintiffs on behalf of the commonwealth of Pennsylvania.

By authority of a statute of Pennsylvania, of the 28th of January, 1836, the plaintiffs in error were, by the governor of the state, appointed to the place of canal commissioners; and by the same statute the appointment was directed to be made annually on the 1st day of February, and the compensation of the commissioners regulated at \$4 per diem each. Under this law, the plaintiffs in error, in virtue of an appointment of the 1st of February, 1843, accepted and took upon themselves the office and duties of canal commissioners. By a subsequent statute of the 18th of April, 1843, the appointment of canal commissioners was transferred from the governor to the people, upon election by the latter, and the per diem allowance to be made to all the commissioners was by this law reduced from four to three dollars, this reduction to take effect from the passage of the act of April 18, 1843, which, as to the rest of its provisions, went into operation on the second Tuesday of January following its passage, that is, on the second Tuesday of January in the year 1844. Upon a settlement of their account as canal commissioners, made before the auditor-general of the state, the plaintiffs in error, out of money of the state then in their hands, claimed the right to retain compensation for their services at the rate of \$4 per diem, for the full term of twelve months from the date of their appointment by the governor; whilst for the state, on the other hand, it was refused to allow that rate of compensation beyond the 18th of April, 1843, the period of time at which, by the new law, the emoluments of the appointment were changed. In consequence of this difference, and of the refusal of the plaintiffs in error to pay over the balance appearing against them on the account as stated by the auditor-general, an action was instituted against them in the name of the state, in the court of common pleas of Dauphin county, and a judgment obtained for that balance. This judgment having been carried by writ of error before the supreme court, was there affirmed, and from that tribunal, as the highest in the state, this cause is brought hither for revision.

The grounds on which this court is asked to interpose between the judgment

on behalf of the state and the plaintiffs in error are these: That the appointment of these plaintiffs by the governor of Pennsylvania, under the law of January 28, 1836, was a positive obligation or contract on the part of the state to employ the plaintiffs for the entire period of one year, at the stipulated rate of \$4 per diem; and that the change in the tenure of office and in the rate of compensation made by the law of April 18, 1843, within the space of one year from the 1st of February, 1843, was a violation of this contract, and therefore an infraction of the tenth section of the first article of the constitution of the United States. In order to determine with accuracy whether this case is within the just scope of the constitutional provision which has thus been invoked, it is proper carefully to consider the character and relative positions of the parties to this controversy, and the nature and objects of the transaction which it is sought to draw within the influence of that provision.

§ 1827. *The contracts referred to in article 1, section 10, of the constitution are those by which perfect rights, certain definite, fixed, private rights of property, are vested.*

The high conservative power of the federal government here appealed to is one necessarily involving inquiries of the most delicate character. The states of this Union, consistently with their original sovereign capacity, could recognize no power to control either their rights or obligations, beyond their own sense of duty or the dictates of natural or national law. When, therefore, they have delegated to a common arbiter amongst them the power to question or to countervail their own acts or their own discretion in conceded instances, such instances should fall within the fair and unequivocal limits of the concession made. Accordingly, it has been repeatedly said by this court, that to pronounce a law of one of the sovereign states of this Union to be a violation of the constitution is a solemn function, demanding the gravest and most deliberate consideration; and that a law of one of the states should never be so denominated, if it can upon any other principle be correctly explained. Indeed, it would seem that, if there could be any course of proceeding more than all others calculated to excite dissatisfaction, to awaken a natural jealousy on the part of the states, and to estrange them from the federal government, it would be the practice, for slight and insufficient causes, of calling on those states to justify, before tribunals in some sense foreign to themselves, their acts of general legislation. And the extreme of such an abuse would appear to exist in the arraignment of their control over officers and subordinates in the regulation of their internal and exclusive polity; and over the modes and extent in which that polity should be varied to meet the exigencies of their peculiar condition. Such an abuse would prevent all action in the state governments, or refer the modes and details of their action to the tribunals and authorities of the federal government. These surely could never have been the legitimate purposes of the federal constitution. The contracts designed to be protected by the tenth section of the first article of that instrument are contracts by which perfect rights, certain definite, fixed private rights of property, are vested. These are clearly distinguishable from measures or engagements adopted or undertaken by the body politic or state government for the benefit of all, and from the necessity of the case, and according to universal understanding, to be varied or discontinued as the public good shall require.

§ 1828. *There is no contract in the selection and appointment of officers and agents.*

The selection of officers, who are nothing more than agents for the effectuat-

ing of such public purposes, is matter of public convenience or necessity, and so too are the periods for the appointment of such agents; but neither the one nor the other of these arrangements can constitute any obligation to continue such agents, or to reappoint them, after the measures which brought them into being shall have been found useless, shall have been fulfilled, or shall have been abrogated as even detrimental to the well-being of the public. The promised compensation for services actually performed and accepted, during the continuance of the particular agency, may undoubtedly be claimed, both upon principles of compact and of equity; but to insist beyond this on the perpetuation of a public policy either useless or detrimental, and upon a reward for acts neither desired nor performed, would appear to be reconcilable with neither common justice nor common sense. The establishment of such a principle would arrest necessarily everything like progress or improvement in government; or if changes should be ventured upon, the government would have to become one great pension establishment on which to quarter a host of sinecures. It would especially be difficult, if not impracticable, in this view, ever to remodel the organic law of a state, as constitutional ordinances must be of higher authority and more immutable than common legislative enactments, and there could not exist conflicting constitutional ordinances under one and the same system. It follows, then, upon principle, that in every perfect or competent government, there must exist a general power to enact and to repeal laws; and to create, and change or discontinue, the agents designated for the execution of those laws. Such a power is indispensable for the preservation of the body politic, and for the safety of the individuals of the community. It is true, that this power, or the extent of its exercise, may be controlled by the higher organic law or constitution of the state, as is the case in some instances in the state constitutions, and as is exemplified in the provision of the federal constitution relied on in this case by the plaintiffs in error, and in some other clauses of the same instrument; but where no such restriction is imposed, the power must rest in the discretion of the government alone. The constitution of Pennsylvania contains no limit upon the discretion of the legislature, either in the augmentation or diminution of salaries, with the exceptions of those of the governor, the judges of the supreme court, and the presidents of the several courts of common pleas. The salaries of these officers cannot, under that constitution, be diminished during their continuance in office. Those of all other officers in the state are dependent upon legislative discretion. We have already shown that the appointment to and the tenure of an office created for the public use, and the regulation of the salary affixed to such an office, do not fall within the meaning of the section of the constitution relied on by the plaintiffs in error; do not come within the import of the term contracts, or, in other words, the vested, private personal rights thereby intended to be protected. They are functions appropriate to that class of powers and obligations by which governments are enabled, and are called upon, to foster and promote the general good; functions, therefore, which governments cannot be presumed to have surrendered, if, indeed, they can, under any circumstances, be justified in surrendering them. This doctrine is in strictest accordance with the rulings of this court in many instances, from amongst which may be cited its reasoning in the important and leading case of *The Charles River Bridge v. Warren Bridge*, in 11 Pet., 420 (§§ 2058-82, *infra*), and in the case of *State of Maryland v. Baltimore & Ohio R. Co.*, in 3 How., 534, to which might be added other decisions upon claims to monopoly, as ferry privileges, in restraint of legislative

action for public improvement and accommodation. In illustration of the doctrine here laid down, may also be cited the very elaborate opinion of the supreme court of New York, in the case of *The People v. Morris*, reported in 13 Wend., 325.

§ 1829. *A law changing the compensation and tenure of an office does not impair the obligation of a contract.*

The precise question before us appears to have been one of familiar practice in the state of Pennsylvania, so familiar, indeed, and so long acquiesced in, as to render its agitation at this day somewhat a subject of surprise; and the reasoning of the supreme court upon it, in the case of *Commonwealth v. Bacon, & Serg. & Rawle*, 322, is at once so clear and compendious, as to render it well worthy of quotation here. "These services," says Duncan, justice, in delivering the opinion, "rendered by public officers, do not, in this particular, partake of the nature of contracts, nor have they the remotest affinity thereto. As to a stipulated allowance, that allowance, whether annual, per diem or particular fees for particular services, depends on the will of the law-makers; and this, whether it be the legislature of the state, or a municipal body empowered to make laws for the government of a corporation. This has been the universal construction, and the constitution puts this question at rest in the provision for the salary of the governor and judges of the supreme court, and of the presidents of the courts of common pleas. The governor is to receive, at stated times, for his services, a compensation which shall neither be increased nor diminished during the period for which he shall have been elected. The judges and presidents shall, at stated times, receive for their services an adequate compensation, to be fixed by law, which shall not be diminished during their continuance in office. These provisions are borrowed from the constitution of the United States. It is apparent that the compensation of the governor and judges is a matter of constitutional provision,—that of all other officers is left open to the legislature. The allowances, the compensation, the salary, the fees of all other officers and members of the legislature, depend on the legislature, who can and who do change them, from time to time, as they conceive just and right."

So, in the case of *Commonwealth v. Mann*, 5 Watts & Serg., 418, the court say: "That if the salaries of judges and their title to office could be put on the ground of contract, then a most grievous wrong has been done them by the people, by the reduction of a tenure during good behavior to a tenure for a term of years. The point that it is a contract, or partakes of the nature of a contract, will not bear the test of examination." And again, in the case of *Barker v. The City of Pittsburg*, the court declare it as the law: "That there is no contract, express or implied, for the permanence of a salary, is shown by the constitutional provision for the permanence of the salaries of the governor and judges as exceptions." 4 Barr (Penn. St.), 51. We consider these decisions of the state court as having correctly expounded the law of the question involved in the case before us, as being concurrent with the doctrines heretofore ruled and still approved by this court,—concurrent, too, with the decision of the supreme court of Pennsylvania now under review, which decision we hereby adjudge and order to be affirmed.

MR. JUSTICE M'LEAN held, that as there was no contract to be impaired the court had no jurisdiction, and that the proper entry, therefore, would be to dismiss the writ.

HALL v. WISCONSIN.

(18 Otto, 5-11. 1880.)

Opinion by MR. JUSTICE SWAYNE.

STATEMENT OF FACTS.—This is a writ of error to the supreme court of Wisconsin. The case we are called on to consider is thus disclosed in the record: By an act of the legislature, entitled “An act to provide for a geological, mineralogical and agricultural survey of the state,” approved March 3, 1857, James Hall, of the state of New York, the plaintiff in error, and Ezra Carr and Edward Daniels, of Wisconsin, were appointed “commissioners” to make the survey. Their duties were specifically defined, and were all of a scientific character. They were required to distribute the functions of their work by agreement among themselves, and to employ such assistants as a majority of them might deem necessary. The governor was required “to make a written contract with each commissioner” for the performance of his allotted work, and “the compensation therefor, including the charge of each commissioner;” and it was declared that “such contract shall expressly provide that the compensation to such commissioners shall be at a certain rate per annum, to be agreed upon, and not exceeding the rate of \$2,000 per annum, and that payment will be made only for such part of the year as such commissioner may actually be engaged in the discharge of his duty as such commissioner.” In case of a vacancy occurring in the commission, the governor was empowered to fill it, and he was authorized to “remove any member for incompetency or neglect of duty.”

To carry out the provisions of the act, the sum of \$6,000 per annum for six years was appropriated, “to be paid to the persons entitled to receive the same.” By an act of the legislature of April 2, 1860, Hall was made the principal of the commission, and was vested with the general supervision and control of the survey. He was required to contract with J. D. Whitney and with Charles Whittlesey for the completion within the year of their respective surveys. To carry into effect these provisions, the governor was authorized to draw such portion of the original appropriation not drawn previous to the 29th of May, 1858, as might be necessary for that purpose; the residue to be otherwise used as directed. By a subsequent act of March 21, 1862, both the acts before mentioned were repealed without qualification.

On the 29th of May, 1858, Hall entered into a contract with the governor, whereby it was stipulated on his part that he should perform the duties therein mentioned touching the survey, “this contract to continue till the 3d day of March, 1863, unless the said Hall should be removed for incompetency or neglect of duty, . . . or unless a vacancy shall occur in his office by his own act or default.” On the part of the state it was stipulated “that the said Hall shall receive for his compensation and expenses, including the expense of his department of said survey, at the rate of \$2,000 per annum. . . . *Provided*, that for such time as said Hall or his assistants shall not be engaged in the prosecution of his duties, according to the terms of said act and of this contract, deduction shall be made, *pro rata*, from the sum of his annual compensation and expenses.”

Hall brought this action upon the contract. The declaration avers that immediately after the execution of the contract he entered upon the performance of the duties thereby enjoined upon him, and continued in their faithful performance until the time specified in the contract for its expiration, to wit, the

3d of March, 1863; that he was not removed by the governor for incompetency or neglect, nor was any complaint ever made by the governor against him; that he never at any time, directly or indirectly, assented to the repeal of the acts of 1857 and 1860; and that thereafter he continued in the performance of his labors the same as before, and that for the year ending March 3, 1863, he devoted his whole time and skill, without cessation, to the work. He avers further that for his services performed prior to March 3, 1862, he was fully paid, but that for the year ending March 3, 1863, he had received nothing; that payment was demanded and refused on the 3d of December, 1863, and that the defendant is, therefore, justly indebted to him in the sum of \$2,000, with interest from the date last mentioned. He avers, finally, that on the 30th of January, 1875, he presented his claim to the legislature by a proper memorial, and that its allowance was refused.

The state demurred upon two grounds: 1. That the complaint did not show facts sufficient to constitute a cause of action. 2. That it appeared upon the face of the complaint that the cause of action did not accrue within six years before the commencement of the action.

In support of the first objection it was insisted that the employment of the plaintiff was an office, and that the legislature had therefore the right to abolish it at pleasure. For the plaintiff it was maintained that there was a contract, and that the repealing act impaired its obligation in violation of the contract clause of the constitution of the United States. The court sustained the demurrer upon the first ground, and, the plaintiff declining to amend, dismissed his petition. The opinion of the court is limited to the first point, and ours will be confined to that subject. The whole case resolves itself into the issue thus raised by the parties. No question is made as to the suability of the state. The proceeding is authorized by a local statute. The question raised by the record is within our jurisdiction. In the exercise of that jurisdiction in such cases this court is unfettered by the authority of state adjudications. It acts independently, and is governed by its own views. *Township of Pine Grove v. Talcott*, 19 Wall., 666.

§ 1830. *Distinction between an office and a contract.*

The question to be considered was before us in *United States v. Hartwell*, 6 id., 385. It was there said that "an office is a public station or employment conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument and duties. . . . A government office is different from a government contract. The latter, from its nature, is necessarily limited in its duration and specific in its objects. The terms agreed upon define the rights and obligations of both parties, and neither may depart from them without the assent of the other." In *United States v. Maurice*, 2 Brock., 96, Mr. Chief Justice Marshall said: "Although an office is an employment, it does not follow that every employment is an office. A man may certainly be employed under a contract, express or implied, to perform a service without becoming an officer."

The case before us comes within the definition we have taken from *United States v. Hartwell*, *supra*. The statute under which the governor acted was explicit, that he should "make a written contract with each of the commissioners aforesaid, expressly stipulating and setting forth the nature and extent of the services to be rendered by each, and the compensation therefor," and that "such contract" should expressly provide that the compensation of each commissioner should be at a certain rate per annum, to be agreed upon,

and not exceeding \$2,000 per annum for the time such commissioner may be actually engaged. The action of the governor conformed to this view. The instrument executed pursuant to the statute recites that it is an "agreement" between the governor as one party, and Hall, Carr and Randall, the commissioners, as the other. They severally agreed to do what the statute contemplated, and he agreed to pay all that it permitted. The names and seals of the parties were affixed to the agreement, and its execution was attested by two subscribing witnesses, as in other cases of contract.

Where an office is created, the law usually fixes the compensation, prescribes its duties, and requires that the appointee shall give a bond with sureties for the faithful performance of the service required. To do all this, if the employment were an office, by a contract with the officer and without his bond, would, to say the least, be a singular anomaly. The acts of 1857 and 1860 both speak of Hall as "of Albany, N. Y." He was not, therefore, a citizen or a resident of the state of Wisconsin. It is well settled in Wisconsin that such a person cannot be a public officer of that state. *State v. Smith*, 14 Wis., 497; *State v. Murray*, 28 id., 96. In *United States v. Hatch*, the supreme court of Wisconsin decided that the term "civil officers" as used in the organic law (act of congress of April 20, 1836) embraces only those officers in whom a portion of the sovereignty is vested, or to whom the enforcement of municipal regulations or the control of the general interests of society is confided, and does not include such officers as canal commissioners. 1 Pinn. (Wis.), 182. In *Butler v. The Regents of University*, 32 Wis., 124, the same court held, without dissent, that a professor in the state university, appointed for a stated term with a fixed salary, was not a public officer in such a sense as prevented his employment from creating a contract relation between himself and the regents. It is hard to distinguish that case in principle from the one before us.

§ 1831. *An agreement made in pursuance of a statute between the governor of a state and an individual is a contract, and not an office conferred on the latter.*

In a sound view of the subject it seems to us that the legal position of the plaintiff in error was not materially different from that of parties who, pursuant to law, enter into stipulations limited in point of time, with a state, for the erection, alteration or repair of public buildings, or to supply the officers or employees who occupy them with fuel, light, stationery and other things necessary for the public service. The same reasoning is applicable to the countless employees in the same way, under the national government. It would be a novel and startling doctrine to all these classes of persons that the government might discard them at pleasure, because their respective employments were public offices, and hence without the protection of contract rights. It is not to be supposed that the plaintiff in error would have turned his back upon like employment, actual or potential, elsewhere, and have stipulated as he did to serve the state of Wisconsin for the period named, if the idea had been present to his mind that the state had the reserved power to break the relation between them whenever it might choose to do so. Nor is there anything tending to show that those who acted in behalf of the state had any such view at that time. All the facts disclosed point to the opposite conclusion as to both parties.

§ 1832. *Power to abolish an office.*

Undoubtedly, as a general proposition, a state may abolish any public office created by a public law (*Newton v. Commissioners*, 100 U. S., 559; §§ 1799-

1804, *supra*), but even with respect to those offices the circumstances may be such as to create an exception. In *Dartmouth College v. Woodward*, Mr. Justice Story said: "It is admitted that the state legislatures have power to enlarge, repeal and limit the authorities of public officers in their official capacities, in all cases where the constitutions of the states respectively do not prohibit them; and this, among others, for the very reason that there is no express or implied contract that they shall always, during their continuance in office, exercise such authorities. . . . But when the legislature makes a contract with a public officer, as in case of a stipulated salary for his services during a limited period, this, during the limited period, is just as much a contract, within the purview of the constitutional prohibition, as a like contract would be between two private citizens." 4 Wheat., 518, 694 (§§ 2099–2117, *infra*). When a state descends from the plane of its sovereignty and contracts with private persons, it is regarded *pro hac vice* as a private person itself, and is bound accordingly. *Davis v. Gray*, 16 Wall., 203. The general government has no powers but such as are given to it expressly or by implication. The states and their legislatures have all such as have not been surrendered, or prohibited to them. *Gilman v. Philadelphia*, 3 Wall., 713 (§§ 1164–70, *supra*). And see, also, 2 *Greenleaf's Cruise*, 67.

That the laws under which the governor acted, if valid, gave him the power to do all he did is not denied. We will not, therefore, dwell upon that point. The validity of those laws is too clear to admit of doubt. It would be a waste of time to discuss the subject. We are of the opinion that the supreme court of the state erred in the judgment given. It will, therefore, be reversed, and the case remanded for further proceedings in conformity with this opinion.

LEAGUE v. DE YOUNG.

(11 Howard, 185–204. 1850.)

ERROR to the Supreme Court of Texas.

Opinion by MR. JUSTICE GRIER.

STATEMENT OF FACTS.—A brief statement of the history of this case will be necessary to a correct apprehension of the points involved.

By the colonization laws of Mexico in force in the state of Texas before their revolution, every married man who became a settler or colonist was entitled to a square league of land. In 1835, when Texas declared her independence, the faith of the republic was pledged that all who would perform the duties of citizens should receive the benefit of this law; accordingly, in the constitution of the new republic, adopted on the 17th of March, 1836, it was provided that all white persons "residing in Texas on the day of the declaration of independence should be considered citizens of the republic, and if they had not previously received land under the colonization laws, should be entitled, every head of a family, to one league and labor of land," etc. In 1837, December 14, an act of the congress of Texas was passed, establishing a land office, and authorizing the appointment of certain commissioners with power to grant certificates of claims to land to all persons who should make proof that they were entitled to them. Immense numbers of these certificates were soon put in circulation, either forged or fraudulently obtained, which, if confirmed by surveys and patents, would soon have absorbed all the vacant land in the republic. To guard against such impositions, an act was passed on the 29th of January, 1840, entitled "An act to detect fraudulent certificates," by which a new board of

commissioners was appointed "to inspect the board of land commissioners of each county, and ascertain by satisfactory testimony what certificates were genuine and legal." All others not so reported were forbidden to be surveyed or patented. This was followed on the 4th of February, 1841, by a supplement, in which persons holding certificates not reported genuine and legal by the board of commissioners were permitted to enter suit against the government, and have a trial by jury to establish the genuineness and validity of their certificates; and if found valid, and so certified by the court, the claimant should be entitled to a survey and patent.

In 1843, a statute of limitation was passed, requiring all suits to establish certificates and claims to be instituted before the 1st day of January, 1844. Thus it appears that after the 1st of January, 1844, all claimants of these head-rights, under the constitution of the republic and its land law of 1837, were barred, and their certificates of no validity whatever, unless suit has been brought and their genuineness established in a court of justice; and this continued to be the case, till the adoption of the new constitution, previous to the admission of Texas as a state of the Union, in 1845 (5 Stats. at Large, 797).

The eleventh article of that constitution provided as follows: "Section 1. All certificates for headright claims, issued to fictitious persons, or which were forged, and all locations and surveys thereon, are, and the same were, null and void from the beginning. Section 2. The district courts shall be opened until the 1st day of July, 1847, for the establishment of certificates for head-rights not recommended by the commissioners appointed under the act to detect fraudulent land certificates, and to provide for issuing patents to legal claimants; and the parties suing shall produce the like proof, and be subject to the requisitions, which were necessary, and were prescribed by law to sustain the original applications for said certificates; and all certificates above referred to, not established or sued upon before the period limited, shall be barred, and the said certificates, and all locations and surveys thereon, shall be forever null and void; and all relocations made on such surveys shall not be disturbed until the certificates are established as above directed."

This is a succinct history of the legislation complained of by the plaintiff. He instituted this action in the district court of the state of Texas for the county of Galveston. It is a bill or petition for a *mandamus* to the defendants (who are the surveyor and the deputy surveyor of the district), commanding them to make a survey of a certain certificate granted on the 20th of June, 1838, by the land commissioners of the county of San Augustine to Colin T. McRea, for one league and labor of land, etc. The plaintiff claimed to be the assignee of this certificate. The defendants alleged in their answer that they were forbidden by law to survey this certificate, as it had not been returned as genuine and legal by the commissioners under the act of the 29th of January, 1840, nor had any suit been brought to establish its genuineness before the 1st day of July, 1847, according to the provisions of the constitution. The court refused to grant the *mandamus*; and on writ of error to the supreme court of Texas, their judgment was affirmed. To the judgment of the supreme court of the state this writ of error has been prosecuted, under the twenty-fifth section of the Judiciary Act. 1 Stats. at Large, 85.

The sum of the argument on which the plaintiff founds his claim to our interference seems to be that the republic of Texas was under obligation to make these grants of land. That all grants made by the land commissioners under the act of 1837 were in their nature judicial decisions, and, whether fair or

fraudulent, their validity could never after be inquired into. That such certificate constituted a perfect right to the quantity of land awarded, and all legislation of the republic of Texas, appointing new tribunals to examine their genuineness and legality, or to limit the time within which the holder or assignee of a certificate may demand a survey and patent, is void because it impairs the obligation of contracts; and the eleventh section of the constitution of the state of Texas is void for the same reason.

If it were necessary for this court to consider these arguments it would be a sufficient answer to say: 1. That the certificates are not in the nature of judicial decisions vesting title in the holders, whether forged or fraudulent. 2. If they were judicial decisions, a state may grant new trials and make new tribunals of review in order to detect fraudulent grants or reverse fraudulent judgments, without impairing the obligation of any contract.

§ 1833. *Judgments obtained by fraud are void and confer no title.*

3. Judgments as well as grants obtained by fraud or collusion are void and confer no vested title; and a state may justly require those who claim that their grants are not of this character to make proof of their genuineness in some proper tribunal before they can be entitled to a survey or patent under them, and may limit the time within which suits may be instituted. The United States have pursued this course with regard to French and Spanish grants, and it has never been alleged that they thereby impaired their contract (contained in the treaty) to protect valid grants.

4. The eleventh article of the constitution of the state of Texas avoids none but forged and fraudulent certificates, and extends the time within which valid ones may be established by suits against the state, and therefore annuls no vested rights and impairs the obligation of no contract, but, on the contrary, confers a right which had been lost and forfeited by the laches of the party.

§ 1834. *Laws of Texas, passed before her admission into the Union, are not within the inhibition against laws impairing the obligation of contracts. (a)*

5. And lastly, if the congress of Texas had abolished all these certificates, whether fraudulent or genuine; or if the people of Texas had done the same thing by their constitution adopted before their admission as a state of the Union, their right to do so could not be questioned by this court, under any power conferred upon them by the twenty-fifth section of the Judiciary Act. There is no allegation that the legislature of the state of Texas has passed any law impairing the obligation of contracts, or affecting vested titles guarantied by the treaty of union, since that state has been admitted as one of the states of this Union. The constitution of the United States was made by and for the protection of the people of the United States. The restraints imposed by that instrument upon the legislative powers of the several states could affect them only after they became states of the Union, under the provisions of the constitution, and had consented to be bound by it. It surely needs no argument to show that the validity of the legislation of a foreign state cannot be tested by the constitution of the United States, or that the twenty-fifth section of the Judiciary Act confers no power on this court to annul their laws, however unjust or tyrannical. How far the people of the state of Texas are bound to acknowledge contracts or titles repudiated by the late republic, is a question to be decided by their own tribunals, and with which this court has no right to interfere under any power granted to them by the constitution and acts of congress.

The judgment of the supreme court of Texas is, therefore, affirmed.

LIVINGSTON v. MOORE.

(7 Peters, 469-553. 1833.)

STATEMENT OF FACTS.—Plaintiffs, claiming as heirs of John Nicholson, who died seized, brought ejectment in the circuit court of the United States for the eastern district of Pennsylvania, against defendants, who claimed under a sale made by the state of Pennsylvania to satisfy a debt due her.

Opinion by MR. JUSTICE JOHNSON.

This case comes up by writ of error from the circuit court of the United States for Pennsylvania, in which the plaintiffs here were plaintiffs there. The plaintiffs make title as heirs of John Nicholson, and the defendants as purchasers under certain commissioners, constituted by a law of that state for the purpose of selling the landed estate of John Nicholson, in satisfaction of certain liens which the state asserted to hold on his lands. The plaintiffs controvert the validity of that sale: 1. As violating the constitution of Pennsylvania. 2. As violating the constitution of the United States. 3. As inconsistent with the principles of private rights and natural justice, and therefore void, though not to be brought within the description of a violation of any constitutional stipulation.

1. To maintain the argument upon which the counsel for plaintiffs rely, to establish the unconstitutional character of the acts under which the sale was made to defendants, the plaintiffs' counsel commenced with an effort to remove out of his way the liens to satisfy which the legislature professes to pass the acts authorizing the same. It appears from the record that at the time of passing the acts which constituted this board of commissioners, to wit, in 1806 and 1807, the state claimed to hold four liens upon the lands of John Nicholson. 1. A judgment for special damages, amounting to £4,208 8s., entered December 18, 1795. 2. A settled account of March 3, 1796, for \$58,429.24, afterwards reduced to \$51,209.22. 3. Another settled account of December 20, 1796, for \$63,727.86. And, 4. A judgment confessed and entered March 21, 1797, for \$110,390, with certain special matter attached to the confession, wholly immaterial to the present controversy. The evidence of dates and circumstances might seem to lead to the opinion that the first judgment, or the consideration of it, was incorporated into the settlements, and that the judgment of 1797 covered the whole. But of this there is no sufficient evidence; and the several liens must, on the facts in proof, be considered as they are exhibited on the record, as substantive and independent.

By a law of Pennsylvania of February 15, 1785, settlements made by the comptroller, with certain prescribed formalities, are declared to be liens upon the real estate of the debtor, "in the same manner as if judgment had been given in favor of the commonwealth against such person for such debt in the supreme court." A right of appeal is given if the debtor is dissatisfied, with injunctions that the court shall give interest for the delay, if the appeal is not sustained; but unless such appeal is made and judgment against the debtor, there is no provision in the law for enforcing satisfaction of the lien by sale or otherwise. It is made to be a dead weight upon the hands of both debtor and creditor, without the means of relieving the one or raising satisfaction for the other.

§ 1835. *When this court finds principles distinctly settled by adjudications of the state courts in regard to state laws, it has no right to question or deviate from them.*

A great proportion of the argument for plaintiffs, both here and below, was

devoted to the effort to prove that the two settlements enumerated were not subsisting liens at the time of passing the two acts of 1806 and 1807, under which the sale was made to the defendants. But from this, as a subject of adjudication, we feel relieved by the two decisions cited from the fourth volume of Yeates, since it appears that this very lien of the 3d of March, 1796, has been sustained by a decision of the highest tribunal in that state, as long ago as 1803 (*Smith v. Nicholson*, 4 Yeates, 6), and that again in 1805, this decision was considered, and confirmed, and acted upon, in another case in which the several applications of the principles established in the first case came under consideration. *United States v. Nicholls*, 4 Yeates, 251. Now the relation in which our circuit courts stand to the states in which they respectively sit and act, is precisely that of their own courts, especially when adjudicating on cases where state lands or state statutes come under adjudication. When we find principles distinctly settled by adjudications, and known and acted upon as the law of the land, we have no more right to question them, or deviate from them, than could be correctly exercised by their own tribunals.

It is proper here to notice a relaxation of this principle, into which the court below seems to have been surprised, and in which the argument of counsel in this cause was calculated to induce this court to acquiesce. In the case first decided in the supreme court of Pennsylvania, to wit, that of *Smith v. Nicholson*, 4 Yeates, 8, most of the arguments made use of in this cause to get rid of the lien of the settlement, and particularly that of a repeal of the act of 1785, or a want of compliance with its requisitions, were pressed upon that court, and carefully examined and disposed of by the judges. But there have been a variety of other grounds taken in the court below in this cause, and again submitted to this court in argument, which do not appear from the report of that decision to have been brought to the notice of the state court. Such were the want of notice of the settlement; the want of its being entered in the books of the accounting officer; the balance not being struck in dollars and cents; that the order of settlement was reversed, and as the plaintiffs' counsel proposed to establish by evidence, that it was not a final and conclusive adjustment of all the existing debits and credits between the parties. Into the examination of most of these arguments the court below has entered, with a view to estimating and repelling their sufficiency, to shake the settlement in which the lien of the settlements is claimed. But we cannot feel ourselves at liberty to pursue the same course, since it supposes the existence of a revising power inconsistent with the authority of adjudications on which the validity of those liens must now be placed. The rule of law being once established by the highest tribunal of a state, courts which propose to administer the law as they find it, are ordinarily bound, *in limine*, to presume that, whether it appears from the reports or not, all the reasons which might have been urged, *pro* or *con*, upon the point under consideration, had been examined and disposed of judicially.

§ 1836. *A judgment held not to supersede liens which the state held under certain settlements.*

It is next contended that the judgment of March, 1797, had absorbed or superseded the liens of the settled accounts. This ground they proposed to sustain by giving in evidence the journals of the house of representatives of the commonwealth, exhibiting certain reports of the register-general and of the committee of ways and means, conducing to prove that this judgment was rendered for the identical cause of action on which the settlements were founded. This evidence was rejected by the court; and that rejection consti-

tutes one of the causes of complaint on which relief is now sought here. But this court is satisfied that supposing the evidence of these journals sufficient to prove the identity, and in other respects unexceptionable, establishing that fact would not have benefited the cause of the plaintiffs. On this point there is an unavoidable inference to be drawn from the case of *The United States v. Nicholls*, 4 Yeates, 251, for in that case, the lien of a settlement of prior date in favor of the state was sustained against a subsequent mortgage to the United States; although, as the case shows, there was a judgment upon the same cause of action with the settlement, of a date subsequent to the mortgage to the United States, and obtained upon an appeal from the settlement. Mr. Dallas, for the United States, argued that this appeal suspended the lien; but no one seems to have imagined that the judgment superseded or absorbed the settlement. If to this be added what was asserted by defendants' counsel, and acquiesced in by the plaintiffs, that, by the settled law of Pennsylvania, a judgment in an action of debt upon a previous judgment does not destroy the lien of the first judgment, it puts this question at rest.

In approaching the acts of 1806 and 1807, we are then authorized in assuming that, at the time they were passed, the state held unsatisfied liens upon the lands of John Nicholson to a large amount, under the two settlements of 1776, without any legal means of raising the money by sale; and also judgments to a great amount, which, by reason of the death of Nicholson, and the want of a personal representative, they were equally precluded from all ordinary means of having satisfied. Thus circumstanced, the legislature passed those acts, the professed and unaffected and only object of which was to raise, from the sale of John Nicholson's land, money sufficient to satisfy the liens of the state. In justice to the moral as well as legal and constitutional character of those laws, it is proper to give an outline of their provisions. It is obvious from the evidence in the cause, that, between the date of the settled accounts and the passing of those acts, great changes had taken place in the possession and property of the lands of John Nicholson. Whether in any or all the cases of such change of property, the tracts sold became discharged of the liens of the state or not, is not now the question; if they were, the holders were at liberty to assert their rights against the state. In this case no such discharge is set up; the tract was one that had remained the property of Nicholson. There were then three interests to be regulated: first, that of a state; second, that of the persons in possession; and third, that of the heirs of Nicholson. That the state was not unmindful of the last is distinctly shown by the offer of compromise tendered to the family before the act of 1806 was passed, and by adopting a mode of sale calculated, as much as possible, to avoid throwing back the purchaser upon the heirs for damages, where sales had been made by their ancestor. Hence the plan of the act of 1806 was this: first, to ascertain all the lands affected by the lien throughout the state; then to assess each ratably, according to the amount of the debt, instead of selling each and all as they could be discovered; at the same time allowing a discretion in the commissioners to compromise with persons claiming an interest in the lands, and to assign over an interest in the lien proportionate to the sum received upon such compromise; of course obviating so far the necessity of a resort to a sale or to litigation.

Here there was a general offer to all persons claiming an interest in these lands of a release from the lien, upon paying the sum thus assessed ratably and according to value; and it was only when the offer was not accepted, or

where no one claimed an interest, that the general power to sell came into exercise. Nor was it then to be exercised until after a report made to the governor, and under process issuing from him; ample notice was required to be given of the sale, and a credit not exceeding four years allowed. It is true that, by the terms of these acts, the power of selling is extended to "any body of lands, late the property of the said John Nicholson, deceased, which are subject to the lien of the commonwealth, under and by virtue of process to be issued by the governor, either in gross or by separate tracts, as to them, or a majority of them, may appear most advisable;" but there is nothing which authorizes or requires the commissioners to sell all the lands of J. Nicholson, or an acre more than what is necessary to satisfy the liens; and so the words just recited import; since, after raising by sale enough to satisfy the liens, it could no longer be predicated of any of those lands that "they are subject to the liens of the commonwealth," in the language of the section which gives the power to sell. And it is true, also, that the money is required to be paid by the purchasers into the treasury; but this is obviously a measure solely intended to secure the proceeds from again falling into dangerous hands; and if the power to sell be limited, by its very nature and terms, to the raising of enough to satisfy these liens, on what ground can exception be taken to this precaution? How can it work an injury to heirs or creditors? to say nothing of a reasonable dependence upon the justice and good faith of the country to refund any surplus, supposing the commissioners were at liberty to raise a surplus by sale.

Nor can any reasonable exception be taken to the discretionary power given to sell "in gross or by separate tracts," when it is considered how very possible it was that sales might be effected in gross when they could not be made in detail. Speculators might not be induced to adventure otherwise, and the separation of contiguous tracts might often destroy or diminish the value of each.

§ 1837. *The legislature of Pennsylvania had power to authorize a sale of lands to satisfy debts due the state.*

After presenting this expose of the design and operation of these laws, we shall search in vain in the constitution of the state or the United States, or even in the principles of common right, for any provision or principles to impugn them; and on this point I am instructed to report it, as the decision of this court, that the words used in the constitution of Pennsylvania, in declaring the extent of the powers of its legislature, are sufficiently comprehensive to embrace the powers exercised over the estate of Nicholson, in the two acts under consideration, and that there are no restrictions, either express or implied, in that constitution, sufficient to control and limit the general terms of the grant of legislative power to the bounds which the plaintiffs would prescribe to it. For myself individually, I must use the privilege of assigning the reasons which claim my concurrence in that opinion.

§ 1838. *Where the powers of government are not clearly separated, the legislature may exercise powers in their nature judicial.*

The objection made to the exercise of this power is that it is one of a judicial character, and could not exist in the legislature of a country having a constitution which distributes the powers of government into legislative, executive and judicial. I will not pause to examine the question whether the subjection of property to the payment of judgments be in fact a matter appertaining essentially to judicial power; or whether, after deciding that the debt is due, the judgment action does not cease, and all that follows is the

exercise of legislative or executive power; another view of the subject will, in my opinion, dispose of this question. The power existing in every body politic is an absolute despotism; in constituting a government, the body politic distributes that power as it pleases, and in the quantity it pleases, and imposes what checks it pleases upon its public functionaries. The natural distribution, and the necessary distribution to individual security, is into legislative, executive and judicial; but it is obvious that every community may make a perfect or imperfect separation and distribution of these powers at its will. It has pleased Pennsylvania, in her constitution, to make what most jurists would pronounce an imperfect separation of those powers; she has not thought it necessary to make any imperative provision for incorporating the equity jurisdiction in its full latitude into her jurisprudence; and the consequence is, as it ever will be, that, so far as her common law courts are incapable of assuming and exercising that branch of jurisdiction, her legislature must often be called upon to pass laws which bear a close affinity to decrees in equity. Of that character are the acts of 1806 and 1807 under consideration. The relations in which the state and John Nicholson's estate stood to each other presented a clear case for equitable relief; a lien on the one hand, and property to satisfy it on the other, but no common law means of obtaining a sale. Thus circumstanced, is there anything in the constitution of Pennsylvania to prevent the passing of these laws?

When it is intimated that the separation of the primary powers of government is incomplete under the constitution of Pennsylvania, it may be necessary to submit a few observations explanatory of the idea. It is true that the separation of common law from equity jurisdiction is peculiar to Great Britain; no other of the states of the old world having adopted it. But it is equally true that in no other of the states of the old world did the trial by jury constitute a part of their jurisprudence; and every practical lawyer knows that to give jurisdiction to a court of equity, or to distinguish a case of equity jurisdiction from one of common law under the British practice, the averment is indispensable that the complainant is remediless at law. When it is said that the separation of common law from equity jurisdiction is peculiar to Great Britain, it must only be understood that it is there exercised by distinct courts and under distinct forms. For, as an essential branch or exercise of judicial power, it is acknowledged to exist everywhere; nor is it possible for any one acquainted with its nature and character, and the remedies it affords for the assertion of rights or the punishment of wrongs, to doubt that the power to exercise it, and the means of exercising it, must exist somewhere, or the administration of justice will be embarrassed, if not incomplete. To administer it through the ordinary powers of a common law court is impracticable; and hence, wherever there exists no provision in the jurisprudence of a country for its full exercise, the consequence must ever be that after the common law courts have engrafted into their practice as much as can be there assumed, the legislature is compelled to exercise the rest, or else leave a large space for the appropriate field of judicial action unoccupied.

A specimen of this will be found in the early legislation of the state of South Carolina, in which, before the establishment of a court of equity, laws are frequently found authorizing administrators or others to sell lands for the payment of debts, and for similar purposes. And it has been admitted in argument that similar laws are of frequent occurrence in Pennsylvania. The provisions of the constitution of that state on the subject of legislative and judicial

power are as follows: Art. 1, § 1. "The legislative power of this commonwealth shall be vested in a general assembly, which shall consist of a senate and house of representatives."

Art. 4, § 1. "The judicial power of the commonwealth shall be vested in a supreme court, in courts of oyer and terminer and general jail delivery, in a court of common pleas, orphans' courts, registers' court, and a court of quarter sessions of the peace of each county, in justices of the peace, and in such other courts as the legislature may from time to time establish."

Art. 4, § 6. "The supreme court and the several courts of common pleas shall, besides the powers heretofore usually exercised by them, have the powers of a court of chancery so far as relates to the perpetuating of testimony, the obtaining of evidence from places not within the state, and the care of the persons and estates of those who are *non compos mentis*; and the legislature shall vest in the said courts such other powers to grant relief in equity as shall be necessary, and may from time to time enlarge or diminish those powers, or vest them in such other courts as they may judge proper for the due administration of justice."

It is clear from these quotations that the legislature possess all the legislative power that the body politic could confer, except so far as they are restricted by the instrument itself. It is equally clear that the constitution recognizes the distinction between common law and equity powers, and the existence of equity powers beyond what it has vested in the supreme court. But what provision has it made for the exercise of those powers? No other than this, that the legislature shall vest in the said courts such other powers to grant relief in equity as shall be found necessary. But where is the limitation prescribed to the legislature in judging of the necessity of vesting such powers? They have not thought it necessary to invest their courts with such powers; and if the reason which influenced them in judging it unnecessary was that they held themselves competent to afford the necessary relief by the exercise of legislative power, where is the restriction in the constitution that controls them in thus extending or applying the powers with which they hold themselves to be constitutionally vested? They are sought in vain.

Again: "They may from time to time enlarge or diminish those powers, or vest them in such other courts as they shall judge proper, for the due administration of justice." Now they have, by the first section of the same article, the power to establish what courts they please; and suppose they thought proper to have vested the whole equity jurisdiction not specifically disposed of in a board of commissioners, instead of vesting specific powers in such a board, where is the constitutional provision that inhibits such an act of legislation?

§ 1839. *An act giving a lien on public accounts is not a contract that the liens shall be enforced by judicial process.*

The plaintiffs contend that it is to be found in the bill of rights of that state, or in the constitution of the United States. Both those constitutions contain the provision against the violation of contracts; and the plaintiffs' counsel insists that there were three contracts in existence between the state of Pennsylvania and John Nicholson, two of them express, and one implied. The first express contract he finds in the acts of 1782 and 1785; which, in giving the lien upon public accounts, declare that they shall be liens "in the same manner as if judgment had been given in the supreme court." This he construes into a contract that they shall be enforced in the same manner as such a judgment, to wit, by judicial process; and then finds the violation of the contract in the acts

which provide for the raising of the money to satisfy those liens by the sale of the land, through this board of commissioners. But a single observation, we think, disposes of this exception; which is, that the lien of a judgment of a mortgage, or any other lien, is a very different idea from that of the means by which the lien is to be enforced; the one is the right, the other is the remedy; the one constitutes the contract, and the other the remedy afforded by the policy of the country, where it is not provided by the terms of the contract for enforcing or effecting the execution of it. The first is unchangeable without a violation of right; the other may be subject to change at the will of the government. And it may be further observed, in the present instance, that the reference to a judgment in the supreme court is clearly descriptive or illustrative of the meaning of the legislature, with reference only to the binding efficacy of the lien given on these public accounts.

The second express contract is found by the plaintiffs in the confession of judgment on the 21st March, 1797, and the violation of this also is not enforcing it by judicial process. This is obviously an attempt to give the character of a contract to that which is nothing more than an obligation, or duty, or necessity, imposed by the laws of society. The confession of a judgment does indeed create a contract; but it is only on the side of the defendant, who thus acknowledges or assumes upon himself a debt which may be made the ground of an action. But on the side of the plaintiff the necessity of resorting to certain means of enforcing that judgment is not an obligation arising out of contract, but one imposed upon him by the laws of the country.

Again it may be answered, if there was in fact such a contract imputable to the state, the performance had become impossible by the act of God, and of the party himself by his death; and by that confusion of his affairs which prevented every one from assuming the character of his personal representative.

§ 1840. *The taking of land granted by a state for debts due it by its grantee does not impair the obligation of the contract.*

We proceed to the third, or the implied contract; that which is deduced from the original grant of the land to John Nicholson. This sale, it is insisted, is inconsistent with that contract of grant; that it amounts in fact to a resumption of the land; and in connection with this, the point of inconsistency with the reason and nature of things was argued and commented upon. The answer which the case here furnishes we think is this: that subjecting the lands of a grantee to the payment of his debts can never impair or contravene the rights derived to him under his grant, for in the very act the full effect of the transfer of interest to him is recognized and asserted; because it is his, is the direct and only reason for subjecting it to his debts. But it is asserted that in this case the community sits in judgment in its own cause, when it affirms the debt to be due for which the land is subjected to sale, and then subjects the land to sale to satisfy its own decision thus rendered.

§ 1841. — *such a proceeding is not void on the ground that the state sits in judgment on its own cause.*

This view of the acts of the state is clearly not to be sustained by a reference to the facts of the case. As to the judgment of 1797, that is unquestionably a judicial act; and as to the settled accounts, the lien is there created by the act of men who, *quoad hoc*, were acting in a judicial character; and their decision being subjected to an appeal to the ordinary, or rather the highest of the tribunals of the country, gives to those settlements a decided judicial character; and were it otherwise, how else are the interests of the state to be protected?

The body politic has its claims upon the constituted authorities as well as individuals; and if the plaintiffs' course of reasoning could be permitted to prevail, it would then follow that provision might be made for collecting the debts of every one else, but those of the state must go unpaid, whenever legislative aid became necessary to both. This would be pushing the reason and nature of things beyond the limits of natural justice.

§ 1842. — *nor is it void as being a deprivation of property without due process of law.*

It is next contended that the acts of 1806 and 1807 are unconstitutional and void, because contrary to the ninth section of the Pennsylvania bill of rights, which provides, in the words of *magna charta*, that no one shall be deprived of his property but by the laws of the land. This exception has already been disposed of by the view that has been taken of the nature and character of those laws. It has been shown that there is nothing in this provision either inconsistent with natural justice or the constitution of the state: there is nothing of an arbitrary character in them.

§ 1843. — *nor as denying the right of trial by jury.*

They are also charged with being contrary to the ninth article of the amendments of the constitution of the United States, and the sixth section of the Pennsylvania bill of rights, securing the trial by jury. As to the amendments of the constitution of the United States, they must be put out of the case, since it is now settled that those amendments do not extend to the states; and this observation disposes of the next exception, which relies on the seventh article of those amendments. As to the sixth section of the Pennsylvania bill of rights, we can see nothing in these laws on which to fasten the imputation of the violation of the right of trial by jury; since, in creating the lien attached to the settled accounts, the right of an appeal to a jury is secured to the debtor; and as to the inquest given under the execution law, with a view to ascertaining if the rents and profits can discharge the debt in a limited time, as a prelude to the right of selling, we are well satisfied that there is no more reason for extending the provision of the amendment to that inquest, than there would be to an inquest of a coroner or any mere inquest of office. The word trial, used in the sixth section, clearly points to a different object; and the distinction between trial by jury and inquest of office is so familiar to every mind, as to leave no sufficient ground for extending to the latter that inviolability which could have been intended only for the former. The one appertains to a mere remedy for the recovery of money, which may be altered at any time without any danger to private security; the other is justly regarded in every state in the Union, as among the most inestimable privileges of a freeman. The two remaining grounds urged for impugning the constitutionality of these laws have been disposed of by observations already made.

§ 1844. *There is no error in rejecting evidence which could not avail the party objecting.*

It only remains to consider the point made upon the rejection of certain evidence proposed to be introduced; the object of which was to invalidate the settled accounts, by showing that, in fact, the accounts between the state and Nicholson never were settled, that is, finally and conclusively settled. Here again, as was remarked of the evidence already considered, admitting the fact proposed to be proved, what could it avail the party in this suit? As far as the accounts were settled and certified the law gave the lien for the amount certified; and why should that benefit be deferred until the last possible shil-

ling in dispute should be finally passed upon; delayed perhaps until lost, or until the debtor could no longer parry the decision, and thus give a preference to others at his will? If, then, the fact intended to be established by the evidence could not have availed the plaintiffs, the court could have committed no error in rejecting it, whatever may have been the reasons given for the rejection.

We are of opinion that there is no error in the judgment below, and it will accordingly be affirmed, with costs.

JACKSON v. LAMPHIRE.

(3 Peters, 280-291. 1830.)

ERROR to the Court for the Trial of Impeachments and Correction of Errors in the State of New York.

Opinion by MR. JUSTICE BALDWIN.

STATEMENT OF FACTS.—Both parties claim the premises in question under John Cornelius, to whom the state of New York granted them by patent, dated the 7th of July, 1790, in consideration of his military services in the revolutionary war. Six years before the date of the patent, and while the title of Cornelius was imperfect, he conveyed the premises to Henry Hart, the father of the plaintiff's lessor, by deed dated January the 17th, 1784, proved and deposited in the office of the clerk of the county of Albany, according to law, on the 25th of April, 1795. Henry Hart died in 1788, leaving the plaintiff, his only child and heir at law, who was born the 21st of September, 1784, removed to Canada in 1791, and remained there till 1807 or 1808, when he returned to Albany, where he resided till the commencement of this suit of May term, 1825; he claims as heir at law to his father. On the 23d of June, 1784, John Cornelius conveyed the same premises to Samuel Broom by deed, duly proved and deposited as aforesaid on the 3d of April, 1795. The title of Broom, by sundry mesne conveyances, became vested in William J. Vredenburg, who conveyed to the defendant. The premises were vacant till 1808, when possession was taken under Vredenburg, who then held the title of Broom.

The defendant did not question the original validity of the deed to Henry Hart, but rested his defense on an act of assembly of the state of New York, passed the 24th of March, 1797, to settle disputes concerning titles to lands in the county of Onondaga, the provisions of which are set forth in the case. The defendant offered in evidence an award made by two of the commissioners appointed by this act, awarding the land in controversy to William J. Vredenburg and John Patterson (to whom Broom had conveyed); the award was dated December 17, 1799, and no dissent was entered by the plaintiff. The court admitted the award to be read in evidence, and gave in charge to the jury that it was competent and conclusive to defeat the title of the plaintiff. Judgment was rendered for the defendant in the supreme court, and affirmed in the court of errors; and the case comes before us by writ of error, under the twenty-fifth section of the judiciary act.

§ 1845. *The supreme court has no authority to declare a state law void on account of its collision with the state constitution.*

The plaintiff contends that the act of the 24th of March, 1797, and all proceedings under it, are void; being a violation both of that part of the constitution of the United States which declares that no state shall pass any law impairing the obligation of contracts, and of the constitution of the state of

New York, which declares that the legislature shall at no time institute any new court but such as shall proceed according to the course of the common law; and that trial by jury in all cases in which it hath heretofore been used shall be established, and remain inviolate forever. This court has no authority, on a writ of error from a state court, to declare a state law void on account of its collision with a state constitution, it not being a case embraced in the judiciary act, which alone gives power to issue a writ of error in this case; and will therefore refrain from expressing any opinion on the points made by the plaintiff's counsel in relation to the constitution of New York.

§ 1846. *A grant is not a contract with the grantee that he shall enjoy the land granted free from any legislative regulations to be made in the future.*

The plaintiff insists that the patent to John Cornelius creates a contract with the grantee, his heirs and assigns, that they should enjoy the land therein granted, free from any legislative regulations to be made in violation of the constitution of the state; that the act in question does violate some of its provisions, and therefore impairs the obligation of a contract. The court are not inclined to adopt this reasoning, or to consider this as a case coming fairly within the clause of the constitution of the United States relied on by the plaintiff. The only contract made by the state is a grant to John Cornelius, his heirs and assigns, of the land in question; the patent contains no covenant to do or not to do any further act in relation to the land, and we do not, in this case, feel at liberty to create one by implication. The state has not by this act impaired the force of the grant; it does not profess or attempt to take the land from the assigns of Cornelius, and to give it to one not claiming under him; neither does the award produce that effect; the grant remains in full force, the property conveyed is held by his grantee, and the state asserts no claims to it. The question between the parties is, which of the deeds from Cornelius carries the title. Presuming that the laws of New York authorized a soldier to convey his bounty land before receiving a patent, and that at the date of the deeds there was no law compelling the grantees to record them; they would take priority from their date.

§ 1847. — *there is no contract in such case that the priority of title shall depend solely on the principles of the common law.*

This is the legal result of the deeds; but there is no contract on the part of the state that the priority of title shall depend solely on the principles of the common law, or that the state shall pass no law imposing on a grantee the performance of acts which were not necessary to the legal operation of his deed at the time it was delivered.

§ 1848. *States may pass recording acts upon the observance of which the preservation of title may be made to depend, and such laws do not impair the obligation of contracts.*

It is within the undoubted power of state legislatures to pass recording acts, by which the elder grantee shall be postponed to a younger, if the prior deed is not recorded within the limited time; and the power is the same whether the deed is dated before or after the passage of the recording act. Though the effect of such a law is to render the prior deed fraudulent and void against a subsequent purchaser, it is not a law impairing the obligation of contracts; such, too, is the power to pass acts of limitations and their effect. Reasons of sound policy have led to the general adoption of laws of both descriptions, and their validity cannot be questioned. The time and manner of their operation, the exceptions to them, and the acts from which the time limited shall begin, to

run, will generally depend on the sound discretion of the legislature, according to the nature of the titles, the situation of the country, and the emergency which leads to their enactment. Cases may occur where the provisions of a law on those subjects may be so unreasonable as to amount to a denial of a right, and call for the interposition of the court; but the present is not one. The state of New York, in 1794, had felt the necessity of legislating on these military lands. The preamble to the recording act of January, 1794, shows very strongly the policy of compelling the deeds for these lands to be recorded; and the known condition of that part of the state, covered by military grants, presented equally cogent reasons, in our opinion, for the passage of the act in question.

As this court is confined to the consideration of only one question growing out of this law, we do not think it necessary to examine its provisions in detail; it is sufficient to say that we can see nothing in them inconsistent with the constitution of the United States, or the principles of sound legislation. Whether it is considered as an act of limitations, or one in the nature of a recording act, or as a law *sui generis*, called for by the peculiar situation of that part of the state on which it operates, we are unanimously of opinion that it is not a law which impairs the obligation of a contract; and that in receiving the award in evidence, and declaring it to be competent and conclusive on the right of the plaintiff, there was no error in the judgment of the court below. The judgment is therefore affirmed.

WATSON v. MERCER.

(8 Peters, 88-111. 1834.)

Opinion by MR. JUSTICE STORY.

STATEMENT OF FACTS.— This is a writ of error to the supreme court of the state of Pennsylvania, brought under the twenty-fifth section of the Judiciary Act of 1789 (1 Stats. at L., 85).

The original suit is an ejectment by the defendants in error for certain lands in Lancaster county in the state of Pennsylvania, upon which a final judgment was rendered in their favor. The facts, so far as they are material to the questions over which this court has jurisdiction, are these: On the 8th of May, 1785, James Mercer and Margaret, his wife, executed a deed of the premises, then being the property of the wife, to Nathan Thompson, in fee, who afterwards, on the same day, reconveyed the same to James Mercer, the husband, in fee; the object of the deeds being to vest the estate in the husband. The certificate of the acknowledgment of the deed of Mercer and wife to Thompson, by the magistrate who took the same, does not set forth all the particulars, as were required by the law of Pennsylvania of the 24th of February, 1770, respecting the acknowledgment of deeds of *femes covert*. The legislature of Pennsylvania, on the 26th of April, 1826, passed an act, the object of which was to cure all defective acknowledgments of this sort, and to give them the same efficacy as if they had been originally taken in the proper form. The plaintiffs in the ejectment claimed title to the premises under James Mercer, the husband; and the defendants as heirs at law of his wife, who died without issue. The ejectment was brought after the passage of the act of 1826.

§ 1849. *What questions may be revised on error to state courts.*

In the case of *Watson v. Bailey*, 1 Binn., 470, the acknowledgment of this very deed from Mercer and wife to Thompson was held to be fatally de-

fective to pass her title. But the act of 1826 has been repeatedly held by the supreme court of Pennsylvania to be constitutional, and to give validity to such defective acknowledgments. It was so held in *Barnet v. Barnet*, 15 Serg. & R., 72, and *Tate v. Stooltzfoos*, 16 id., 35, and again, upon solemn deliberation and argument, in the case now before this court. The object of the present writ of error is to revise the opinions thus pronounced by the highest state court. Our authority to examine into the constitutionality of the act of 1826 extends no further than to ascertain whether it violates the constitution of the United States; for the question whether it violates the constitution of Pennsylvania, is, upon the present writ of error, not before us.

The act of 1826 provides "that no grant, etc., deed of conveyance, etc., heretofore *bona fide* made and executed by husband and wife, and acknowledged by them before some judge, etc., authorized by law, etc., to take such acknowledgment as aforesaid, before the 1st day of September next, shall be deemed, held or adjudged invalid, or defective, or insufficient in law, or avoided, or prejudiced, by reason of any informality or omission in setting forth the particulars of the acknowledgment made before such officer as aforesaid, in the certificate thereof; but all and every such grant, etc., deed of conveyance, etc., so made, executed and acknowledged, as aforesaid, shall be as good, valid and effectual in law, for transferring, passing and conveying the estate, right and title and interest of such husband and wife of, in and to the lands, etc., mentioned in the same, as if all the requisites and particulars of such acknowledgment mentioned in the act, to which this is supplementary, were particularly set forth in the certificate thereof, or approved upon the face of the same."

§ 1850. *The states may pass retrospective laws. Ex post facto laws defined.*

The argument for the plaintiffs in error is, first, that the act violates the constitution of the United States, because it divests their vested rights as heirs at law of the premises in question; and secondly, that it violates the obligation of a contract, that is, of the patent granted by the proprietaries of Pennsylvania to Samuel Patterson, the ancestor of the original defendants, from whom they trace their title to the premises, by descent through Margaret Mercer. As to the first point, it is clear that this court has no right to pronounce an act of the state legislature void, as contrary to the constitution of the United States, from the mere fact that it divests antecedent vested rights of property. The constitution of the United States does not prohibit the states from passing retrospective laws generally, but only *ex post facto* laws. Now it has been solemnly settled by this court, that the phrase *ex post facto* laws is not applicable to civil laws, but to penal and criminal laws, which punish no party for acts antecedently done which were not punishable at all, or not punishable to the extent or in the manner prescribed. In short, *ex post facto* laws relate to penal and criminal proceedings which impose punishments or forfeitures, and not to civil proceedings which affect private rights retrospectively. The cases of *Calder v. Bull*, 3 Dal., 386, 1 Cond. Rep., 172 (§§ 582-599, *supra*); *Fletcher v. Peck*, 6 Cranch, 87, 2 Cond. Rep., 308 (§§ 1805-12, *supra*); *Ogden v. Saunders*, 12 Wheat., 266, 6 Cond. Rep., 523 (§§ 1940-2003, *infra*); and *Satterlee v. Mathewson*, 2 Pet., 380 (§§ 1630-35, *supra*), fully recognize this doctrine.

§ 1851. *An act validating deeds does not impair the obligation of any contract.*

In the next place, does the act of 1826 violate the obligation of any contract? In our judgment, it certainly does not, either in its terms or its principles. It does not even affect to touch any title acquired by a patent or any other grant.

It supposes the titles of the *femes covert* to be good, however acquired; and only provides that deeds of conveyance made by them shall not be void because there is a defective acknowledgment of the deeds by which they have sought to transfer their title. So far, then, as it has any legal operation, it goes to confirm, and not to impair, the contract of the *femes covert*. It gives the very effect to their acts and contracts which they intended to give; and which, from mistake or accident, has not been effected. This point is so fully settled by the case of *Satterlee v. Matthewson*, 2 Pet., 380, that it is wholly unnecessary to go over the reasoning upon which it is founded.

Upon the whole, it is the unanimous opinion of the court, there is no error in the judgment of the supreme court of Pennsylvania, so far as it is subject to the revision of this court, and therefore it is affirmed, with costs.

PHALEN v. VIRGINIA.

(8 Howard, 168-169. 1849.)

ERROR to the General Court of Virginia.

STATEMENT OF FACTS.—By an act passed in 1829 the legislature authorized the drawing of lotteries for a certain purpose. The right was not exercised up to 1834, and in that year an act was passed limiting the time to six years within which to exercise the privilege. In this case, which was a prosecution for selling lottery tickets, the question arose whether the act of 1834 impaired the obligation of the contract contained in the act of 1829.

Opinion by MR. JUSTICE GRIER.

It might admit of some doubt whether the act of 1829 grants any franchise, or constitutes any contract, either with the commissioners therein appointed, or with the turnpike corporation. It imposes certain duties on each. The commissioners are required to use the license thus given, not for their own benefit, but for a public purpose. The money procured by the proposed lotteries is to be paid over to the Fauquier and Alexandria Turnpike Road Company, to be by them expended "in the improvement and repair of the road."

It is true that the corporation might receive greater benefits from the repair of the road than the other citizens of the state; but the act imposed no duty on them as a previous consideration. They are not required to make any repairs till they receive the money. But assuming that this would be too narrow a construction of this act, and that it conferred a privilege or benefit on the corporation in the nature of a franchise or irrevocable contract, yet in its very nature it could not be considered illimitable as to time. On the contrary, the object for which the license was granted called for immediate action. "Three miles" of a great public thoroughfare are represented to be out of repair, and the company without immediate means to effect it. The sum to be raised being fixed and finite, and the subject of its application demanding immediate attention, the time within which the license is given cannot claim to be unlimited. And yet the commissioners and corporation have suffered eleven years to pass before any attempt is made to perform the duty imposed on them, or avail themselves of the license or franchise conferred, and now claim a further term of twenty years to raise the money and repair the road. When the legislature of Virginia passed this most salutary act for the suppression of lotteries, they with commendable caution protected all vested rights. And notwithstanding the neglect to perform the duties imposed by the act of 1829, the

act of 1834 does not revoke the grant or annul the license, but limits the time to six years within which the duties must be performed and the privilege exercised.

§ 1852. *The provision against laws impairing the obligation of contracts does not extend to all legislation about contracts.*

It has been often decided by this court that the prohibition of the constitution now under consideration, by which state legislatures are restrained from passing any "law impairing the obligation of contracts," does not extend to all legislation about contracts. They may pass recording acts, by which an elder grantee shall be postponed to a younger, if the prior deed be not recorded within a limited time; and this, whether the deed be dated before or after the act. Acts of limitation also, giving peace and confidence to the actual possessor of the soil, and refusing the aid of courts of justice in the enforcement of contracts, after a certain time, have received the sanction of this court. Such acts may be said to effect a complete divestiture, or even transfer, of right; yet, as reasons of sound policy have led to their adoption, their validity cannot be questioned.

§ 1853. *An act limiting the time within which a franchise must be enjoyed does not impair the obligation of a contract.*

What is the act under consideration but a limitation of the time within which a certain privilege or license, limited in its very nature and purpose, may be exercised? If reasons of sound policy justify legislative interference with contracts of individuals, how much more will it justify the limitation of licenses so injurious to public morals. The suppression of nuisances injurious to public health or morality is among the most important duties of government. Experience has shown that the common forms of gambling are comparatively innocuous when placed in contrast with the wide-spread pestilence of lotteries. The former are confined to a few persons and places, but the latter infects the whole community; it enters every dwelling; it reaches every class; it preys upon the hard earnings of the poor; it plunders the ignorant and simple. It is a principle of the common law that the king cannot sanction a nuisance. But, without asserting that a legislative license to raise money by lotteries cannot have the sanctity of a franchise or contract in its nature irrevocable, it cannot be denied that the limitation of such a license as the present is as much demanded by public policy as other acts of limitation which have received the sanction of this court.

There is also another view of this case, which concludes the plaintiff in error from the benefit of a defense under this clause of the constitution, even if it were tenable. The act of 1829 had become obsolete by non-user. Without further legislation, the license granted by it could not be exercised. The plaintiff in error cannot claim a right to sell lottery tickets without invoking the aid of the act of 11th March, 1834, passed a few days after the "act suppressing lotteries." The courts of Virginia have very properly decided that "this dormant right to draw the lottery, which was revived by the act of March, 1834, must be taken as subordinate to and limited by the act of the 25th of the previous month; that those statutes must be taken *in pari materia*, and receive the same construction as if embodied in one act; that there is nothing repugnant in the provisions of the one to those of the other, where the first is taken as limiting the time within which the right under the second is to be exercised." This construction of their statutes by the courts of Virginia is not only just and correct, but is conclusive on this court and on the case, as it

estops the plaintiff in error from averring against the constitutionality of the limitation under which he claims his privilege. The judgment of the general court of Virginia is therefore affirmed, with costs.

MURRAY v. CHARLESTON.

(6 Otto, 432-449. 1877.)

ERROR to the Supreme Court of South Carolina.

Opinion by MR. JUSTICE STRONG.

STATEMENT OF FACTS.—The plaintiff, a resident of Bonn in Germany, was, prior to the 1st day of January, 1870, and he still is, the holder and owner of \$35,262.35 of what is called stock of the city of Charleston. The stock is in reality a debt of the city, the evidence of which is certificates, whereby the city promises to pay to the owners thereof the sums of money therein mentioned, together with six per cent. interest, payable quarterly. One-third of the interest due the plaintiff on the 1st days of April, July and October, 1870, and January and July, 1871, having been retained by the city, this suit was brought to recover the sums so retained; and the answer to the complaint admitted the retention charged, but attempted to justify it under city ordinances of March 20, 1870, and March 21, 1871. By these ordinances, set out in full in the answer, the city appraiser was directed to assess a tax of two cents upon the dollar of the value of all real and personal property in the city of Charleston, for the purpose of meeting the expenses of the city government; and the third section of each ordinance declared that the taxes assessed on city stock should be retained by the city treasurer out of the interest thereon, when the same is due and payable. On these pleadings the case was submitted to the court for trial without a jury; and the court made a special finding of facts, substantially as set forth in the complaint and averred in the answer, upon which judgment was given for the defendant. This judgment was subsequently affirmed by the supreme court, and the record is now before us, brought here by writ of error. It is objected that we have no jurisdiction of the case, because, it is said, no federal question was raised of record, or decided in the court of common pleas, where the suit was commenced.

§ 1854. *Wherever rights under the constitution of the United States are denied by state legislation, this court will interpose.*

The city of Charleston was incorporated in 1783, before the adoption of the federal constitution. Among other powers conferred upon the city council was one to "make such assessments on the inhabitants of Charleston, or those who hold taxable property within the same, for the safety, convenience, benefit and advantage of the city, as shall appear to them expedient." It was under this authority, repeated in subsequent legislation, the city ordinances of 1870 and 1871 were made. It may well be doubted whether the acts of the legislature were intended to empower the city to tax for its own benefit the debts it might owe to its creditors, especially to its non-resident creditors. Debts are not property. A non-resident creditor cannot be said to be, in virtue of a debt due to him, a holder of property within the city; and the city council was authorized to make assessments only upon the inhabitants of Charleston, or those holding taxable property within the same. To that extent the supreme court of the state has decided the city has power to assess for taxation. That decision we have no authority to review. But neither the charter itself, nor any subsequent acts of legislation, directly or expressly interfered with any debts

due by the city, or gave to the city any power over them. They simply gave limited legislative power to the city council. It was not until the ordinances were passed under the supposed authority of the legislative act that their provisions became the law of the state. It was only when the ordinances assessed a tax upon the city debt, and required a part of it to be withheld from the creditors, that it became the law of the state that such a withholding could be made. The validity of the authority given by the state, as well as the validity of the ordinances themselves, was necessarily before the court of common pleas when this case was tried; and no judgment could have been given for the defendants without determining that the ordinances were laws of the state, not impairing the obligation of the contracts made by the city with the plaintiff. And when the case was removed into the supreme court of the state, that court understood a federal question to be before it. One of the grounds of the notice of the appeal was "that such a tax is a violation of good faith in the contract of loan, impairs the obligation of said contract, and is, therefore, unconstitutional and void." It is plain, therefore, that both in the common pleas and in the supreme court of the state a federal question was presented by the pleadings and was decided,—decided in favor of the state legislation and against a right the plaintiff claims he has under the constitution of the United States.

§ 1855. — *and express reference to the constitution is not necessary.*

The city ordinances were in question on the ground of their repugnancy to the inhibition upon the states to make any law impairing the obligation of contracts; and the decision was in favor of their validity. Nothing else was presented for decision, unless it be the question whether the acts of the state legislature authorized the ordinances; and that was ruled affirmatively. The jurisdiction of this court over the judgments of the highest courts of the states is not to be avoided by the mere absence of express reference to some provision of the federal constitution. Wherever rights acknowledged and protected by that instrument are denied or invaded under the shield of state legislation, this court is authorized to interfere. The form and mode in which the federal question is raised in the state court is of minor importance, if, in fact, it was raised and decided. The act of congress of 1867 gives jurisdiction to this court over final judgments in the highest courts of a state in suits "where is drawn in question the validity of a statute of, or an authority exercised under, any state, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of their validity." Not a word is said respecting the mode in which it shall be made to appear that such a question was presented for decision. In the present case it was necessarily involved, without any formal reference to any clause in the constitution, and it is difficult to see how any such reference could have been made to appear expressly.

§ 1856. — *the true jurisdictional test is whether a federal question was decided adversely to the party claiming under the constitution or laws of the United States.*

In questions relating to our jurisdiction, undue importance is often attributed to the inquiry whether the pleadings in the state court expressly assert a right under the federal constitution. The true test is not whether the record exhibits an express statement that a federal question was presented, but whether such a question was decided, and decided adversely to the federal right. Everywhere in our decisions it has been held that we may review the judgments of a

state court when the determination or judgment of that court could not have been given without deciding upon a right or authority claimed to exist under the constitution, laws or treaties of the United States, and deciding against that right. Very little importance has been attached to the inquiry whether the federal question was formally raised. In *Crowell v. Randell*, 10 Pet., 368, it was laid down, after a review of almost all our previous decisions, "that it is not necessary the question should appear on the record to have been raised, and the decision made in direct and positive terms, *in ipsissimis verbis*, but that it is sufficient if it appears by clear and necessary intendment that the question must have been raised, and must have been decided, in order to have induced the judgment." This case was followed by *Armstrong v. Treasurer of Athens County*, 16 id., 281, where it was held sufficient to give this court jurisdiction if it appear from the record of the state court that the federal question was necessarily involved in the decision, and that the court could not have given the judgment or decree which they passed without deciding it. See, also, *Bridge Proprietors v. Hoboken Co.*, 1 Wall., 116 (§§ 2087-92, *infra*), and *Furman v. Nichol*, 8 id., 44 (§§ 1813-20, *supra*).

That involved in the judgment of the court of common pleas and in that of the supreme court of the state was a decision that the city ordinances of Charleston were valid, that they did control the contract of the city with the plaintiff, and that they did not impair its obligation, is too plain for argument. The plaintiff complains that the city has not fully performed its contracts according to their terms; that it has paid only four per cent. interest instead of six per cent., which it promised to pay, and that it has retained two per cent. of the interest for its own use. The city admits all this, but attempts to justify its retention of one-third of what it promised to pay by pleading its own ordinances directing its officer to withhold the two per cent. of the interest promised whenever it became due and payable, according to the stipulations of the contract, calling the amount detained a tax. Of course, the question is directly presented whether the ordinances are a justification; whether they can and do relieve the debtor from full compliance with the promise; in other words, whether the ordinances are valid and may lawfully be applied to the contract. The court gave judgment for the defendant, which would have been impossible had it not been held that they have the force of law, notwithstanding the constitution of the United States, and the supreme court affirmed the judgment. Our jurisdiction, therefore, is manifest.

§ 1857. *A law under the guise of taxation, changing the terms of a contract, impairs its obligation and is unconstitutional and void.*

We come, then, to the question whether the ordinances decided by the court to be valid did impair the obligation of the city's contract with the plaintiff. The solution of this question depends upon a correct understanding of what that obligation was. By the certificates of stock, or city loan, held by the plaintiff, the city assumed to pay to him the sum mentioned in them, and to pay six per cent. interest in quarterly payments. The obligation undertaken, therefore, was both to pay the interest at the rate specified, and to pay it to the plaintiff. Such was the contract, and such was the whole contract. It contained no reservation or restriction of the duty described. But the city ordinances, if they can have any force, change both the form and effect of the undertaking. They are the language of the promisor. In substance, they say to the creditor: "True, our assumption was to pay to you quarterly a sum of money equal to six per cent. per annum on the debt we owe you. Such was

our express engagement. But we now lessen our obligation. Instead of paying all the interest to you, we retain a part for ourselves, and substitute the part retained for a part of what we expressly promised you." Thus applying the ordinances to the contract, it becomes a very different thing from what it was when it was made; and the change is effected by legislation, by ordinances of the city, enacted under the asserted authority of laws passed by the legislature. That by such legislation the obligation of the contract is impaired is manifest enough, unless it can be held there was some implied reservation of a right in the creditor to change its terms, a right reserved when the contract was made,—unless some power was withheld, not expressed or disclosed, but which entered into and limited the express undertaking. But how that can be,—how an express contract can contain an implication, or consist with a reservation directly contrary to the words of the instrument, has never yet been discovered.

§ 1858. *The prohibition of laws impairing the obligation of contracts is a limitation of the legislation of states on the subject of taxation as well as on other subjects.*

It has been strenuously argued on behalf of the defendant that the state of South Carolina and the city council of Charleston possessed the power of taxation when the contracts were made; that by the contracts the city did not surrender this power; that, therefore, the contracts were subject to its possible exercise, and that the city ordinances were only an exertion of it. We are told the power of a state to impose taxes upon subjects within its jurisdiction is unlimited (with some few exceptions), and that it extends to everything that exists by its authority or is introduced by its permission. Hence it is inferred that the contracts of the city of Charleston were made with reference to this power, and in subordination to it. All this may be admitted, but it does not meet the case of the defendant. We do not question the existence of a state power to levy taxes as claimed, nor the subordination of contracts to it, so far as it is unrestrained by constitutional limitation. But the power is not without limits, and one of its limitations is found in the clause of the federal constitution, that no state shall pass a law impairing the obligation of contracts. A change of the expressed stipulations of a contract, or a relief of a debtor from strict and literal compliance with its requirements, can no more be effected by an exertion of the taxing power than it can be by the exertion of any other power of a state legislature. The constitutional provision against impairing contract obligations is a limitation upon the taxing power, as well as upon all legislation, whatever form it may assume. Indeed, attempted state taxation is the mode most frequently adopted to affect contracts contrary to the constitutional inhibition. It most frequently calls for the exercise of our supervisory power. It may, then, safely be affirmed that no state, by virtue of its taxing power, can say to a debtor: "You need not pay to your creditor all of what you have promised to him. You may satisfy your duty to him by retaining a part for yourself, or for some municipality, or for the state treasury." Much less can a city say: "We will tax our debt to you, and in virtue of the tax withhold a part for our own use."

§ 1859. *How far contracts are made with reference to the taxing power of the state.*

What, then, is meant by the doctrine that contracts are made with reference to the taxing power resident in the state, and in subordination to it? Is it meant that when a person lends money to a state, or to a municipal division of

the state having the power of taxation, there is in the contract a tacit reservation of a right in the debtor to raise contributions out of the money promised to be paid before payment? That cannot be, because, if it could, the contract (in the language of Alexander Hamilton) would "involve two contradictory things: an obligation to do, and a right not to do; an obligation to pay a certain sum, and a right to retain it in the shape of a tax. It is against the rules, both of law and of reason, to admit by implication in the construction of a contract a principle which goes in destruction of it." The truth is, states and cities, when they borrow money and contract to repay it with interest, are not acting as sovereignties. They come down to the level of ordinary individuals. Their contracts have the same meaning as that of similar contracts between private persons. Hence, instead of there being in the undertaking of a state or city to pay, a reservation of a sovereign right to withhold payment, the contract should be regarded as an assurance that such a right will not be exercised. A promise to pay, with a reserved right to deny or change the effect of the promise, is an absurdity.

§ 1860. *Under what conditions the promises to pay of a state or a municipality may be taxed.*

Is, then, property, which consists in the promise of a state, or of a municipality of a state, beyond the reach of taxation? We do not affirm that it is. A state may undoubtedly tax any of its creditors within its jurisdiction for the debt due to them, and regulate the amount of the tax by the rate of interest the debt bears, if its promise be left unchanged. A tax thus laid impairs no obligation assumed. It leaves the contract untouched. But until payment of the debt or interest has been made, as stipulated, we think no act of state sovereignty can work an exoneration from what has been promised to the creditor, namely, payment to him, without a violation of the constitution. "The true rule of every case of property founded on contract with the government is this: It must first be reduced into possession, and then it will become subject, in common with other similar property, to the right of the government to raise contributions upon it. It may be said that the government may fulfil this principle by paying the interest with one hand, and taking back the amount of the tax with the other. But to this the answer is, that, to comply truly with the rule, the tax must be upon all the money of the community, not upon the particular portion of it which is paid to the public creditors, and it ought, besides, to be so regulated as not to include a lien of the tax upon the fund. The creditor should be no otherwise acted upon than as every other possessor of money; and, consequently, the money he receives from the public can then only be a fit subject of taxation when it is entirely separated" (from the contract), "and thrown undistinguished into the common mass." 3 Hamilton, Works, 514 *et seq.* Thus only can contracts with the state be allowed to have the same meaning as all other similar contracts have.

§ 1861. *Authorities reviewed.*

Such limitations of the power of state taxation we have heretofore recognized. We have held property in one stage of its ownership not to be taxable, and in a succeeding stage to be taxable. Those decisions are not without some analogy to the rule we have mentioned. Thus, in *Brown v. State of Maryland*, 12 Wheat. 419 (§§ 1466-70, *supra*), where it was held that a state tax could not be levied, by the requisition of a license, upon importers of merchandise by the bale or package, or upon other persons selling the goods imported by the bale or package, Mr. Chief Justice Marshall, considering both the pro-

hibition upon states against taxing imports, and their general power to tax persons and property, said: "Where the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the state." *Vide*, also, *Woodruff v. Parham*, 8 Wall., 123 (§§ 1471-73, *supra*); *State Tax on Railway Gross Receipts*, 15 id., 284 (§§ 1263-64, *supra*). A tax on income derived from contracts, if it does not prevent the receipt of the income, cannot be said to vary or lessen the debtor's obligation imposed by the contracts.

In opposition to the conclusion we have reached we are referred to *Champaign County Bank v. Smith*, 7 Ohio St., 42, and *People v. Home Ins. Co.*, 29 Cal., 533, in which it is said the power of a state to tax its own bonds was sustained. We do not, however, regard those cases as in conflict with the opinion we now hold; and, if they were, they would not control our judgment when we are called upon to determine the meaning and extent of the federal constitution. In the former, it appeared that the tax collected was in virtue of an assessment of state bonds belonging to the bank, but deposited with the auditor of state as security for the circulating notes of the company. The tax thus assessed having been carried into the duplicate, the collector seized and appropriated the bank notes and money of the bank, and suit was brought to recover the amount so taken. In sustaining a demurrer to the petition, the court held, it is true, that a state has power to tax its own bonds equally with other property, and that the exercise of such a power involves no violation of a contract. But it was not held that the state could collect the tax by withholding from the creditor any part of what the state had assumed to pay. The tax was laid, not upon the debt, but upon the creditor; and it was collected, not out of what the state owed, but out of the general property of the bank. Neither by the assessment nor in the collection was there any interference with the contract. In *People v. Home Ins. Co.*, the question was whether bonds of the state of California, belonging to a New York insurance company, but deposited and kept in the state, as required by an act to tax and regulate foreign insurance companies doing business in the state, were assessable for taxation there. It was ruled that they were. This case, no more than the former, meets the question we have before us. It certainly does not hold that a state or a city, by virtue of its taxing power, can convert its undertaking to pay a debt bearing six per cent. interest into one bearing only four.

These are the only cases cited to us as directly sustaining the judgment we have now in view. How far short of sustaining it they are must be apparent. And we know of none that are more in point. It seems incredible that there can be any, for, as we said in *Case of State Tax on Foreign-held Bonds*, 15 Wall., 300 (§§ 437-446, *supra*), "the law which requires the treasurer of the company (indebted) to retain five per cent. of the interest due to the non-resident bondholder is not . . . a legitimate exercise of the taxing power. It is a law which interferes between the company and the bondholder, and, under the pretense of levying a tax, commands the company to withhold a portion of the stipulated interest and pay it over to the state. It is a law which thus impairs the obligation of the contract between the parties. The obligation of a contract depends upon its terms and the means which the law in existence at the time affords for its enforcement. A law which alters the terms of a contract, by imposing new conditions, or dispensing with those expressed, is a law which impairs its obligation; for such a law . . . relieves

the parties from the moral duty of performing the original stipulations of the contract, and it prevents their legal enforcement." This was said, it is true, in a case where the question was, whether a tax thus imposed upon a non-resident holder of bonds issued by a company chartered by the state was warranted by the constitution. But, so far as it speaks of what constitutes impairing the contract obligation, it is applicable, in its fullest extent, to all legislation affecting contracts, no matter who may be the parties.

We do not care now to enter upon the consideration of the question whether a state can tax a debt due by one of its citizens or municipalities to a non-resident creditor, or whether it has any jurisdiction over such a creditor, or over the credit he owns. Such a discussion is not necessary, and it may be doubtful whether the question is presented to us by this record. It is enough for the present case that we hold, as we do, that no municipality of a state can, by its own ordinances, under the guise of taxation, relieve itself from performing to the letter all that it has expressly promised to its creditors. There is no more important provision in the federal constitution than the one which prohibits states from passing laws impairing the obligation of contracts, and it is one of the highest duties of this court to take care the prohibition shall neither be evaded nor frittered away. Complete effect must be given to it in all its spirit. The inviolability of contracts, and the duty of performing them as made, are foundations of all well-ordered society, and to prevent the removal or disturbance of these foundations was one of the great objects for which the constitution was framed.

The judgment of the supreme court of South Carolina will be reversed, and the record remitted with instructions to proceed in accordance with this opinion; and it is so ordered.

JUSTICES MILLER and HUNT dissented, the former, in a brief opinion, holding that the power of taxation found in the charter of the city of Charleston, long before the contract was made, entered into and became a part of the contract.

GUARANTY COMPANY v. BOARD OF LIQUIDATION.

(15 Otto, 622-625. 1881.)

ERROR to the Supreme Court of Louisiana.

Opinion by WAITE, C. J.

STATEMENT OF FACTS.—The federal question which this case involves rests on the following facts:

On the 8th of March, 1869, the general assembly of the state of Louisiana passed act No. 116, of 1869, to authorize an issue of negotiable state bonds to aid in the construction of the Mississippi and Mexican Gulf Ship Canal. Special provision was made in the act for taxation to meet any liability that might be incurred in this way. Bonds to the amount of \$480,000 were put out, purporting on their face to have been issued under the authority thus granted, and the New York Guaranty and Indemnity Company, for all that appears to the contrary, became the *bona fide* holder of \$250,000 of this amount. On the 24th of January, 1874, act No. 3, of 1874, was passed to provide for funding the obligations of the state by an issue, if necessary, of \$15,000,000 of "consolidated bonds of the state of Louisiana." To accomplish this a "board of liquidation" was created, with power to execute the new bonds and exchange them for old at the rate of sixty cents of the new for \$1 of the old. If the board

rejected any bond offered for exchange, the holder could apply by petition to some proper court for relief, and if on that petition final judgment should be rendered in his favor against the board, he would be entitled, on giving up his old bond, to get one of the new on the terms proposed.

On the 14th of March, in the same year, 1874, act No. 55, of 1874, was passed, which purported to prohibit all state officers from levying or collecting any tax to pay the principal or interest falling due after January 1, 1874, of any of the state debt, unless such levy and collection were specially authorized by some law of the state subsequently adopted, and also prohibiting the setting apart of any funds in the treasury for any such payment. The same law purported to take away from the courts of the state all power or jurisdiction to arrest or impede its operation by *mandamus*, injunction, or otherwise. On the 17th of March, 1875, act No. 11, of 1875, was passed, to prohibit the board of liquidation from funding, under act No. 3, of 1874, questionable and doubtful obligations of the state, "until said bonds . . . shall first, by final decree of the supreme court of the state of Louisiana, have been declared legal and valid obligations against the state of Louisiana, and that the same were issued in strict conformity to law, and not in violation of the constitution of this state or of the United States, and for a valid consideration." In this act the bonds issued in aid of the Mississippi and Mexican Gulf Ship Canal Company were specially designated as questioned and of doubtful validity.

§ 1862. *A decision of a state court, that certain bonds were not entitled to the benefit of a funding scheme, does not impair the obligation of a contract.*

After this act was passed, the New York Guaranty and Indemnity Company, being desirous of funding its bonds under the provisions of act No. 3, filed its petition in the fifth district court of the parish of Orleans, praying that the bonds "be decreed to have been issued in strict conformity to law, and not in violation of the constitution of this state or of the United States, and that they be declared legal and valid obligations against the state of Louisiana, and issued for a valid consideration." No other judgment was asked than such an one as was necessary under act No. 11, of 1875, to secure the benefit of act No. 3, of 1874,—the funding act. This petition got in due course of procedure to the supreme court of the state, and it was there decided that the suit thus begun was not one for the recovery of the money due on the bonds, but was rather in the nature of an inquisition to determine whether the bonds in question were of the class which the state had determined to include in its funding scheme. For this reason the court held that for the purposes of such an inquiry the petitioner, as a *bona fide* holder, occupied no better position than the first taker. Because of this ruling the present writ of error has been brought by the company.

This statement of the case is sufficient, as we think, to show that the question below was not whether, in an action against the state, properly authorized, to recover the amount due upon the bond, act No. 11 permitted the state to prove, as against a *bona fide* holder, that the bond was invalid, but whether the *bona fide* holder of an invalid bond was entitled to the benefit of the scheme of compromise which the state had offered to the holders of its securities that were valid in the hands of the first taker. Such being the case, no obligation of the original contract has been impaired. Every legal right which the original taker acquired when the bond was put out still remains. The Guaranty Company may enforce all such rights now in any appropriate manner. All the court below has said is, that, as between the state and the first taker, the

bonds were not valid obligations, and that, consequently, they are not entitled to the privileges of the funding laws. The obligation of the state to pay the bonds in money to the *bona fide* holders in accordance with the original promise still remains. The judgment which has been rendered, and which we are now reviewing, is no bar to any proper proceeding for that purpose. The suit which was authorized, and the suit which was actually begun, only related to the right of the holder to come into the compromise which the state offered to certain classes of its creditors. The judgment is that the bonds do not belong to any of the designated classes. The question here is, not whether, if that inquiry were open to us, we should be of the same opinion, but whether the obligation the state is under to the company has been impaired by act 11, of 1875, as thus construed. We think the state had the right to say, when it proposed a scheme for the compromise of its debts, what creditors should be included. That, in our opinion, is all that has been done.

It follows that the federal question was decided right below, and the judgment is consequently affirmed.

WOLFF v. NEW ORLEANS.

(18 Otto, 858-869. 1890.)

ERROR to U. S. Circuit Court, District of Louisiana.

Opinion by MR. JUSTICE FIELD.

STATEMENT OF FACTS.—In March, 1876, the relator, Rebecca W. Wolff, recovered a judgment in the circuit court of the United States for the district of Louisiana, against the city of New Orleans, for the sum of \$13,000. Execution was issued upon it and returned unsatisfied. She thereupon caused the judgment to be registered, under the act of the legislature of the state of 1870, known as act No. 5, of the extra session of that year, to the provisions of which we shall hereafter refer; and then called upon the mayor and administrators of the city to pay it out of the contingent fund of the corporation, or, if it could not be paid in that way, to levy a special tax for its payment. The authorities having failed to comply with this request, she applied for a *mandamus* to compel them to pay it out of that fund or to levy a tax for that purpose, setting forth in her petition the recovery of the judgment, the issue of execution thereon, its return unsatisfied, and the refusal of the city authorities, as stated. An alternative writ was accordingly issued. To this writ the city authorities appeared and filed an answer to the petition, in which they admitted the recovery of the judgment, the issue of the execution, and its return unsatisfied, and set up that the judgment was recovered on bonds of the city issued to the New Orleans, Jackson & Great Northern Railroad Company, under the act of the legislature of the state, approved on the 15th of March, 1854; that no tax for the payment of the principal of those bonds was directed to be levied by that act, or any other act of the state; that there was no contingent fund of the city out of which the judgment could be paid; and that there were no moneys to the credit of the fund for current expenses, not otherwise appropriated; and that for these reasons they had not budgeted the judgment or levied a tax for its payment, and could not levy a special tax for that purpose. In an amended answer they further set up that at the time the bonds upon which the judgment was recovered were issued, a general statute of the state prohibited municipal corporations from incurring any debt or liability unless in the ordinance creating the same full provision was made for the pay-

ment of the principal and interest; and that a special statute prescribing the form of the ordinance by which a particular debt could be created, declared that such ordinance should be submitted to the legal voters of the corporation, and that the assent of the majority of them should be a condition of its validity; that the ordinance thus submitted, providing for the issue of the bonds, contained no provision for levying a tax to pay the principal of them, but contained another provision deemed ample for that purpose; and that, therefore, it was the evident intention of the legislature that the principal debt should be thus paid and not by means of taxation.

The relator demurred to the return of the respondents, but it would seem that, when the demurrer was called, the case was submitted upon the pleadings and certain proofs which had been filed. The court decreed that the city authorities, exercising the discretion vested in them according to section 3 of act No. 5 of the extra session of 1870, should appropriate from the money set apart in the budget or annual estimate for contingent expenses a sufficient sum of money to pay the judgment; but that if no appropriation be made by the common council of the city, the judgment should be paid according to its priority of filing and registry in the office of the controller, from the first money in the next annual estimate set apart for that purpose. The decree was accompanied by a provision that nothing therein should require the common council to assess or levy any tax upon the city for the payment of the judgment, until the legislature of the state should authorize the same, thus assuming that existing legislation did not permit any such tax. To reverse this decree the relator has brought the case to this court.

§ 1863. *Where the indebtedness of a city is established by judgments, the payment of which is not restricted to any special fund, a mandamus will lie to compel the levy of a tax to pay such judgment.*

The act which authorized the issue of the bonds, upon which the relator recovered judgment, provided that the railroad company should issue to the city certificates of stock equal in amount to the bonds received, and declared that the stock should remain "forever pledged for the redemption of said bonds." It made no other provision for the ultimate payment of the principal, but provided that a special tax should be levied each year to pay the annual interest. It is contended that only to the stock thus pledged and the income from it were the bondholders to look for the payment of the principal. The same position was urged in *United States v. New Orleans*, on the application by the relator in that case for a *mandamus* to compel the city authorities to levy a tax to pay judgments recovered upon similar bonds, and was adjudged to be untenable. 98 U. S., 381. The court held that the indebtedness of the city was conclusively established by the judgments recovered against it, and that their payment was not restricted to any species of property or revenues, or subject to any conditions. If there were any limitations upon the means by which payment of the bonds was to be had, they should have been insisted upon when the suits were pending, and have been continued in the judgments. The fact that no such limitations were there found was conclusive that none existed.

The court also held that if the question were an open one its conclusion would be the same; that the declaration of the act, that the stock which the city was to receive from the railroad company should remain "forever pledged for the redemption of said bonds," only created a statutory pledge by way of collateral security for their payment, and did not release the city from its primary liability; and that the bondholder was not bound to look to that se-

curity, but could proceed directly against the city without regard to it. The court further held that the statutes of the state restraining municipal corporations from creating any indebtedness, without providing at the same time for the payment of the principal and interest, were not limitations upon the power of the legislature to authorize the creation of debts by such corporations upon other conditions; and though, as a general rule, it was deemed expedient to prohibit cities from incurring debts on their own motion, without making provision for their payment, it did not follow that the legislature might not authorize the incurring of a particular obligation without such provision; and, in the instance mentioned, the statute prescribed the details of the ordinance to be passed by the city in execution of the authority conferred. The views thus expressed dispose of the objections to the *mandamus* in this case, founded upon what is contained in the railroad act as well as what is omitted from it. Nothing new has been presented to our consideration to lead us to doubt the correctness of our conclusions. There is no occasion, therefore, to repeat the reasons upon which they were founded.

§ 1864. *All laws are void which limit the taxing powers of a city to such an extent as to impair the obligations of its contracts.*

But counsel also urge, in their argument against the granting of the *mandamus*, that the power of a city to levy a tax upon property for all purposes, judgments included, is limited by acts of the legislature to \$1.50 on every \$100 of valuation, and that the amount thus raised is insufficient to meet the current expenses of the city and pay previous judgments of other parties. They repeat the averments of the answer, that there was no contingent fund of the city out of which the judgment of the relator could be paid, nor moneys to the credit of the fund for current expenses not otherwise appropriated. They cite the charter of 1870, which requires a budget to be made in December of each year, exhibiting the various items of liability and expenditure for the ensuing year, and the act of March 6, 1876, which limits the right of taxation upon property by the city to \$1.50 on every \$100 of its assessed value. They also insist that the conditions on which judgments against the city are to be paid are prescribed in act No. 5 of the extra session of 1870. This last act provides that no writ of execution or *fiari facias* shall issue from any of the courts of the state to enforce the payment of any judgment for money against the city of New Orleans; but that such judgment, when the same shall have become executory, shall have the effect of fixing the amount of the plaintiff's demand, and that he may cause a certified copy of it, with his petition and the defendant's answer, and the clerk's certificate that it has become executory, to be filed in the office of the controller of the city, and that thereupon it shall be the duty of the controller or auditing officer to cause the same to be registered and to issue a warrant upon the treasurer or disbursing officer of the corporation for the amount, without any special appropriation of money therefor, "provided always that there be sufficient money in the treasury to pay such judgment, specially designated and set apart for that purpose in the annual budget or detailed statement of items of liability and expenditure required to be made" by section 124 of the act of March 20, 1856, amending the city charter, or by subsequent legislation.

The act further provides that in case the amount designated in the annual budget for the payment of judgments against the city shall have been exhausted, the "common council shall have power, if they deem it proper, to appropriate from the money set apart in the budget or annual estimate for

contingent expenses, a sufficient sum of money to pay said judgment or judgments; but if no such appropriation be made by the common council, then all judgments shall be paid, in the order in which they shall be filed and registered in the office of controller, from the first money *next annually set apart for that purpose.*"

The respondents contend that, under these provisions, no judgment creditor can claim that his judgment shall be paid absolutely, for its payment is made to depend upon the conditions stated; or insist upon an appropriation in the budget for any fixed sum, for this is controlled by the limit of taxation and the amount of necessary expenditures to sustain the government of the city. The amount for judgments to be provided annually, they say, is to be fixed by the discretion of the common council in framing the budget; and this discretion is to be guided by the limit of taxation for all purposes, and the amount required for police, lights, paving streets, public schools, and other necessary expenses of the city. These expenditures have heretofore exhausted, and, if the limit of taxation prescribed by the act of March 6, 1876, be enforced, will hereafter continue to exhaust, nearly all the funds raised. The balance remaining is, and, with that limit of taxation, always will be, insufficient to pay any considerable portion of the earliest judgments against the city. So the relator must wait for an indefinite period,—perhaps until the statute has barred her claim,—and take the uncertain chance of obtaining from the city in the distant future any portion of the sum due to her.

§ 1865. *The Louisiana act of March 6, 1876, authorizing the "premium bond" plan, is unconstitutional and void.*

The act of March 6, 1876, giving effect to what is known as the "*premium bond plan*," does not hold out to the bondholder the delusive hope of payment in the distant future which flitters around act No. 5 of 1870; it cuts him off absolutely, unless he will accept the conditions of the proposed plan. It recites in its preamble that the total debt of the city, bonded and floating, exceeds \$23,000,000; that the taxable property of the city has become so reduced in value as to require a tax at the rate of at least five per cent. per annum to liquidate the debt; that a tax so exorbitant will render its collection impossible; that the continuation of a tax beyond the ability of the property to pay would lead to a further destruction of the assessable property of the city and to ultimate bankruptcy; and that the city has adopted a plan for the liquidation of its indebtedness, looking to the payment of its creditors in full, "obtaining thereby the indulgence necessary for the public well-being and the maintenance of the public honor." The plan proposed was an exchange of outstanding bonds for premium bonds; the latter to be of the denomination of \$20 each, bearing five per cent. interest from September 1, 1875, payable at no designated period, the interest and principal to be paid at the same time and not separately, and the maturity of the bonds — principal and interest — to be determined by chance in the drawing of a lottery. One million of these bonds is to be divided into ten thousand series of one hundred bonds each. The ten thousand series are to be placed in a wheel, and, in April and October of each year, as many series are to be drawn as are to be redeemed, according to a certain schedule adopted. The bonds composing the series thus drawn are to be entered for payment three months thereafter, principal and interest, and are to be receivable for all taxes, licenses, and other obligations of the city. At the expiration of the three months the bond numbers of the drawn series are to be placed in a wheel and one thousand one hundred and seventy-

six prizes, amounting to \$50,000, are to be drawn and distributed. Under this plan the city is released from payment of the principal or interest of its debt, except such portion as may be drawn from the lottery each year. As justly observed by counsel in one of the cases before us, under this arrangement, whether a creditor will be paid in one or in fifty years, will depend upon the turn of a wheel and the drawing of a lucky number. Of course this plan disregards all the terms upon which the outstanding bonds of the city — and, among others, those held by the relator — were issued, and postpones indefinitely the payment of both their principal and interest. To induce its adoption by the city's creditors, the act, in its seventh section, provides that no tax for the payment of the principal or interest of other than the premium bonds shall thereafter be levied; repeals all laws requiring or authorizing the city to pay any such tax, and declares that it shall be incompetent for any court to issue a *mandamus* to the officers of the city to levy and collect any interest tax other than on the premium bonds.

For the interest on the premium bonds and other purposes of the city, the act provides that a tax of only one and one-half per cent. per annum shall be levied; and this limitation of the taxing power of the corporation is "declared to be a contract not only with the holder of said premium bonds, but also with all residents and tax-payers of said city, so as to authorize any holder of said premium bonds to legally object to any rate of taxation in excess of the rate herein limited." It is plain that if the provisions of this act can be sustained as a valid exercise of legislative power, the judgment of the relator is practically annulled or rendered so uncertain of payment as to be of little value. When the bonds were issued, upon which the judgment was recovered, the city was by its charter invested with "all the powers, rights, privileges and immunities incident to a municipal corporation and necessary for the proper government of the same;" and it could have provided the means, by taxation, for their payment when they became due. As we said in the case already cited, "the power of taxation is an incident to such a corporation, and may be exercised for all the purposes authorized by its charter or subsequent legislation. Whatever the legislature empowers the corporation to do is presumably for its benefit, and may, in 'the proper government of the same,' be done." Besides the power thus existing at the time the bonds were issued, the act providing for their issue directed, as already stated, a special tax to be levied each year to meet the annual interest on them. Such being the case, the question is, whether the city has been divested of its power by the act of 1876, which we have mentioned.

§ 1866. *The power of the legislature over corporations, however unlimited in other respects, is strictly subordinate to the constitutional provision against impairing the obligation of contracts.*

The argument in support of the act is substantially this: that the taxing power belongs exclusively to the legislative department of the government, and when delegated to a municipal corporation may, equally with other powers of the corporation, be revoked or restricted at the pleasure of the legislature. It is true that the power of taxation belongs exclusively to the legislative department, and that the legislature may at any time restrict or revoke at its pleasure any of the powers of a municipal corporation, including, among others, that of taxation, subject, however, to this qualification, which attends all state legislation, that its action in that respect shall not conflict with the prohibitions of the constitution of the United States, and, among other things, shall not operate

directly upon contracts of the corporation, so as to impair their obligation by abrogating or lessening the means of their enforcement. Legislation producing this latter result, not indirectly as a consequence of legitimate measures taken, as will sometimes happen, but directly by operating upon those means, is prohibited by the constitution, and must be disregarded — treated as if never enacted — by all courts recognizing the constitution as the paramount law of the land. This doctrine has been repeatedly asserted by this court when attempts have been made to limit the power of taxation of a municipal body, upon the faith of which contracts have been made, and by means of which alone they could be performed. So long as the corporation continues in existence, the court has said that the control of the legislature over the power of taxation delegated to it is restrained to cases where such control does not impair the obligation of contracts made upon a pledge, expressly or impliedly given, that the power should be exercised for their fulfillment. However great the control of the legislature over the corporation while it is in existence, it must be exercised in subordination to the principle which secures the inviolability of contracts.

The case of *Von Hoffman v. City of Quincy*, reported in 4th Wallace, is a leading one on this subject. There the legislature of Illinois had, in 1851, 1853 and 1857, passed acts authorizing that city to subscribe for stock of certain railroad companies, and in payment thereof to issue its bonds with coupons for interest annexed. Those acts authorized the city to levy a special annual tax upon the property therein, real and personal, to pay the annual interest upon the bonds, and required that the tax when collected should be set aside as a special fund for that purpose. The city failed to pay the coupons held by the relator for a long time after they became due, and refused to levy the tax necessary for that purpose. The relator thereupon sued the city and recovered judgment. Execution issued thereon being returned unsatisfied, he applied to the circuit court of the United States for the southern district of Illinois for a *mandamus* to compel the authorities of the city to apply to the payment of the judgment any unappropriated funds they had, or, if they had no such funds, to levy a tax under the acts mentioned sufficient for that purpose. The court issued an alternative writ, to which the city authorities answered, setting up an act of the legislature of the state, of November, 1863, authorizing the city council to levy a tax for certain special purposes, such as lighting the streets and erecting buildings for schools, and also a tax on all real and personal property to pay the debts and meet the general expenses of the city, not exceeding fifty cents on each \$100 of the annual assessed value thereof, and repealing all other laws touching taxes except such as related to their collection, or to streets, alleys and licenses. And they alleged that the full amount of taxes thus authorized was in process of collection; that the power of the city in that respect was exhausted; and that the fifty cents on the \$100, when collected, would not be sufficient to pay the annual expenses for the year 1864 and the debts of the city. The relator demurred to the answer, and judgment was given against him; but the case being brought to this court, the judgment was reversed. In delivering the unanimous opinion of the court, Mr. Justice Swayne said:

“It is well settled that a state may disable itself by contract from exercising its taxing power in particular cases. It is equally clear that where a state has authorized a municipal corporation to contract, and to exercise the power of local taxation to the extent necessary to meet its engagements, the power thus

given cannot be withdrawn until the contract is satisfied. The state and the corporation, in such cases, are equally bound. The power given becomes a trust which the donor cannot annul, and which the donee is bound to execute; and neither the state nor the corporation can any more impair the obligation of the contract in this way than in any other. The laws requiring taxes to the requisite amount to be collected, in force when the bonds were issued, are still in force for all the purposes of this case. The act of 1863 is, so far as it affects these bonds, a nullity. It is the duty of the city to impose and collect the taxes in all respects as if that act had not been passed. A different result would leave nothing of the contract but an abstract right, of no practical value, and render the protection of the constitution a shadow and a delusion." 4 Wall., 535, 554 (§§ 1877-82, *infra*).

§ 1867. *Contracts by the state, how far protected by the constitution.*

The prohibition of the constitution, against the passage of laws impairing the obligation of contracts, applies to the contracts of the state, and to those of its agents acting under its authority, as well as to contracts between individuals. And that obligation is impaired, in the sense of the constitution, when the means by which a contract, at the time of its execution, could be enforced, that is, by which the parties could be *obliged* to perform it, are rendered less efficacious by legislation operating directly upon those means. As observed by the court in the case cited, "without the remedy the contract may, indeed, in the sense of the law, be said not to exist, and its obligation to fall within the class of those moral and social duties which depend for their fulfillment wholly upon the will of the individual. The ideas of validity and remedy are inseparable, and both are parts of the obligation which is guarantied by the constitution. The obligation of a contract 'is the law which binds the parties to perform their agreement.'"

The restraint upon the legislature to the extent mentioned, by the contract clause of the constitution, against revoking or limiting the power of taxation delegated by it to municipal bodies as the means of carrying out the purposes of their incorporation, or purposes designed for their benefit, is a different matter from that of exempting property from taxation; and even in the latter case it has been adjudged in repeated instances that one legislature can bind its successors. The restraint in no respect impairs the taxing power of the existing legislature or of its successors, or removes any property from its reach.

§ 1868. *Case cited and distinguished.*

These views are not inconsistent with the doctrine declared by the decision of the court in the recent case of *Meriwether v. Garrett*, 102 U. S., 472 (CORPORATIONS, §§ 2224-37). There the charter of the city of Memphis had been repealed, and the state had taken the control and custody of her public property, and assumed the collection of the taxes previously levied, and their application to the payment of her indebtedness. The city, with all her officers, having thus gone out of existence, there was no organization left — no machinery — upon which the courts could act by *mandamus* for the enforcement of her obligations to creditors. The question considered, therefore, was whether the taxes levied before the repeal of the charter, but not paid, were assets which the court could collect through a receiver and apply upon judgments against the city. Here the municipal body that created the obligations upon which the judgment of the relator was recovered, existing with her organization complete, having officers for the assessment and collection of taxes, there are parties upon whom the courts can act. The courts, therefore, treating as invalid

and void the legislation abrogating or restricting the power of taxation delegated to the municipality, upon the faith of which contracts were made with her, and upon the continuance of which alone they can be enforced, can proceed, and by *mandamus* compel, at the instance of parties interested, the exercise of that power as if no such legislation had ever been attempted. And that the relator seeks to have done here.

Following the doctrine of *Von Hoffman v. City of Quincy*, we are of opinion that the act of March 6, 1876, the provisions of which we have stated, is invalid so far as it limits the power which the city possessed, when the bonds upon which the relator has recovered judgment were issued, to levy a tax for their payment. In thus limiting the power without providing other adequate means of payment of the bonds, the legislature has impaired the obligation of the contract between her and the city. The judgment of the court below must, therefore, be reversed, and the cause remanded with directions to issue the writ as prayed in the petition of the relator; and it is so ordered.

Opinion by MR. JUSTICE HARLAN.

I concur in the opinion just delivered, except the paragraph in which reference is made to *Meriwether v. Garrett*, 102 U. S., 472. The present case does not require us to determine any question as to the effect which the repeal of a municipal charter may have upon the rights of existing creditors. Nor do I wish to be understood as assenting to the correctness of the statement in the opinion as to what was involved and decided in *Meriwether v. Garrett*.

LOUISIANA v. PILSBURY.

(15 Otto, 278-302. 1881.)

ERROR to the Supreme Court of Louisiana.

STATEMENT OF FACTS.—Petition on the relation of a holder of the consolidated bonds of the city of New Orleans for a *mandamus* to compel the municipal authorities of that city to levy a special tax to pay the coupons on outstanding bonds issued under the act of the Louisiana legislature of 1852. In that year the three municipalities of New Orleans were united and certain suburb corporations annexed to the city, and the act in question consolidated all the debts of the different municipal organizations. The bonds on which this proceeding was taken were issued under the authority vested in the city by that legislation. All other facts material to the questions of law involved appear sufficiently in the opinion of the court.

Opinion by MR. JUSTICE FIELD.

As will be seen by the statement of the case, the petition for the *mandamus* proceeds upon the theory that the transaction, authorized by the thirty-seventh section of the act of 1852, and the fifth section of the supplementary act of the same day, when consummated by the issue of the bonds of the city of New Orleans, and their exchange for the obligations of the old city, of the three municipalities, and of the city of Lafayette, constituted a contract between the city and the bondholders, the obligations of which could not be subsequently impaired by state legislation; and that the provision pledging the levy and collection of an annual tax of \$600,000, increased by the supplementary act to \$650,000, for the payment of the interest on the bonds, and their gradual retirement, was an essential part of that contract. On the other hand, the city authorities, the respondents here, deny the validity of the act of 1852, on two

grounds: 1st, that its object is not sufficiently expressed in its title, under the constitution of 1845; and 2d, that in providing for a tax to be levied upon real estate and slaves, to the exclusion of personal property, and in proportion to the indebtedness of each municipality, it violates the constitution of 1845, which requires equality and uniformity of taxation throughout the state. And they also invoke against the issue of the writ the subsequent legislation of the state limiting the taxes which shall be levied upon property in the city, prescribing the purposes to which they shall be applied, prohibiting the levy and collection of any other tax, and depriving the courts of the state of the power to issue a *mandamus* to compel them to pay any debt not liquidated by judgment, or to levy and collect any interest tax other than that provided by the premium bond act of 1876.

§ 1869. *An act authorizing a tax to pay city bonds is a contract the obligation of which cannot be impaired.*

Assuming for the present that the act of 1852 is not invalid, for the reasons stated, the first inquiry is as to the character of the transaction authorized by it and the supplementary act. Did it, when consummated, amount to a contract between the city and parties subsequently taking the bonds; and did the pledge to levy the annual tax named form a part of the contract? Unless both of these questions can be answered in the affirmative, it will be to no purpose to inquire into the subsequent legislation of the state respecting the tax, as no inhibition would rest upon its power over the subject.

The acts of 1852 consolidated the three previously existing municipalities within the limits of New Orleans into one, and added to it the adjacent city of Lafayette. The new corporation took all the property and interests of the municipalities, and of Lafayette, and consequently became subject to their obligations. The advantages which accrued from the possession of their property were accompanied with the burdens of their debts. This liability was not, however, left to rest upon any general principles of corporate liability in such cases. The legislature recognized its existence, and, in consolidating the municipalities and the corporation of Lafayette, declared that the debts of the old corporation, of the municipalities, and of that city, should be assumed and paid by the city of New Orleans, which was declared to be liable therefor. The first of the acts appointed commissioners of the debt thus consolidated, and authorized them to issue new bonds of the city having forty years to run, with interest coupons payable semi-annually, in exchange for the obligations and debts of the old corporation, and of the municipalities, to which the debts of Lafayette were subsequently added by the supplementary act. To meet the interest it provided that the common council of the city should annually, in the month of January, pass an ordinance to raise the sum of \$600,000, increased to \$650,000 by the supplementary act, by a special tax on real estate and slaves, to be called the consolidated loan tax. It also provided that any surplus remaining at the end of each year, after payment of the interest on these bonds, and the expenses of managing the debt, should be applied to the purchase of such of the bonds as might have the shortest period to run. These provisions, until the bonds were accepted, were in the nature of proposals to the creditors of the old city, of the municipalities, and of Lafayette. The state in effect said to them: The city will give these bonds, running for the period designated, and drawing interest, in exchange for your demands; and as security for the payment of interest, and the gradual redemption of the principal, the city shall annually, in January, levy a special tax for that pur-

pose to the amount of \$650,000. The provisions were designed to give value to the proposed bonds in the markets of the country, and necessarily operated as an inducement to the creditors to take them. When the bonds were issued and taken by the creditors, a contract was consummated between them and the city as fully as if all the provisions had been embodied as express stipulations in the most formal instrument signed by the parties. On the one hand, the creditors surrendered their debts against the former municipalities; and, on the other hand, in consideration of the surrender, the city gave to them its bonds, which carried the pledge of an annual tax of a specified amount for the payment of the interest on them, and ultimately of the principal. The annual tax was the security offered to the creditors; and it could not be afterwards severed from the contract without violating its stipulations, any more than a mortgage executed as security for a note given for a loan could be subsequently repudiated as forming no part of the transaction. Nearly all legislative contracts are made in a similar way. The law authorizes certain bonds to be issued, or certain work to be done upon specified conditions. When these are accepted, a contract is entered into imposing the duties and creating the liabilities of the most carefully drawn instrument embodying the provisions. *Von Hoffman v. City of Quincy*, 4 Wall., 535 (§§ 1877–82, *infra*); *Hartman v. Greenhow*, 102 U. S., 672; *People v. Bond*, 10 Cal., 563; *Brooklyn Park Co. v. Armstrong*, 45 N. Y., 235.

There were other provisions in the act of 1852 besides those stated, which, though not essential to the obligatory form of the contract, were designed to inspire the creditors with confidence in the punctual payment of the interest and principal. It declared that all ordinances, resolutions, or other acts passed by the council after the 1st day of January of each year should be null and void, unless the ordinance imposing the consolidated loan tax should have been previously passed. It also declared that after its passage no obligation or evidence of debt of any description whatever, except those therein authorized, should be issued by the city or under its authority. Whatever legal force may be ascribed to them, they were intended as solemn asseverations that the pledge of the annual tax should never be violated.

§ 1870. *The act of Louisiana of February, 1852, to consolidate the city of New Orleans, is not in conflict with article 118 of the state constitution of 1845, requiring the expression in the title of the object of the law.*

The question then arises, Was the act of 1852 valid? Its invalidity is asserted, as stated above, on two grounds, the first of which is that its object is not expressed in its title, as required by article 118 of the constitution of 1845. The title of the act is, "An act to consolidate the city of New Orleans, and to provide for the government and administration of its affairs." The article of the constitution declares that "every law enacted by the legislature shall embrace but one object, and that shall be expressed in the title." A similar provision is found in several state constitutions. Its object is to prevent the practice, common in all legislative bodies where no such provision exists, of embracing in the same bill incongruous matters, having no relation to each other, or to the subject specified in the title, by which measures are often adopted without attracting attention, which, if noticed, would have been resisted and defeated. It thus serves to prevent surprise in legislation. But it was not intended to prevent the union of several different provisions in the same bill, if they are germane to the general subject indicated by its title. A bill to incorporate a city and provide for its government may, without conflicting with

the constitutional clause, contain provisions relating to the various subjects upon which municipal legislation may be required for the preservation of peace, good order and health within its limits, the promotion of its growth and prosperity, and the raising of revenue for its government. So here, under the title of the act in question, provisions might be enacted, not merely relating to the union of the different municipalities and the government of the city, but to all the varied details into which the general administration of its affairs might lead. The municipalities were in debt at the consolidation, and this was well known to the legislature. A change in their government, and in the administration of their affairs, required some disposition to be made of their debts. Whatever interests were possessed by them were the proper subjects of legislation in the act which took them out of existence as separate municipalities and created a new corporation in their place, with power to deal with their affairs. We hold, therefore, that the act of 1852 was not invalid, on the ground that its object is not sufficiently expressed in its title.

§ 1871. *Construction of article 127 of the Louisiana constitution of 1845, touching equality and uniformity of taxation.*

The second ground of objection to the validity of the act of 1852 is that the tax prescribed is to be levied upon real estate and slaves, to the exclusion of personal property, and in each municipality in proportion to its indebtedness; which, as contended, violated the rule of equality and uniformity required by the constitution of 1845. The language of the act is, that "the common council shall annually, in the month of January, pass an ordinance to raise the sum of \$600,000, by a special tax on real estate and slaves, to be called the consolidated loan tax, and the rate per cent. of said tax in each municipality shall be in proportion to the indebtedness of each." This amount, as already stated, was, upon the annexation of the city of Lafayette, increased to \$650,000. On the passage of this act — February 23, 1852,— the constitution of 1845 was in force. The constitution of 1852 was not adopted until July of that year. Article 127 of the constitution of 1845 is as follows: "Taxation shall be equal and uniform throughout the state. After the year 1848, all property on which taxes may be levied in this state shall be taxed in proportion to its value, to be ascertained as directed by law. No one species of property shall be taxed higher than another species of property of equal value on which taxes shall be levied; the legislature shall have power to levy an income tax, and to tax all persons pursuing any occupation, trade or profession."

This article has been frequently before the supreme court of the state for construction, and, until the decision of the present case, the requirement of equality and uniformity in the tax has been held to apply only to taxes levied for state, and not to those levied for municipal, purposes. The first case was *Second Municipality of New Orleans v. Duncan*, 2 La. Ann., 182. That municipality had passed an ordinance imposing a special tax of one per cent. on all real estate within its limits, for the purpose of paying its debts and providing for the support of schools; and objection was taken to its constitutionality on two grounds: 1st, that the power of taxation was vested exclusively in the legislature, and could not be delegated to the municipality; and, 2d, that the taxation authorized impinged upon the rule that no one species of property should be unduly assessed. Both grounds were supposed to derive support from the article of the constitution in question,— the first, because, as contended, the equality and uniformity required throughout the state were only obtainable by confining the exercise of the power of taxation to the legislature, whose au-

thority was co-extensive with the territorial limits of the state; and the second, from the inhibition against taxing one species of property higher than another. But the court replied, speaking through its chief justice: "The article by its terms applies to state, and not to municipal, taxes. It provides for equality and uniformity of taxation *throughout the state*. . . . The framers of the constitution had before them the condition of the municipalities of New Orleans, with their debts, their abuses and their wants, and their corporate existence is recognized and continued, as to certain public rights, by an express provision. The jurisprudence under which the present system of taxation had grown up was before them, and the power of remedying the evils of misgovernment was left *in statu quo* with the legislature; and the convention confined itself to providing for the state government, leaving the municipal bodies, as it is believed sound policy justified, under legislative control." And referring to the admission made in the record that there was no special ordinance of the municipality assessing taxes on personal property, the court added: "We know of no reason imperative on the municipality to impose their taxes in any particular form, or to include any other species of property in an ordinance imposing a tax on real estate. It constitutes no objection, under any view of the subject, to the validity of this tax, that personal property was not also taxed by special ordinance."

This case was decided in 1847, and it is objected that it arose before that part of the article went into effect which declares that "no one species of property shall be taxed higher than another species of property of equal value on which taxes shall be levied." It is doubtful whether this objection be correct in point of fact; but assuming it to be so, the requirement of equality and uniformity was in force; and the part cited does not require that taxation shall be universal. It simply requires that, when different kinds of property are taxed, the rate of taxation shall be the same on all. The construction given was afterwards affirmed by the same court in *City of Lafayette v. Cummins*, 3 La. Ann., 673, decided in 1848. There the question was as to the validity of a municipal tax on the trade and occupation of the defendant as a butcher, levied under an ordinance of the city passed in 1847. There were other trades and occupations not embraced in the ordinance, and, consequently, not taxed. It was therefore contended that the imposition of the tax was contrary to that clause of the article of the constitution which provides for the equality and uniformity of taxation throughout the state. But the court replied that "in the case of *Duncan v. Second Municipality*, this question, after very thorough argument, was determined by this court, and the article was held applicable only to state, and not to municipal, taxes." It is said in answer to this decision that the language of the court was a mere dictum. We do not so regard it. The point of contention in the case was whether the equality and uniformity applied to taxation on occupations and trades as well as on property. The answer which met the objection to the taxation on real property exclusively was held to meet the objection to taxation on certain occupations to the exclusion of others.

The constitution of 1852 contained a similar clause,—identical in language, omitting the words "after the year 1848," —and with one exception, subsequently reversed, it has received a similar construction from the supreme court of the state. The case referred to was that of *Municipality No. 2 v. White*, which arose in 1854. 9 La. Ann., 446. The municipality had imposed a tax on the owners of property contiguous to a newly opened street, to pay the ex-

penses of opening it, under a law which authorized the apportionment of the cost in such cases upon the owners of adjacent property, according to the benefit derived from the improvement. The court was of opinion that the law was liable to the objection that the tax was not equal and uniform, as required by the clause in question, and held it to be unconstitutional. The decision was in conflict with that in *Duncan's case*, but it was rendered by a divided court, and in *Yeatman v. Crandall*, which arose in 1856, it was overruled. In the latter case, the plaintiff sought to enjoin the collection of a levee tax, which was imposed on certain alluvial lands, on the ground that the statute authorizing it was unconstitutional, in that it violated the rule of equality and uniformity prescribed by the article in question. But the court said: "This article refers to state taxation, in its proper sense for general or state purposes. When it says that taxation shall be equal and uniform throughout the state, it points directly to its object, which is to regulate the mode of filling the state treasury. It does not take away the power of making local assessments for local improvements, upon the equitable principle that he who reaps the benefit must bear the burden. . . . It is notorious that an acre of land pays twice as great a tax for local purposes in one parish as an acre of equal value pays in another parish. Yet no one thinks the constitution infringed by such a state of things." 11 La. Ann., 220.

By this decision the doctrine of the earlier cases, upon the clause in the constitution of 1845, was re-established; and one of the judges, who had concurred in the decision in the *White case*, stated that he had been led to reconsider his opinion, and that he yielded his former impressions on this point the more readily, because the supreme court which sat under the constitution of 1845, and five of the seven judges with whom he had sat upon the bench, had concurred in holding that the article in question was not intended to apply to municipal or local taxation for local improvements. The doctrine of this case was affirmed the same year in *Surgi v. Snetchman*, 11 La. Ann., 387, and again in 1859 in *Wallace v. Shelton*, 14 id., 498. In its opinion, in the latter case, the court said that the questions in the *Yeatman case* were decided upon full consideration, after having the aid of the arguments of learned counsel in that case, and also in another case then under consideration on a rehearing, and were subsequently affirmed in the two cases mentioned; and added that, "after these decisions, which were in conformity with those under the constitution of 1845, we had hoped the question would be considered as at rest."

§ 1872. — *the tax as proportioned to the indebtedness of each municipality was not objectionable on the ground of not being uniform.*

The objection to the want of equality and uniformity in the taxation authorized by the act of 1852, in that it was to be levied on the property of the different municipalities in proportion to the indebtedness of each, does not strike us as possessing much force. The debts created by the municipalities were separate and different in amounts, and before the consolidation the taxes upon the property in them must necessarily have been assessed at different rates. There was no obligation upon the legislature to relieve either of them from the unequal burdens consequent upon the different amounts of their indebtedness. The subject was one resting in its discretion. Nor was it an unreasonable provision, when authorizing the city to issue its bonds for the indebtedness of them all, to require that taxation to raise the funds for their payment should be thus apportioned.

§ 1873. *The validity and obligation of contracts, recognized as valid by the highest tribunal of the state, cannot be impaired by any subsequent decision altering the construction of the act upon which the contracts are based.*

From the extended reference to the adjudications of the supreme court of Louisiana, upon the constitution of 1845, requiring uniformity and equality in taxation, there can be no serious question as to the validity of the act of 1852, so far as the consolidated bonds of the city of New Orleans are concerned, and the provisions made by it and the supplementary act for the annual levy of a tax of \$650,000 to pay the interest and reduce the principal. The decisions upon the clause of the constitution of 1852 are corroborative of the correctness of the construction originally placed upon the clause of the constitution of 1845. Whether such a construction was a sound one is not an open question in considering the validity of the bonds. The exposition given by the highest tribunal of the state must be taken as correct so far as contracts made under the act are concerned. Their validity and obligation cannot be impaired by any subsequent decision altering the construction. This doctrine applies as well to the construction of a provision of the organic law as to the construction of a statute. The construction, so far as contract obligations incurred under it are concerned, constitutes a part of the law as much as if embodied in it. So far does this doctrine extend, that when a statute of two states, expressed in the same terms, is construed differently by the highest courts, they are treated by us as different laws, each embodying the particular construction of its own state, and enforced in accordance with it in all cases arising under it. *Christy v. Pridgeon*, 4 Wall., 196, and *Shelby v. Guy*, 11 Wheat., 361. The statute as thus expounded determines the validity of all contracts under it. A subsequent change in its interpretation can affect only subsequent contracts. The doctrine on this subject is aptly and forcibly stated by the chief justice in the recent case of *Douglass v. County of Pike*, 101 U. S., 677, 687. "The true rule," he observes, "is to give a change of judicial construction in respect to a statute the same effect in its operation on contracts and existing contract rights that would be given to a legislative amendment; that is to say, make it prospective, not retroactive. After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is, to all intents and purposes, the same in its effect on contracts as an amendment of the law by means of a legislative enactment." See, also, *Gelpcke v. City of Dubuque*, 1 Wall., 175 (BONDS, §§ 1367-70); *Havemeyer v. Iowa County*, 3 id., 294; *Thomson v. Lee County*, id., 327 (BONDS, §§ 1669-72); *Lee County v. Rogers*, 7 id., 181; *Chicago v. Sheldon*, 9 id., 50 (§§ 2312-15, *infra*); *Olcott v. The Supervisors*, 16 id., 678; *Fairfield v. County of Gallatin*, 100 U. S., 47 (BONDS, §§ 869-871).

We refer to this doctrine, not from any doubt as to the correctness of the construction of the article of the constitution of 1845 given by the supreme court of the state, but in answer to the objections of counsel and the position of the court below. We are of opinion that the construction given was correct. It is impossible to apply to the varying wants of a municipality the rule invoked with reference to taxation for state purposes on property throughout the state, without producing the very inequality which that rule was designed to prevent. There would often be manifest injustice in subjecting the whole property of a city to taxation for an improvement of a local character. The

rule that he who reaps the benefit should bear the burden must in such cases be applied. The same construction of a similar clause in the constitutions of other states has been adopted by their highest courts. The constitution of Virginia of 1850 prescribed that "taxation shall be equal and uniform throughout the commonwealth, and all property, other than slaves, shall be taxed in proportion to its value, which shall be ascertained in such manner as may be prescribed by law;" and the court of appeals of the state held that the provision related solely to taxation for purposes of state revenue, and did not apply to taxes by counties and corporations for local purposes. *Gilkeson v. The Frederick Justices*, 13 Gratt. (Va.), 577. The constitution of Arkansas of 1836 provided that "all property subject to taxation shall be taxed according to its value,—that value to be ascertained in such manner as the general assembly shall direct,—making the same equal and uniform throughout the state;" and the supreme court of the state held that the provision was intended to apply to state revenue, and was not applicable to taxes levied for county purposes. *Washington v. State*, 13 Ark., 752. See, also, *McGehee v. Mathis*, 21 id., 40. That taxation for state purposes, to be equal and uniform within the meaning of the constitution of 1845, need not have been universal, is a proposition which calls for no argument. It was only necessary that all property on which taxes were levied—not all property in the state—should be taxed according to its value, and in conformity with some fixed rate or mode. *State v. Lathrop*, 10 La. Ann., 398; *New Orleans v. Commercial Bank*, id., 735.

§ 1874. *Obligation of the city of New Orleans to levy a tax to pay the interest on the consolidated debt.*

The validity of the consolidated debt of New Orleans, and the obligation of the city to provide for the payment of the interest and the redemption of the principal, were never questioned by the legislative department of the state until 1876, but were repeatedly and in the most emphatic manner recognized and affirmed. In fourteen acts of the legislature passed prior to that year the consolidated bonds are referred to as valid obligations of the city, though in one of them, it is true, a different mode of raising the tax from that specified in the act of 1852 is required, and in another the levy and collection of the tax are postponed for two years. Thus the act passed in 1856 amending the charter provides that the common council shall in each year levy an equal and uniform tax upon all property in the city, real and personal, but that said tax, added to the consolidated loan tax and other taxes designated, shall not in the aggregate be more than \$1.50 on \$100 of valuation, except in case of invasion, "provided it be sufficient to pay the interest on the consolidated debt and railroad bonds issued by the city of New Orleans." In the mode thus prescribed the amount stipulated by the act of 1852 was annually raised and applied until 1874, without objection from the bondholders. Hence it is contended that they waived their right to the special tax mentioned. But no such inference can be justly drawn from their silence. They could not complain so long as the amount prescribed was raised and applied as stipulated. Had the requisite funds been given to the city, and then applied to pay the interest on the bonds, and to purchase with the residue such of them as had the shortest time to run, the bondholders would have been equally without cause of complaint, and would as little have waived by their silence the right to insist upon the special tax if a resort to it should become necessary. Nor is their right in that respect affected by the fact that since 1852 slavery has been abolished, and that there are no longer slaves upon whom taxation can be levied. The obligation of the city to

raise the required fund by special tax on real estate still remains. That is no more lessened than it would be by the destruction of any other portion of the taxable property, although the rate of taxation on what is left might be thereby increased.

§ 1875. *The "Premium Bond Act" of March 6, 1876, so far as it relates to the New Orleans consolidated debt, is null and void.*

The act of 1874, which postponed the levy and collection of the tax for a sinking fund for the purchase of bonds of the city until December, 1876, also declared that the act should in no wise be construed to hinder, delay or affect the prompt payment of the interest on them as they matured. The validity of the consolidation bonds was "recognized in all its integrity, it being the object of the act to afford temporary relief to the tax-payers of New Orleans in the embarrassed condition of its affairs, and not to detract from or impair the rights of the holders of said bonds." But notwithstanding this declaration of the validity of the consolidated debt, and the inviolability of the provisions for its payment, no tax was subsequently raised to pay the interest or to retire the principal. And before the time arrived to which the postponement of a levy was made, new light respecting the obligations of the city and the rights of the bondholders had dawned upon the city authorities. Although for twenty-two years all departments of the state government had recognized the validity of the bonds, and the annual interest had been regularly paid and more than half of them retired, it was then for the first time discovered that the act of 1852, authorizing the issue of the bonds, was invalid; that its object was not sufficiently stated in the title; that the tax prescribed was neither equal nor uniform, and therefore was in conflict with the constitution. The outcome of these new notions was the Premium Bond Act of March 6, 1876, passed by the legislature at the solicitation of the municipal authorities.

This act is a most remarkable piece of legislation. So far as the consolidated bonds are concerned, it amounts to little less than open repudiation of the city's faith. It admits that the debt of the city as established by law is so large as to require for its liquidation taxation on property within its limits at the rate of at least five per cent., and yet authorizes a tax of only one and a half per cent. to pay the expenses of the city government, and to meet the obligations which are offered in exchange for those bonds. It recites in its preamble that the total debt of the city, bonded and floating, exceeds \$23,000,000; that the taxable property of the city has become so reduced in value as to require a tax at the rate of at least five per cent. per annum to liquidate the debt; that the levying of a tax at so exorbitant a rate will render its collection impossible; that the continuation of a tax beyond the ability of the property to pay would lead to a further destruction of the assessable property of the city and to ultimate practical bankruptcy; and that the council of the city have adopted a plan for the liquidation of its indebtedness, looking to the payment of its creditors in full, "obtaining thereby the indulgence necessary for the public well-being and the maintenance of the public honor."

The plan proposed was to exchange all recognized and valid bonds of the city of New Orleans and of the cities of Jefferson and Carrollton for bonds to be known as premium bonds of the city; the latter to be of the denomination of \$20, and dated September 1, 1875, each bearing five per cent. interest from July 15th of that year, the interest and principal to be paid at the same time and not separately, and that time to be determined by chance in a lottery. One million of these bonds was to be divided into ten thousand series of one hun-

dred bonds each. The ten thousand series were to be placed in a wheel, and, in April and October of each year, as many series were to be drawn as were to be redeemed, according to a certain schedule adopted. The bonds composing the series thus drawn were to be entered for payment three months thereafter, principal and interest, and were to be receivable for all taxes, licenses, and other obligations of the city. At the expiration of the three months the bond numbers of the drawn series were to be placed in a wheel and one thousand one hundred and seventy-six prizes, amounting to \$50,000, were to be drawn and distributed. Under this plan the city was to be released from payment of the principal and interest of its debt, except such portion as might be drawn in the lottery each year. Under this arrangement it would depend upon the turn of a wheel and the drawing of a fortunate number whether a creditor would be paid in one year or in fifty years. The plan completely disregards all the conditions upon which the consolidated bonds were issued, and postpones indefinitely the payment of interest and principal, or rather leaves the time of payment within fifty years to be determined by chance.

The act of 1852, as we have stated, declares that the city council shall, in January of every year, pass an ordinance for the levy and collection of a special tax to be applied to the payment of the interest on the consolidated bonds and to retire the principal. The act of 1876 declares that no tax shall be levied by the city council that year or any year afterwards to pay the principal or interest on those bonds, or on any other than the premium bonds. The act of 1852 declares that all ordinances, resolutions and acts of the city council of any year shall be null and void, unless the ordinance imposing the special tax designated shall have been previously passed. The act of 1876 declares that all laws requiring or authorizing the city council to levy any tax for bonds or interest on bonds other than premium bonds are repealed; and, as if that was not sufficient evidence of the repudiation of former obligations, it forbids the courts to issue a *mandamus* to the officers of the city to levy and collect any interest tax other than for those bonds. To meet the interest on them and for all other purposes of the city, the act further provides that a tax of only one and one-half per cent. per annum shall be levied; and this limitation of the taxing power of the corporation is "declared to be a contract not only with the holder of said premium bonds, but also with all residents and tax-payers of said city, so as to authorize any holder of said premium bonds to legally object to any rate of taxation in excess of the rate herein limited."

If the provisions of this act nullifying the pledges of the act of 1852 are valid, the consolidated bonds are virtually destroyed; no taxation is allowed to raise funds for them; their payment, therefore, would be so uncertain as to render them practically valueless. The chance with premium bonds offered in their place of a favorable turn of the wheel in a lottery would be a poor substitute for the levy of an annual tax for the payment of interest and principal. We shall not waste words upon the scheme thus developed to evade the just obligations of the city. Notwithstanding the declaration in its preamble, that the act seeks from the creditors the indulgence necessary "for the public well-being and the maintenance of the public honor," it is, so far as the consolidated bonds are concerned, tainted with the leprosy of repudiation. It says to the creditors: "Take these premium bonds, and trust for payment within fifty years to your fortune in the lottery we offer; no other way is left open to obtain a possible payment. No tax can be levied for your benefit. No compulsory writ can issue from the courts. Take these bonds or take nothing."

The primal duty of the city authorities to fulfil punctually their obligations and maintain good faith is thus proclaimed to be no duty at all.

§ 1876. *The power of taxation delegated to a municipality cannot be revoked so as to impair the obligation of contracts.*

We do not deny that the power of taxation belongs exclusively to the legislative department of the government, that the extent to which it may be delegated to municipal bodies is a matter of discretion, and that in general the power may be revoked at the pleasure of the legislature. But, as we said in the case of *Wolff v. New Orleans*, decided at the last term (13 Otto, 358; §§ 1863–68, *supra*), legislation revoking the power is subject to this qualification, which attends all state legislation, that it “shall not conflict with the prohibitions of the constitution of the United States, and, among other things, shall not operate directly upon contracts of the corporation, so as to impair their obligation by abrogating or lessening the means of their enforcement. Legislation producing this latter result, not indirectly as a consequence of legitimate measures taken, as will sometimes happen, but directly by operating upon those means, is prohibited by the constitution, and must be disregarded — treated as if never enacted — by all courts recognizing the constitution as the paramount law of the land. This doctrine has been repeatedly asserted by this court when attempts have been made to limit the power of taxation of a municipal body, upon the faith of which contracts have been made, and by means of which alone they could be performed. . . . However great the control of the legislature over the corporation while it is in existence, it must be exercised in subordination to the principle which secures the inviolability of contracts.” The case of *Von Hoffman v. City of Quincy*, reported in 4 Wall., 535 (§§ 1877–82, *infra*), is a leading one on this subject. The court there said, “that when a state has authorized a municipal corporation to contract, and to exercise the power of local taxation to the extent necessary to meet its engagements, the power thus given cannot be withdrawn until the contract is satisfied. The state and the corporation, in such cases, are equally bound.”

The inhibition upon the courts of the state to issue a *mandamus* for the levy of a tax for the payment of interest or principal of any bonds except those issued under the premium bond plan was a clear impairment of the means for the enforcement of the contract with the holders of the consolidated bonds. When the contract was made the writ was the usual and the only effective means to compel the city authorities to do their duty in the premises in case of their failure to provide in other ways the required funds. There was no other complete and adequate remedy. The only ground on which a change of remedy existing when a contract was made is permissible without impairment of the contract is, that a new and adequate and efficacious remedy be substituted for that which is superseded. Here no remedy whatever is substituted for that of *mandamus*. The holders are denied all remedy. *Louisiana v. New Orleans*, 102 U. S., 203–207. Legislation of a state thus impairing the obligation of contracts made under its authority is null and void, and the courts in enforcing the contracts will pursue the same course and apply the same remedies as though such invalid legislation had never existed. The act of March, 1876, cannot, therefore, be permitted to restrict the power of the city authorities to levy the tax stipulated by the act of 1852 to pay the interest on the consolidated bonds issued thereunder and to retire the bonds.

It follows from the views expressed that the judgment of the supreme court of the state of Louisiana must be reversed, and the cause be remanded to that

court with instructions to reinstate the same and to remand it to the third district court of the parish of Orleans, or its successor, to carry into effect the provisions of the thirty-seventh section of the act of the legislature approved February 23, 1852, and the fifth section of the supplementary act approved the same day, embraced in Nos. 71 and 72 of the acts of that year, as containing a valid contract between the city of New Orleans and the creditors holding the bonds issued under them; and to direct the district court to issue a *mandamus* to the city of New Orleans and its authorities, annually to levy and collect the tax of \$650,000 directed by the acts, and to apply the same in the following order: First, to the payment of the current interest of the year; secondly, to the payment of arrearages of interest of former years until all the arrearages are satisfied; and, thirdly, to the purchase of bonds having the shortest period to run.

Judgment to this effect, and that the defendants pay the costs in this court and in the supreme and district courts of Louisiana, will be entered.

VON HOFFMAN v. CITY OF QUINCY.

(4 Wallace, 535-555. 1866.)

ERROR to U. S. Circuit Court, Southern District of New York.

STATEMENT OF FACTS.—The city of Quincy issued bonds under certain acts of the legislature which authorized the levy of a special annual tax to pay the interest as it fell due. Subsequently, in 1863, a law was passed restricting the power of taxation. The relator in this case obtained a judgment on interest coupons, and applied for a *mandamus* to compel a levy of a tax to pay the same.

Opinion by MR. JUSTICE SWAYNE.

The demurrer admits what is set forth in the answer. On the other hand, the answer, according to the law of pleading, admits what is alleged in the petition and not denied. It is then a part of the case before us, that when the bonds were issued and negotiated there were statutes of Illinois in force which authorized the levying of a sufficient special tax to pay the coupons in question as they became due. Such statutes are so inconsistent with the provisions of the act of 1863, relied upon by the city, and cover the same ground, in such a manner that the act of 1863 unquestionably repeals them, if that act be valid for the purposes it was intended to accomplish.

The validity of the bonds and coupons is not denied. No question is made as to the judgment. The case turns upon the validity of the statute restricting the power of taxation left to the city within the narrow limits which it prescribes. The answer says expressly that fifty cents on the \$100 worth of property, which is all the statute allows to be levied to meet the debts and current expenses of the city, will not be sufficient for those purposes. The expenses will, of course, be first defrayed out of the fund. What the deficiency will be as to the debts, or whether anything applicable to them will remain, is not stated. So far, it appears that nothing has been paid upon these liabilities. And it was not claimed at the argument that the result under the statute would be different in the future. The question to be determined is whether the statute, in this respect, is valid, or whether the legislature transcended its power in enacting it.

The duty which the court is called upon to perform is always one of great delicacy, and the power which it brings into activity is only to be exercised in

cases entirely free from doubt. The constitution of the United States declares (art. 1, § 10) that "no state shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts." The case of *Fletcher v. Peck*, 6 Cranch, 87 (§§ 1805-12, *supra*), was the first one in this court in which this important provision came under consideration. It was held that it applied to all contracts, executed and executory, "whoever may be parties to them." In that case the legislature of Georgia had repealed an act passed by a former legislature, under which the plaintiff in error had acquired his title by mesne conveyances from the state. The court pronounced the repealing act within the inhibition of the constitution, and therefore void. Chief Justice Marshall said: "The validity of this rescinding act might well be doubted were Georgia a single sovereign power; but Georgia cannot be viewed as a single, unconnected sovereign power, on whose legislature no other restrictions are imposed than may be found in its own constitution. She is a part of a large empire. She is a member of the American Union, and that Union has a constitution, the supremacy of which all acknowledge, and which imposes limits to the legislatures of the several states which none claim a right to pass." This case was followed by those of *New Jersey v. Wilson*, 7 Cranch, 164 (§ 2295, *infra*), and *Terrett v. Taylor*, 9 id., 43. The principles which they maintain are now axiomatic in American jurisprudence, and are no longer open to controversy.

§ 1877. *Laws become a part of the contract.*

It is also settled that the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This principle embraces alike those which affect its validity, construction, discharge and enforcement. Illustrations of this proposition are found, in the obligation of the debtor to pay interest after the maturity of the debt, where the contract is silent; in the liability of the drawer of a protested bill to pay exchange and damages, and in the right of the drawer and indorser to require proof of demand and notice. These are as much incidents and conditions of the contract as if they rested upon the basis of a distinct agreement. *Green v. Biddle*, 8 Wheat., 92 (§§ 191-206, *supra*); *Bronson v. Kinzie*, 1 How., 319 (§§ 1650-55, *supra*); *McCracken v. Hayward*, 2 id., 612 (§§ 1656-58, *supra*); *People v. Bond*, 10 Cal., 570; *Ogden v. Saunders*, 12 Wheat., 231 (§§ 1940-2003, *infra*).

In *Green v. Biddle*, the subject of laws which affect the remedy was elaborately discussed. The controversy grew out of a compact between the states of Virginia and Kentucky. It was made in contemplation of the separation of the territory of the latter from the former, and its erection into a state, and is contained in an act of the legislature of Virginia, passed in 1789, whereby it was provided "that all private rights and interests within" the district of Kentucky "derived from the laws of Virginia prior to such separation shall remain valid and secure under the laws of the proposed state, and shall be determined by the laws now existing in this state." By two acts of the legislature of Kentucky, passed respectively in 1797 and 1812, several new provisions relating to the consequences of a recovery in the action of ejectment—all eminently beneficial to the defendant, and onerous to the plaintiff—were adopted into the laws of that state. So far as they affected the lands covered by the compact, this court declared them void. It was said: "It is no answer that the acts of Kentucky now in question are regulations of the remedy, and not of the right to the lands. If these acts so change the nature and extent of exist-

ing remedies as materially to impair the rights and interests of the owner, they are just as much a violation of the compact as if they *overturned* his rights and interests."

In *Bronson v. Kinzie*, 1 How., 297 (§§ 1650-55, *supra*), the subject was again fully considered. A mortgage was executed in Illinois containing a power of sale. Subsequently, an act of the legislature was passed, which required mortgaged premises to be sold for not less than two-thirds of their appraised value, and allowed the mortgagor a year after the sale to redeem. It was held that the statute, by thus changing the pre-existing remedies, impaired the obligation of the contract, and was therefore void. In *McCracken v. Hayward*, 2 id., 608 (§§ 1656-58, *supra*), the same principle, upon facts somewhat varied, was again sustained and applied. A statutory provision, that personal property should not be sold under execution for less than two-thirds of its appraised value was adjudged, so far as it affected prior contracts, to be void for the same reason. In *Sturges v. Crowninshield*, 4 Wheat., 122 (§§ 1937-39, *infra*), the question related to a law discharging the contract. It was held that a state insolvent or bankrupt law was inoperative as to contracts which existed prior to its passage. In *Ogden v. Saunders*, 12 Wheat., 213 (§§ 1940-2003, *infra*), the question was as to the effect of such a law upon a subsequent contract. It was adjudged to be valid, and a discharge of the contract according to its provisions was held to be conclusive.

§ 1878. *Instances of laws impairing the obligation of contracts.*

A statute of frauds embracing a pre-existing parol contract not before required to be in writing would affect its validity. A statute declaring that the word *ton* should thereafter be held, in prior as well as subsequent contracts, to mean half or double the weight before prescribed, would affect its construction. A statute providing that a previous contract of indebtedness may be extinguished by a process of bankruptcy would involve its discharge, and a statute forbidding the sale of any of the debtor's property, under a judgment upon such a contract, would relate to the remedy.

§ 1879. *Obligation and remedy; any degree of impairment is forbidden.*

It cannot be doubted, either upon principle or authority, that each of such laws passed by a state would impair the obligation of the contract, and the last-mentioned not less than the first. Nothing can be more material to the obligation than the means of enforcement. Without the remedy the contract may, indeed, in the sense of the law, be said not to exist, and its obligation to fall within the class of those moral and social duties which depend for their fulfillment wholly upon the will of the individual. The ideas of validity and remedy are inseparable, and both are parts of the obligation which is guaranteed by the constitution against invasion. The obligation of a contract "is the law which binds the parties to perform their agreement." *Sturges v. Crowninshield*, 12 id., 257 (§§ 1937-39, *infra*). The prohibition has no reference to the degree of impairment. The largest and least are alike forbidden. In *Green v. Biddle*, 8 id., 84 (§§ 191-206, *supra*), it was said: "The objection to a law on the ground of its impairing the obligation of a contract can never depend upon the extent of the change which the law effects in it. Any deviation from its terms by postponing or accelerating the period of performance which it prescribes, imposing conditions not expressed in the contract, or dispensing with those which are, however minute or apparently immaterial in their effect upon the contract of the parties, impairs its obligation. Upon this principle it is that if a creditor agree with his debtor to postpone the day of

payment, or in any other way to change the terms of the contract, without the consent of the surety, the latter is discharged, although the change was for his advantage."

"One of the tests that a contract has been impaired is that its value has, by legislation, been diminished. It is not, by the constitution, to be impaired at all. This is not a question of degree or cause, but of encroaching in any respect on its obligation—dispensing with any part of its force." *Planters' Bank v. Sharp*, 6 How., 327 (§§ 2177–87, *infra*). This has reference to legislation which affects the contract directly and not incidentally or only by consequence.

§ 1880. *Laws affecting the remedy only.*

The right to imprison for debt is not a part of the contract. It is regarded as penal rather than remedial. The states may abolish it whenever they think proper. *Beers v. Haughton*, 9 Pet., 359; *Ogden v. Saunders*, 12 Wheat., 230 (§§ 1940–2003, *infra*); *Mason v. Haile*, 12 id., 373; *Sturges v. Crowninshield*, 4 id., 200 (§§ 1937–39, *infra*). They may also exempt from sale, under execution, the necessary implements of agriculture, the tools of a mechanic, and articles of necessity in household furniture. It is said: "Regulations of this description have always been considered in every civilized community as properly belonging to the remedy, to be exercised by every sovereignty according to its own views of policy and humanity." It is competent for the states to change the form of the remedy, or to modify it otherwise, as they may see fit, provided no substantial right secured by the contract is thereby impaired. No attempt has been made to fix definitely the line between alterations of the remedy, which are to be deemed legitimate, and those which, under the form of modifying the remedy, impair substantial rights. Every case must be determined upon its own circumstances. Whenever the result last mentioned is produced, the act is within the prohibition of the constitution, and to that extent void. *Bronson v. Kinzie*, 1 How., 311 (§§ 1650–55, *supra*); *McCracken v. Hayward*, 2 id., 608 (§§ 1656–58, *supra*). If these doctrines were *res integra* the consistency and soundness of the reasoning which maintains a distinction between the contract and the remedy—or, to speak more accurately, between the remedy and the other parts of the contract—might perhaps well be doubted. 1 Kent's Commentaries, 456; Sedgwick on Stat. and Cons. Law, 652; Mr. Justice Washington's dissenting opinion in *Mason v. Haile*, 12 Wheat., 379. But they rest in this court upon a foundation of authority too firm to be shaken, and they are supported by such an array of judicial names that it is hard for the mind not to feel constrained to believe they are correct. The doctrine upon the subject established by the latest adjudications of this court render the distinction one rather of form than substance.

§ 1881. *Where a state authorizes a municipal corporation to contract and exercise power of local taxation, this power cannot be withdrawn until the contract is satisfied.*

When the bonds in question were issued there were laws in force which authorized and required the collection of taxes sufficient in amount to meet the interest, as it accrued from time to time, upon the entire debt. But for the act of the 14th of February, 1863, there would be no difficulty in enforcing them. The amount permitted to be collected by that act will be insufficient, and it is not certain that anything will be yielded applicable to that object. To the extent of the deficiency the obligation of the contract will be impaired, and if there be nothing applicable, it may be regarded as annulled. A right without

a remedy is as if it were not. For every beneficial purpose it may be said not to exist. It is well settled that a state may disable itself by contract from exercising its taxing power in particular cases. *New Jersey v. Wilson*, 7 Cranch, 166 (§ 2295, *infra*); *Dodge v. Woolsey*, 18 How., 331 (CORPORATIONS, §§ 565-573); *State Bank of Ohio v. Knoop*, 16 id., 369 (§§ 2246-53, *infra*). It is equally clear that where a state has authorized a municipal corporation to contract and to exercise the power of local taxation to the extent necessary to meet its engagements, the power thus given cannot be withdrawn until the contract is satisfied. The state and the corporation in such cases are equally bound. The power given becomes a trust which the donor cannot annul, and which the donee is bound to execute; and neither the state nor the corporation can any more impair the obligation of the contract in this way than in any other. *People v. Bell*, 10 Cal., 570; *Dominic v. Sayre*, 3 Sandf., 555.

The laws requiring taxes to the requisite amount to be collected, in force when the bonds were issued, are still in force for all the purposes of this case. The act of 1863 is, so far as it affects these bonds, a nullity. It is the duty of the city to impose and collect the taxes in all respects as if that act had not been passed. A different result would leave nothing of the contract but an abstract right — of no practical value,—and render the protection of the constitution a shadow and a delusion.

§ 1882. *Mandamus will lie against a municipal body to compel the levy of taxes.*

The circuit court erred in overruling the application for a *mandamus*. The judgment of that court is reversed, and the cause will be remanded, with instructions to proceed in conformity with this opinion.

UNITED STATES v. MEMPHIS.

(7 Otto, 285-298. 1877.)

ERROR to U. S. Circuit Court, Western District of Tennessee.

STATEMENT OF FACTS.—The city of Memphis, in March and July, 1867, made contracts for paving streets. In December, 1867, additional territory was annexed to the city. In December, 1869, this new territory (the ninth and tenth wards) was declared by the legislature to be exempt from liability for the debts of the city incurred prior to its annexation. This suit was brought by the contractor to subject by *mandamus* the property of the city, including the ninth and tenth wards, to the payment of his debt for paving under the contracts of 1867. The judgment of the court below was adverse to the contractor, who sued out this writ of error. Further facts appear in the opinion of the court.

Opinion by MR. JUSTICE STRONG.

By the *mandamus* awarded on the 30th of March, 1875, the city was commanded "to levy and collect upon all the property within the city taxable by law, a tax, in addition to all other taxes allowed by law," sufficient in amount to pay the relator's judgment. In obedience to this mandate the general council of the city passed an ordinance levying a tax of fifty-four cents on each \$100 worth of property, and proceeded to collect it. But the relator, thinking this tax insufficient to raise the sum required by the writ to be raised, applied to the court for an *alias* writ, commanding an additional levy of taxes upon all the taxable property of the city, including the capital of merchants as taxable (but excluding the property in the ninth and tenth wards, and the property upon which special assessments had been made and paid), sufficient in amount

to pay the sum required to be paid by the original writ. In compliance with this application such an *alias mandamus* was ordered by the court, and he now complains that the court erred in ordering the levy, excluding the property in the ninth and tenth wards. Those wards were no part of the city when the contracts were made, in virtue of which the relator's rights accrued. The territory embraced within them was added to the city by an act of the legislature of December 3, 1867, and by a subsequent act, passed December 1, 1869, it was enacted that the people residing within the limits of the addition to the city made by the act of 1867 shall not be taxed to pay any part of the debt of the city contracted prior to the passage of said act. In view of this legislation the inquiry arises, whether the property within those wards is by law exempt from taxation for payment of the debt due the relator, for the *mandamus* directed the levy of a tax only upon the property taxable by law. To respond intelligently to this inquiry, the nature and origin of the debt must be considered.

In the months of March and July, 1867, the city entered into contracts with two firms, by which they undertook to pave certain streets with Nicholson pavements. These contracts, with the consent of the city, were assigned to the relator in 1868, and under them the streets were paved. Some of the work was done and some of the materials were furnished before the passage of the act of 1867, but much the greater portion was done thereafter. None of the pavements were laid in the ninth or tenth wards. It was for the work done and materials furnished under these contracts, and in consequence of the city's liability assumed in them, that the relator's judgment was recovered on the 16th of March, 1875. Such, in brief, was the origin and nature of the debt.

§ 1883. *A debt is created when a contract is made.*

Though in large part the pavements were constructed after the ninth and tenth wards became a part of the city, we think, within the meaning of the act of 1869, the debt must be held as having been contracted when the contracts were made. It was then the city assumed the liability and took up the burden which is now in judgment. It appears quite plainly that the legislature, in the act of 1869, did not intend to use the word "debt" in its technical sense. Looking at the spirit of the act rather than to its letter, the purpose evidently was to relieve the new territory brought into the city by the act of 1867 from obligations previously incurred by the city for objects in which the added territory had no interest when the obligations were assumed, and in regard to which it had no voice.

§ 1884. *Where a portion of a city is annexed after contracts of the city have been made, it is competent for the legislature to exempt such portion from liability upon such contracts by a law passed subsequent to such annexation.*

It is true the act of 1867, which made the ninth and tenth wards a part of the city, did not itself exempt them from any of the liabilities of the municipal corporation of which they became a part. It might have given such an exemption. But no discrimination was then made in their favor. The people resident in them became at once entitled to a common ownership of the city's property and privileges, subject to the same duties as those resting on others. Had the act of 1869 never been passed, it must be conceded they would have been on an exact equality with all other owners of property in the city, equally entitled with them to all municipal rights and privileges, and equally subject to all municipal burdens and charges. See cases collected in Dillon on Municipal Corporations, secs. 36, 136, 633, 634. That act, however, was passed. In terms it relieved the people of the ninth and tenth wards from liability to pay

any part of the debt of the city contracted before they came into it. It is still the law of the state, unless it violates some provision of the constitution. The relator contends that it is in conflict with the ordinance that "no retrospective law, or law impairing the obligation of contracts, shall be passed." To this we cannot assent. The act was wholly prospective in its operation when it was passed. It furnished a rule only for the future, and it interfered with no vested rights, or with the obligation of any contract. There never was any contract relation between the people of those wards and Brown, the relator. The utmost effect of the act of 1867 was to give the contractors with the city, after their contracts were made, a possibly enlarged remedy; and the act of 1869 withdrew the gift before any absolute right to it had been acquired, before the act of 1873 was passed,—the act which authorized taxation to pay the debt contracted. The same power which added the wards to the city might have severed them from it. Had they been parts of the city when the contracts were made, and subsequently been severed from it, no one could successfully contend they would have remained liable to city taxation for any city purpose. It is evident, therefore, that neither any vested right nor any contract obligation was disturbed by the act of 1869, which declared those wards exempt from taxation for any debt contracted before they were incorporated into the city.

§ 1885. *A law exempting from liability to antecedent contracts property annexed to a city does not violate the constitution of the United States nor that of the state of Tennessee.*

Nor do we perceive that the act of 1869 violated any other provision of the state constitution to which our attention has been called. It was not a law for the benefit of individuals, inconsistent with the general laws of the land; nor did it grant immunities or exemptions not extended to all individuals in like condition; nor did it deprive any person of property without the judgment of his peers or the law of the land. It has been argued on behalf of the relator that the act violated the principles of taxation established by the constitution, requiring taxation of all property within the taxing district, forbidding the exemption of any except such as the constitution declares may be exempted, and requiring that taxes shall be equal and uniform. We have not been able to feel the force of this objection. We find nothing in the provisions of the constitution to which we have been referred that justifies it. Surely the legislature is not prohibited from declaring what districts shall be liable to taxation for local uses, and the act of 1869 was but an exertion of this power.

§ 1886. *A party cannot be heard to complain of an order made at his own instance.*

The second assignment of error is that the *alias* writ of *mandamus* commanded the levy of the additional tax, excluding from its operation the property on which the assessments by the front foot for the cost of the pavement had been paid. Whether the exclusion was erroneously directed or not we are not now called upon to determine, for the relator cannot be heard to insist that it was. The action of the court was in this particular exactly what he asked. He presented a petition asking that such property should be excluded from the levy, and he cannot now be permitted to complain in this court of an order made in the inferior court at his instance.

§ 1887. *The basis of valuation is immaterial to a city creditor so long as he obtains his dues.*

The remaining assignment of error is that the court ordered the additional levy to be made on the assessment for 1876, instead of the assessment for 1875.

It does not appear certainly that such was the order of the court. It was made on the 2d of March, 1876, and it directed the mayor and council to levy the additional tax when they next levied taxes. Whether the basis of the levy was to be the assessment of 1875 or that of 1876 is not clear, nor is it a matter of any importance. It is not claimed that the aggregate assessment for the latter year was less in amount than that of the former. It is not, therefore, apparent that the relator was hurt by the order. The city is required to levy a tax sufficient in amount to yield to him the sum mentioned, and that secures his rights.

Judgment affirmed.

MEMPHIS v. UNITED STATES.

(7 Otto, 293-299. 1877.)

ERROR to U. S. Circuit Court, Western District of Tennessee.

For the material facts in this case see the preceding case of *United States v. Memphis*, 7 Otto, 284.

Opinion by MR. JUSTICE STRONG.

The important question in this case is whether the law of the state empowered the city of Memphis to levy the tax which by the writ of *mandamus* it was commanded to levy. If it did not, the award of the writ cannot be sustained, for a *mandamus* will not be granted to compel the levy of a tax not authorized by law. By an act of the legislature passed on the 18th of March, 1873, it was enacted as follows: "That where an incorporated town or city has, by virtue of presumed authority to lay special assessments for specific purposes, levied and collected taxes or special assessments, the right to make which levy and assessment was afterwards declared void by the supreme court of the state, said town or city shall have the power to levy a tax, in addition to all other taxes allowed by law to be levied, sufficient to cover the entire cost of the improvement, with interest thereon, for which said special assessments were illegally made; and in the levying of such additional tax authority is hereby given to such town or city to allow as valid payments on said additional tax any sum or sums, with interest, paid by persons in satisfaction, or in part satisfaction, of said special assessments, illegally levied and collected as aforesaid."

§ 1888. *A creditor by contract has a vested right to existing remedies or their equivalent.*

This statute, it is true, was not in existence when the plaintiff's contract with the city was made, but it is confessedly available for him unless it was repealed before he acquired any rights under it. Plainly it was enacted to meet his case; and had there been no repeal, the question now raised would not be before us. It is claimed, however, that it was repealed before the circuit court awarded the *mandamus*, and what was the effect of that legislative action upon the power of the court in this case becomes, therefore, a very important question. It is an acknowledged principle that a creditor by contract has a vested right to the remedies for the recovery of the debt which existed at law when the contract was made, and that the legislature of a state cannot take them away without impairing the obligation of the contract, though it may modify them, and even substitute others, if a sufficient remedy be left, or another sufficient one be provided. The law is in effect a part of the contract.

§ 1889. *New remedy authorized after a contract is made.*

But it is not so clear that when a new remedy is authorized after a contract

has been made, that remedy may not be wholly taken away by the legislature, before any vested rights have been acquired under it. In such a case the parties did not contract with reference to it, and it did not enter into their agreement. It had nothing to do with the obligations they assumed. It is, however, no less true that vested rights may be acquired by the creditor under it and by virtue of it; and when such rights have been acquired, they are beyond the reach of the legislature, and the repeal of the law will not affect them. As to them, the law continues in force, notwithstanding its repeal.

§ 1890. *The rights of a judgment creditor cannot be affected by changes in legislation.*

In this case the relator recovered his judgment against the city on the 16th of March, 1875. Into that judgment his contract was merged, and it no longer had any legal existence. If, as asserted by Blackstone, the judgment was itself a contract, the remedies for its enforcement, existing at the time when it was recovered, could not be taken away either by direct legislation, or indirectly, by repealing the law which gave those remedies. And if the judgment may not be considered a contract of record, still the vested rights it gave to the relator, whatever they were, are equally secure against legislative invasion.

§ 1891. *Under the constitution of Tennessee an act of the legislature does not become a law until approved by the governor.*

After the judgment was obtained an execution was issued to collect the amount of it, and on the 22d of March, 1875, the alternative *mandamus* was issued to compel the levy of the tax of which the city now complains. It was not until after all this that the act of March 18, 1873, was repealed. The act repealing it was approved by the governor on the 23d of March, 1875, and it became a law only from the time of his approval. Such is the generally received doctrine. See cases cited in 4 Abb. Nat. Dig., 223. It is said, however, the rule in Tennessee is different; and it is contended that as the act passed the two houses on the 20th of March, though not approved by the governor until the 23d, it took effect, by relation, on the day of its passage through the two houses; and we are referred to *Dyer v. States*, Meigs (Tenn.), 237-255, and to *Turner v. Oburn*, 2 Coldw. (Tenn.), 460. Those decisions were under the constitution of 1834, which did not require the approval of the governor, or a passage of the bill over his objection, to make a binding statute, as the constitution of 1870 does. It is true the earlier constitution required the signature of an act by the respective speakers of the house. That was for the purpose of attestation only, and the act was then said to take effect on the day of its passage. The later constitution demands the same signatures, and it demands more, namely, the approval of the governor. It also ordains that no bill shall become a law until it shall have received his approval, or shall have been otherwise passed under the provisions of the constitution; that is, as we understand it, over his refusal to approve. The executive is thus made a necessary constituent of the law-making power. If with this be considered the declaration of the constitution, that no retrospective law, or law impairing the obligation of contracts, shall be made, the conclusion is inevitable that the repealing act had no effect upon anything that was done before March 23, 1875. But before that day we think the relator had acquired a vested right by his judgment and his alternative writ of *mandamus* to have a tax levied sufficient to pay the debt due to him from the city,—a right of which he could be deprived by no subsequent action of the legislature.

§ 1892. *An act which is a mere gratuity may be repealed before any rights vest under it.*

We do not deny that it is competent for a legislature to repeal an act which, when it was passed, was a mere gratuity, if, while it was in existence, no vested rights have been acquired under it or in virtue of it. But such, we think, is not this case. Indeed, there are very strong reasons for holding that the act of March 18, 1873, never was a gratuity. By the act of 1866 the legislature invited contracts with the city for grading and paving, offering to the contractors the security of assessments upon the owners of property abutting on the improved streets. No doubt it supposed it had the power to give such security or such a remedy to the contractor. No doubt both the city and the contractor thought such a power existed. It turned out that they were all mistaken. The contractor, by this mutual mistake, was led into the expenditure of much labor and money, and the city enjoyed the benefit of the expenditure. The security promised for reimbursement to him having failed, the legislature and the city having held forth unfounded expectations to him, by which he was induced to enter into the contract, there was the highest moral obligation resting alike upon the state and upon the city to provide a substitute for the remedy which had proved to be of no value. This substitute was provided by the act of 1873. It was merely adding a legal to a moral obligation. It should not be considered a mere gratuity. It took the place of a resort to abutting lot-owners, and if the contractor could not have been deprived of that, had it been authorized by the constitution, the thing substituted for it should, in justice and common honesty, be regarded as equally secure for his indemnity. But if we are in error in this, it is still enough that by his judgment and his writ of *mandamus* he acquired a vested right to have the tax collected which the writ ordered.

§ 1893. *The effect of a repeal of a statute on pending proceedings.*

The code of Tennessee, section 49, declaratory of the law of the state respecting the effect of repealing statutes, is as follows: "The repeal of a statute does not affect any right which accrued, any duty imposed, any penalty incurred, nor any proceeding commenced under or by virtue of the statute repealed." Thus has been established a rule for the construction of repealing statutes. If now the rule be applied to the act of March 23, 1875, it is manifest that act did not affect any right that had before its passage accrued to Brown, the relator, under or by virtue of it, or any proceeding commenced by him under it. But certainly under his judgment recovered in 1875 he had a right to have a tax levied sufficient to pay it, so long as the act of 1873 remained in force, and he had the right in virtue of that act. So when the alternative *mandamus* was issued, March 22, 1875, a proceeding was commenced under or by virtue of the statute. And if the repealing act affected that proceeding, or took away the right the relator had in force of his judgment, it was retrospective in its operation, and it was therefore prohibited by the constitution. In *Fisher's Negroes v. Dabbs*, 6 Yerg. (Tenn.), 119, it was said by the court that "a distinction between the right and the remedy is made and exists. But where the remedy has attached itself to the right, and is being prosecuted by due course of law, to separate between them and take away the remedy is to do violence to the right, and comes within the reason of that provision of our constitution which prohibits retrospective, or, in other words, retroactive, laws from being passed, or laws impairing the obligation of contracts." *Vide Richardson v. The State*, 3 Coldw. (Tenn.), 122. For these reasons we think that, so far as relates to the

case of Brown, the relator, the act of March 18, 1873, remains in force, and that the city of Memphis has power under that act to levy and collect the tax which was directed by the *mandamus*.

§ 1894. *Direction that the tax to be levied be paid in lawful money.*

The remaining questions in the case are of minor importance. It is said there was error in adjudging that the tax to be levied should be payable only in lawful money of the United States. We do not perceive in this any error. The judgment of the relator could be paid only with such money; and the tax ordered was to be sufficient in amount, after making due allowances for all delinquencies, insolvencies and defaults, etc., to realize \$125,000 each year for the years 1875, 1876, respectively, and as much of said sum for the remaining year (1877) as may be required to pay and satisfy the balance of the decree in favor of the relator, with interest and costs, not satisfied by former taxes collected and paid. The meaning of the writ is that sufficient money shall be collected. If the city elect to credit in payment of the levy what the lot-owners have paid, the *mandamus* does not forbid it; but a sufficient levy must be made and collected to raise in money the sums ordered to be paid in satisfaction of the decree in favor of the relator. This was plainly right.

The only other assignment worthy of notice is that there was error in holding that a new and further tax be laid, sufficient to pay the entire decree for \$292,133.47, the return to the alternative writ disclosing that under a former mandate of the court the city of Memphis had made a special levy of \$302,742.69 for the purpose of paying the relator's decree; that of said levy \$132,742.69 had been collected and paid to the relator, and that the remainder, \$170,000, was being collected and paid over as fast as possible. This assignment is manifestly evasive. The former mandate was not for the satisfaction of the decree of March, 1875. But if it was, it would make no difference. It is the most the city can ask, that it be assumed the former mandate had been obeyed, and that all had been collected that could be collected under the levy. What has not been, therefore, cannot aid in satisfying the decree, and it is not averred that any part of the \$170,000 can be. Notwithstanding the *mandamus*, it is in the power of the city to relieve herself from its binding force by paying the debt due the relator. If she can collect anything by virtue of past levies, to the extent of the collection she will be relieved from levying additional taxes, but the debt must be paid.

Judgment affirmed.

BEERS v. STATE OF ARKANSAS.

(20 Howard, 527-530. 1857.)

ERROR to the Supreme Court of Arkansas.

§ 1895. *Law authorizing suit against state is not a contract.*

Opinion by TANEY, C. J.

This was an action of covenant, brought in the circuit court for Pulaski county, in the state of Arkansas, to recover the interest due on sundry bonds issued by the state, and which the state had failed to pay according to its contract.

The constitution of the state provides that "the general assembly shall direct by law in what courts and in what manner suits may be commenced against the state." And in pursuance of this provision a law was accordingly passed; and it is admitted that the present suit was brought in the proper court and in

the manner authorized by that law. The suit was instituted in the circuit court on the 21st of November, 1854. And after it was brought, and while it was pending in the circuit court, the legislature passed an act, which was approved on the 7th of December, 1854, which provided "that in every case in which suits or any proceedings had been instituted to enforce the collection of any bond or bonds issued by the state, or the interest thereon, before any judgment or decree should be rendered, the bonds should be produced and filed in the office of the clerk, and not withdrawn until final determination of the suit or proceedings, and full payment of the bonds and all interest thereon; and might then be withdrawn, canceled and filed with the state treasurer, by order of the court, but not otherwise." And the act further provided, that in every case in which any such suit or proceeding had been or might be instituted, the court should, at the first term after the commencement of the suit or proceeding, whether at law or in equity, or whether by original or cross bill, require the original bond or bonds to be produced and filed; and if that were not done, and the bonds filed and left to remain filed, the court should, on the same day, dismiss the suit, proceeding or cross-bill.

Afterwards, on the 25th of June, 1855, the state appeared to the suit, by its attorney, and without pleading to or answering the declaration of the plaintiff, moved the court to require him to file immediately in open court the bonds on which the suit was brought, according to the act of assembly above mentioned; and if the same were not filed, that the suit be dismissed. Upon this motion, after argument by counsel, the court passed an order directing the plaintiff to produce and file in court, forthwith, the bonds mentioned and described in the declaration. But he refused to file them, and thereupon the court adjudged that the suit be dismissed, with costs.

This judgment was afterwards affirmed in the supreme court of the state, and this writ of error is brought upon the last-mentioned judgment. The error assigned here is, that the act of December 7, 1854, impaired the obligations of the contracts between the state and the plaintiff in error, evidenced by and contained in each of the said bonds, and the indorsement thereon, and was therefore null and void, under the constitution of the United States. The objection taken to the validity of the act of assembly cannot be maintained. It is an act to regulate the proceedings and limit the jurisdiction of its own courts in suits where the state is a party defendant, and nothing more.

§ 1896. *A state is not suable in its own courts, but it may waive the privilege and may prescribe any conditions it may see fit to impose.*

It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission; but it may, if it thinks proper, waive this privilege, and permit itself to be made a defendant in a suit by individuals, or by another state. And as this permission is altogether voluntary on the part of the sovereignty, it follows that it may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted, and may withdraw its consent whenever it may suppose that justice to the public requires it.

Arkansas, by its constitution, so far waived the privilege of sovereignty as to authorize suits to be instituted against it in its own courts, and delegated to its general assembly the power of directing in what courts, and in what manner, the suit might be commenced. And if the law of 1854 had been passed before the suit was instituted, we do not understand that any objection would have

been made to it. The objection is, that it was passed after this suit was instituted, and contained regulations with which the plaintiff could not conveniently comply. But the prior law was not a contract. It was an ordinary act of legislation, prescribing the conditions upon which the state consented to waive the privilege of sovereignty. It contained no stipulation that these regulations should not be modified afterwards, if, upon experience, it was found that further provisions were necessary to protect the public interest; and no such contract can be implied from the law, nor can this court inquire whether the law operated hardly or unjustly upon the parties whose suits were then pending. That was a question for the consideration of the legislature. They might have repealed the prior law altogether, and put an end to the jurisdiction of their courts in suits against the state, if they had thought proper to do so, or prescribe new conditions upon which the suits might still be allowed to proceed. In exercising this latter power, the state violated no contract with the parties; it merely regulated the proceedings in its own courts, and limited the jurisdiction it had before conferred in suits when the state consented to be a party defendant.

§ 1897. *Judgment of state court dismissing suit cannot be reviewed by supreme court.*

Nor has the state court, in the judgment brought here for review, decided anything but a question of jurisdiction. It has given no decision in relation to the validity of the contract on which the suit is brought, nor the obligations it created, or the rights of parties under it. It has decided, merely, that it has no right under the laws of the state to try these questions, unless the bonds given by the state are filed. The plaintiff refused to file them pursuant to the order of the court, and the case was thereupon dismissed, for want of jurisdiction in the court to proceed further in the suit. There is evidently nothing in the decision, nor in the act of assembly under which it was made, which in any degree impairs the obligation of the contract, and nothing which will authorize this court to reverse the judgment of the state court.

The writ of error must, therefore, be dismissed, for want of jurisdiction in this court. The two cases of William A. Platenius, administrator of James Holford, against the state of Arkansas, in covenant, are the same in all respects with the one above decided, and must, also, for the same reasons, be dismissed for want of jurisdiction. (a)

RAILROAD COMPANY v. TENNESSEE.

(11 Otto, 337-341. 1879.)

ERROR to the Supreme Court of Tennessee.

Opinion by WAITE, C. J.

STATEMENT OF FACTS.—On the 19th of January, 1838, the state of Tennessee established a bank in its own name and for its own benefit, and pledged its faith and credit to give indemnity for all losses arising from any deficiency in the funds specifically appropriated as capital. The state was the only stockholder, and entitled to all the profits of the business. The bank was by its charter capable of suing and being sued. At that time the constitution of the state contained this provision: "Suits may be brought against the state in such manner and in such courts as the legislature may by law direct." Art. 1,

(a) The case of *Bank of Washington v. Arkansas*,* 30 How., 530, was a bill in equity to recover money due on state bonds, and was disposed of on the principles involved in the above case.

sec. 17. No law had then been passed giving effect to this express grant of power, but in 1855 it was enacted that actions might be instituted against the state under the same rules and regulations that govern actions between private citizens, process being served on the district attorney of the district in which the suit was instituted. Code, sec. 2807. No power was given the courts to enforce their judgments, and the money could only be got through an appropriation by the legislature.

In 1865 this law was repealed, and after that there was no law prescribing the manner or the courts in which suits could be brought against the state. On the 16th of February, 1866, an act was passed to wind up and settle the affairs of the bank, under which an assignment of all the property was made to Samuel Watson, trustee. Afterwards, on the 16th of May, 1866, the state and the trustee filed a bill in equity, in the chancery court at Nashville, against the bank and its creditors, for an account of debts and assets and a decree of distribution. At the November term, 1872, of the court, the Memphis & Charleston Railroad Company was admitted as a defendant to this suit, and given leave to file a cross-bill. This cross-bill was accordingly filed, and set forth an indebtedness from the bank to the railroad company, which accrued while the law allowing suits against the state was in existence, and sought to enforce the liability of the state under the indemnity clause of the charter. To this bill both the state and Watson, the trustee, demurred, and assigned for cause, among others, that the state could not be sued. The demurrer was sustained by the chancery court, and the cross-bill dismissed. An appeal was then taken to the supreme court of the state, where the decree below was affirmed, upon the express ground that the repeal of the law authorizing suits against the state was valid, and did not impair the obligation of the contract which the railroad company had. All other questions were waived by the court, and the decision placed entirely on the ground that, as the state could not be sued in its own courts, the bill must be dismissed. To reverse that judgment this writ of error was brought.

§ 1898. *Whether the withdrawal of the right to sue a state impairs the obligation of contracts.*

The question we have to decide is not whether the state is liable for the debts of the bank to the railroad company, but whether it can be sued in its own courts to enforce that liability. The principle is elementary that a state cannot be sued in its own courts without its consent. This is a privilege of sovereignty. It is conceded that, when this suit was begun, the state had withdrawn its consent to be sued, and the only question now to be determined is whether that withdrawal impaired the obligation of the contract which the railroad company seeks to enforce. If it did, it was inoperative, so far as this suit is concerned, and the original consent remains in full force, for all the purposes of the particular contract or liability here involved.

§ 1899. — *held that it does not, where there is no power to enforce the judgment.*

The remedy which is protected by the contract clause of the constitution is something more than the privilege of having a claim adjudicated. Mere judicial inquiry into the rights of parties is not enough. There must be the power to enforce the results of such an inquiry before there can be said to be a remedy which the constitution deems part of a contract. Inquiry is one thing; remedy another. Adjudication is of no value as a remedy unless enforcement follows. It is of no practical importance that a right has been established if the right is

no more available afterwards than before. The constitution preserves only such remedies as are required to *enforce* a contract.

Here the state has consented to be sued only for the purposes of adjudication. The power of the courts ended when the judgment was rendered. In effect, all that has been done is to give persons holding claims against the state the privilege of having them audited by the courts instead of some appropriate accounting officer. When a judgment has been rendered, the liability of the state has been judicially ascertained, but there the power of the court ends. The state is at liberty to determine for itself whether to pay the judgment or not. The obligations of the contract have been finally determined, but the claimant has still only the faith and credit of the state to rely on for their fulfillment. The courts are powerless. Everything after the judgment depends on the will of the state. It is needless to say that there is no remedy to enforce a contract if performance is left to the will of him on whom the obligation to perform rests. A remedy is only wanted after entreaty is ended. Consequently that is not a remedy, in the legal sense of the term, which can only be carried into effect by entreaty.

It is clear, therefore, that the right to sue, which the state of Tennessee once gave its creditors, was not, in legal effect, a judicial remedy for the enforcement of its contracts, and that the obligations of its contracts were not impaired, within the meaning of the prohibitory clause of the constitution of the United States, by taking away what was thus given. This renders it unnecessary to consider whether, in this suit, a cross-bill could have been maintained by the railroad company if the right to sue had been continued, and also whether a remedy given after the charter of the bank was granted, but in force when the debt of the bank was incurred, might be taken away without impairing the obligation of the contract of the state to indemnify the creditors against loss by reason of any deficiency in the capital. Neither do we find it necessary to determine what would be a complete judicial remedy against a state, nor whether, if such a remedy had been given, the obligation of a contract, entered into by the state when it was in existence, would be impaired by taking it away. What we do decide is that no such remedy was given in this case.

Judgment affirmed.

JUSTICES SWAYNE and STRONG dissented.

TENNESSEE v. SNEED.

(6 Otto, 69-75. 1877.)

ERROR to the Supreme Court of Tennessee.

Opinion by MR. JUSTICE HUNT.

STATEMENT OF FACTS.— In the month of March, 1874, Bloomstein, the relator, presented his petition to the state circuit court sitting at Nashville, Tennessee, in which he stated that he was the owner of certain real and personal estate, which was assessed for state taxes in the year 1872 to the amount of \$132.60; that he tendered to Sneed, who was collector of taxes for Davidson county, in payment of said taxes, the amount thereof in "funds receivable by law for such purposes;" that the collector refused to receive the same, but issued a warrant to his deputy to collect the amount claimed; that he has ever since been ready to make such payment, and now brings said funds into court to abide the action with respect thereto; that said funds consist of \$2.60 in legal

tender currency of the United States, and \$130 in bills of the Bank of Tennessee, which were issued subsequently to May 6, 1861, although some of them bear an earlier date; that the bills tendered were originally made payable in gold or silver coin, and were embraced within the twelfth section of the act chartering said bank. He prayed for an alternative writ of *mandamus* to compel the collector to receive the said bills in payment of such taxes, or to show cause to the contrary.

To this writ the defendant, in answer, showed, among others, the following causes why the writ should not issue: 1. That the suit is expressly prohibited by the act of the general assembly of the state, passed February 21, 1873, ch. 13, sec. 2. 2. That it is prohibited by the act (ch. 44) of the same year. 3. That the receipt of such bank-notes in payment of taxes was prohibited by the constitution of the state of Tennessee of 1865. 4. That no such action lay at common law to enforce action by an officer in defiance of the legislative command. 8. That the notes were issued in aid of the late war against the United States.

The petition having been dismissed, the case was thereupon taken to the supreme court of the state. On the 26th of May, 1875, a judgment of affirmance was rendered. It is from this judgment that the writ of error to this court is brought.

The bank in question was chartered in the year 1838, and its charter contained, as its twelfth section, the following provision: "Sec. 12. Be it enacted that the bills or notes of the said corporation originally made payable, or which shall have become payable, on demand, in gold or silver coin, shall be receivable at the treasury, and by all tax collectors and other public officers, in all payments for taxes or other moneys due the state."

The judgment of the supreme court declared that the present proceeding was virtually a suit against the state, and that it was not maintainable prior to the act of 1855, which act was carried into the code as section 2807. By this act it was provided that suits might be brought against the state "under the same rules and regulations that govern actions between private persons," and that process commencing the same might be served upon the attorneys-general of the several districts. This act was repealed in 1865, many years before the commencement of this proceeding, and again in 1873, by the acts presently to be mentioned. We have in the present action a decision of the supreme court of the state upon its own statutes and modes of proceeding, to the effect, first, that a writ of *mandamus*, in a case like the present, is a proceeding against the state; and, second, that it cannot be sustained in this case.

On the 28th of February, 1873, the legislature of Tennessee enacted "that no court has, or shall hereafter have, any power, jurisdiction or authority to entertain any suit against the state, or against any officer of the state, acting by authority of the state, with a view to reach the state, its treasury funds or property; and all such suits now pending, or hereafter brought, shall be dismissed as to the state or such officer, on motion, plea or demurrer of the law officer of the state, or counsel employed by the state." On the 21st of March, 1873, it enacted "that in all cases in which an officer charged by law with the collection of revenue due the state shall institute any proceeding, or take any steps for the collection of the same, alleged or claimed to be due by said officer from any citizen, the party against whom the proceeding or step is taken shall, if he conceives the same to be unjust or illegal, or against any statute or clause of the constitution of the state, pay the same under protest; and upon his making said payment, the officer or collector shall pay such revenue into the

state treasury, giving notice at the time of payment to the comptroller that the same was paid under protest; and the party paying said revenue may, at any time within thirty days after making said payment, and not longer thereafter, sue the said officer having collected said sum for the recovery thereof. And the same may be tried in any court having jurisdiction of the amount and parties; and if it be determined that the same was wrongfully collected, as not being due from said party to the state, for any reason going to the merits of the same, then the court trying the case may certify of record that the same was wrongfully paid and ought to be refunded; and thereupon the comptroller shall issue his warrant for the same, which shall be paid in preference to other claims on the treasury."

Section 2 of the act provides "that there shall be no other remedy, in any case of the collection of revenue, or attempt to collect revenue illegally, or attempt to collect revenue in funds only receivable by said officer under the law, the same being other or different funds than such as the tax-payer may tender or claim the right to pay, than that above provided; and no writ for the prevention of the collection of any revenue claimed, or to hinder or delay the collection of the same, shall in any wise issue, either injunction, *supersedeas*, prohibition, or any other writ or process whatever; but in all cases in which, for any reason, any person shall claim that the tax so collected was wrongfully or illegally collected, the remedy for said party shall be as above provided, and in no other manner."

The act of March 25, 1873, provides "that the several tax collectors shall receive, in discharge of the taxes and other dues to the state, bank-notes of the Bank of Tennessee, known as the old issue, warrants on the treasury legally outstanding, gold, silver, national bank notes, and nothing else." It is said that the acts of 1873, to which reference is made, are laws impairing the obligation of the contract contained in the twelfth section of the bank charter. This is done, it is said, not by a direct infraction of the obligation, but by placing such impediments and obstructions in the way of its enforcement, by so impairing the remedies, as practically to render the obligation of no value. This is the only point in the case involving a question of federal jurisprudence, and the only one that it is necessary for us to consider. The question discussed by Mr. Justice Swayne, in *Walker v. Whitehead*, 16 Wall., 314 (§§ 1642-43, *supra*), of the preservation of the laws in existence at the time of the making of the contract, is not before us. The claim is of a subsequent injury to the contract.

§ 1900. *Laws impairing the remedy. Cases cited.*

There are, no doubt, many cases holding that the remedy may be so much impaired as to affect the obligation of the contract. In *Webster v. Rose*, 6 Heisk. (Tenn.), 93, a stay-law was decided to be unconstitutional. In *Blair v. Williams*, 4 Litt. (Ky.), 34, the same was held of a law extending the time of a replevin beyond that in existence when the contract was made. In *Malony v. Fortune*, 14 Ia., 417, and in *Cargill v. Power*, 1 Mich., 369, an extension of time for the redemption of a pre-existing mortgage was held to be unconstitutional. In *Willard v. Longstreet*, 2 Doug. (Mich.), 172, a law forbidding the sale of property on execution for less than two-thirds of its appraised value was held to be unconstitutional as to pre-existing contracts. In *Walker v. Whitehead*, *supra*, it is said: "Nothing is more material to the obligation of a contract than the means of its enforcement. The ideas of validity and remedy are inseparable, and both are parts of the obligation which is guaranteed

by the constitution against impairment." These are the authorities quoted to sustain the plaintiff's theory, and the list might easily be enlarged.

On the other hand, our own reports and those of the states are full of cases holding that the legislature may alter and modify the remedy to enforce a contract without impairing its obligation. The case of *Sturges v. Crowninshield*, 4 Wheat., 122 (§§ 1937-39, *infra*), is among the first of the class where the question arose upon the abolition of the right of imprisonment of the debtor as a means of compelling payment of his debt. *Mason v. Haile*, 12 Wheat., 370, was a case of the same class. Mr. Justice Thompson says: "Imprisonment of the debtor . . . may be allowed as a means of inducing him to perform his contract; but a state may refuse to inflict this punishment, . . . and leave the contract in full force. Imprisonment is no part of the contract, and simply to release the prisoner does not impair its obligation." On the general subject, and for numerous illustrations, reference is made to the following cases, which it is not necessary to examine in detail: *Bronson v. Kinzie*, 1 How., 311 (§§ 1650-55, *supra*); *Von Hoffman v. City of Quincy*, 4 Wall., 535 (§§ 1877-82, *supra*); *Bruce v. Schuyler*, 9 Ill., 221, in each of which a large number of cases is collected.

§ 1901. *The obligation of a contract is never impaired when an effective remedy is provided.*

If a particular form of proceeding is prohibited, and another is left or is provided which affords an effective and reasonable mode of enforcing the right, the obligation of the contract is not impaired. *Bronson v. Kinzie*, *supra*; *Huntzinger v. Brock*, 3 Grant's Cases (Pa.), 243; *Evans v. Montgomery*, 4 Watts & S. (Pa.), 218; *Read v. Frankfort Bank*, 23 Me., 318. The rule seems to be, that in modes of proceeding and of forms to enforce the contract the legislature has the control, and may enlarge, limit or alter them, provided that it does not deny a remedy, or so embarrass it with conditions and restrictions as seriously to impair the value of the right. *Bronson v. Kinzie*, *supra*.

§ 1902. — *the remedy against illegal taxes may be changed.*

If we assume that prior to 1873 the relator had authority to prosecute his claim against the state by *mandamus*, and that by the statutes of that year the further use of that form was prohibited to him, the question remains, whether an effectual remedy was left to him or provided for him. We think the regulation of the statute gave him an abundant means of enforcing such right as he possessed. It provided that he might pay his claim to the collector under protest, giving notice thereof to the comptroller of the treasury; that at any time within thirty days thereafter he might sue the officer making the collection; that the case should be tried by any court having jurisdiction, and, if found in favor of the plaintiff on the merits, the court should certify that the same was wrongfully paid and ought to be refunded, and the comptroller should thereupon issue his warrant therefor, which should be paid in preference to other claims on the treasury. This remedy is simple and effective. A suit at law to recover money unlawfully exacted is as speedy, as easily tried, and less complicated than a proceeding by *mandamus*. Every attorney knows how to carry on the former, while many would be embarrassed by the forms of the latter. Provision is also made for prompt payment of the amount by the state, if judgment is rendered against the officer on the merits.

We are not cited to any statutes authorizing suits to be brought against a state directly, and we know of none. In a special and limited class of cases the United States permits itself to be sued in the court of claims; but such is

not the general rule. In revenue cases, whether arising upon its internal revenue laws or those providing for the collection of duties upon foreign imports, it adopts the rule prescribed by the state of Tennessee. It requires the contestant to pay the amount as fixed by the government, and gives him power to sue the collector, and in such suit to test the legality of the tax. There is nothing illegal or even harsh in this. It is a wise and reasonable precaution for the security of the government. No government could exist that permitted the collection of its revenues to be delayed by every litigious man or every embarrassed man, to whom delay was more important than the payment of costs. We think there is no ground for the assertion that a speedy and effective remedy is not provided to enforce the claim set up by the plaintiff. This is the only question properly before us, and we are of the opinion that it presents no ground for reversing the judgment of the court below.

The other important questions discussed in the opinion of the court below and argued by the counsel it is not necessary here to examine; they do not arise at this time.

Judgment affirmed.

NATIONAL BANK v. SEBASTIAN COUNTY.

(Circuit Court for Arkansas: 5 Dillon, 414-418. 1879.)

Opinion by PARKER, J.

STATEMENT OF FACTS.—The plaintiff in this action had a right, at the time suit was brought, to bring its action in a district or circuit court of the United States. Secs. 629 and 563 of the R. S.; *Kennedy v. Gibson*, 8 Wall., 500; *Cadle v. Tracy*, 11 Blatch., 101. The county, at the time of the issue by it of the several warrants in suit in this case, had a right to issue such warrants (sec. 605, *Gantt's Digest*); and when such warrants were issued by the county they were evidences of a promise by the county to pay whoever might be the holder thereof. They were so far negotiable as to pass by delivery, and only lacked that commercial character given by the law merchant to certain kinds of commercial instruments, which, when they are received by a *bona fide*, innocent holder for value before they are overdue, come to him freed from any equities to be set up by the maker against them.

The bank received these warrants in the course of its business, having paid a valuable consideration for them. This it had a right to do. At the time of the issue of these warrants, when they were received by the bank, and when suit was brought upon them, the defendant, under the laws of the state, was a body corporate and politic, and, by its name, it could sue and be sued, plead and be impleaded, defend and be defended in any court. Section 937, *Gantt's Digest*, provides "that each county which now exists, or which may hereafter be established, shall be a body corporate and politic." Section 938 provides that "all suits brought by or against a county shall be brought in the name of or against the county by name, and by its name it may sue and be sued, plead and be impleaded, defend and be defended." This was the law of the contract looking to the remedy at the time it was made.

On the 27th of February, 1879, the legislature of the state passed a law, the first section of which provides for the repeal of certain sections of the general law of the state which gave to counties their corporate character and provided that they might be sued. Section 2 is as follows: "That hereafter all persons having demands against any county shall present the same, duly verified

according to law, to the county court of such county, for allowance or rejection."

§ 1903. *The jurisdiction of the federal courts cannot be affected by the state laws.*

The suit in this case had been brought, and was pending in the federal court at the time this law was passed. At that time this court had obtained jurisdiction. This act was evidently passed by the legislature with the intent to take away the right of the holders of obligations issued by the several counties of the state to bring suit on them in the federal courts, although they might have this right under the constitution and laws of the United States. Can this be done? In the case of *United States v. Drennen*, Hemp., 320, it is held that "the jurisdiction of the federal courts is derived from the constitution and laws of the United States, and cannot be enlarged, diminished or affected by state laws." This principle is sustained by *Livingston v. Jefferson*, 1 Marsh., 203; also by the case of *Mason v. Boom Co.*, 3 Wall. Jr., 252. The power to contract with citizens of other states, who have a right to sue in the federal courts, or with a national bank, which has the same right, implies liability to suit by such citizens or such national bank, and no statute limitation of suability can defeat a jurisdiction given by the constitution or laws of the United States. *Cowles v. Mercer County*, 7 Wall., 118. I think it clear that the jurisdiction of the courts of the United States over controversies cannot be impaired by the laws of the states which prescribe the modes of redress in their courts, or which regulate the distribution of their judicial power. *Hyde v. Stone*, 20 How., 175; *Suydam v. Broadnax*, 14 Pet., 67; *Union Bank v. Jolly*, 18 How., 503; *Payne v. Hook*, 7 Wall., 425.

§ 1904. *A law taking away the right to sue in the federal courts impairs the obligation of the contract. Obligation of contracts defined.*

Now, at the time of the passage of this law the county had made its contract; its promise to pay was out; its liability on its promise was clear; the obligation of its contract was in existence. Could the state legislature do anything to impair the obligation of this contract of the county? "No state shall pass any law impairing the obligation of contracts," is the language of the supreme law of the land (article 10, section 1, constitution of the United States). What is the obligation of the contract? It consists in the power and efficacy of the law which applies to and imposes performance of the contract or the payment of an equivalent for non-performance. *Ogden v. Saunders*, 12 Wheat., 213 (§§ 1940–2003, *infra*). The laws which exist at the time of the making of a contract, and in the place where it is made and to be performed, enter into and make part of it. The constitution embraces those laws alike which affect its *validity, construction, discharge and enforcement*. *Von Hoffman v. City of Quincy*, 4 Wall., 535 (§§ 1877–82, *supra*); *Walker v. Whitehead*, 16 Wall., 314 (§§ 1642–43, *supra*); *Edwards v. Kearzey*, 6 Otto, 595 (§§ 1664–71, *supra*).

In the case of *Edwards v. Kearzey*, Mr. Justice Swayne says: "The obligation of a contract includes everything within its obligatory scope. Among these elements nothing is more important than the means of enforcement. This is the breath of its vital existence. Without it the contract, as such, in the view of the law, ceases to be, and falls into the class of 'those imperfect obligations,' as they are termed, which depend for their fulfillment upon the will and conscience of those upon whom they rest. The ideas of right and remedy are inseparable." "Want of right and want of remedy are the same

thing." 1 Bacon's Abridgment, title "Actions in General," letter B. To be in conflict with the constitution, it is not necessary that the act of the legislature should import an actual destruction of the obligation of contracts. It is sufficient that the act imports an impairment of the obligation. If by the legislative act the obligation of contracts is in any degree impaired, or, what is the same thing, if the obligation is weakened or rendered less operative, the constitution is violated, and the act is so far inoperative.

It is a proposition not debatable that the legislature of the state cannot take away the right of the plaintiff to sue in a federal court, as such right is secured by a law of congress, which, with the constitution of the United States, is the supreme law of the land. The demurrer must therefore be sustained.

Judgment accordingly.

RAILROAD COMPANY v. HECHT.

(5 Otto, 168-170. 1877.)

ERROR to the Supreme Court of Arkansas.

§ 1905. *The legislature may change the mode of service of process on corporations without impairing the obligation of the contract expressed in the charter.*

Opinion by WAITE, C. J.

The single question presented by this record is whether a statute which prescribes a mode of service of judicial process upon the Cairo & Fulton Railroad Company, different from that provided for in its charter, is void because it impairs the obligation of a contract. The regulation of the forms of administering justice by the courts is an incident of sovereignty. The surrender of this power is never to be presumed. Unless, therefore, it clearly appears to have been the intention of the legislature to limit its power of bringing this corporation before its judicial tribunals to the particular mode mentioned in the charter, the subsequent legislation upon that subject was not invalid.

§ 1906. *"Shall" and "may," how construed.*

The provision of the charter relied upon is in these words: "Process on said company shall be served on the president by leaving a copy to his address, at the principal office of the corporation, in the hands of any of its officers. The said corporation shall have power to establish a principal office at such place as they may see fit, and the same to change at pleasure." (a) As against the government, the word "shall," when used in statutes, is to be construed as "may," unless a contrary intention is manifest. Here no such intention appears. The largest latitude is given the company in respect to the location of its principal office; and it can hardly be supposed that the legislature meant to deprive itself of the power of providing another mode of service, if that specified was found to be inconvenient or unwise. The provision is one which evidently belongs to remedies against the corporation, and not to the grant of rights. As to remedies, it has always been held that the legislative power of change may be exercised when it does not affect injuriously rights which have been secured. *Sturges v. Crowninshield*, 4 Wheat., 122 (§§ 1937-39, *infra*).

Judgment affirmed.

§ 1907. *State may make a contract.*—A state legislature may bind the state by a contract, which, under the constitution of the United States, the state cannot impair. *Jefferson Branch Bank v. Skelly*,* 1 Black, 436. See § 1764, 1766, 1786.

§ 1908. There is no constitutional objection to the exercise of the power to make a binding contract by a state. *State Bank of Ohio v. Knap*, 16 How., 369 (§§ 2246-53).

(a) The change in the mode of service was in authorizing service on other officers.

§§ 1909-1917. CONSTITUTION AND LAWS.—OBLIGATION OF CONTRACTS.

§ 1909. **Adjusting claims against the government.**—A resolution of congress referring a claim against the government to the secretary of war, to be examined and adjusted, may be repealed by a subsequent resolution, and the claimant's right to have his claim adjusted by that tribunal destroyed, without impairing any right, where the officer is made to act ministerially and not judicially, and neither party would be bound by his award. *Gordon v. United States*, 7 Wall., 188.

§ 1910. **A change of constitution cannot release a state from contracts made under, and permitted by, the constitution in force at the time.** *Dodge v. Woolsey*, 18 How., 381 (CORPORATIONS, §§ 563-573).

§ 1911. **Right to sue the state.**—The constitution and laws of Alabama giving the right to sue the state in her courts provided "that, if judgment should be rendered against the state, it was the duty of the comptroller, on the certificate of the clerk of the court, together with that of the judge who tried the cause, that the recovery was just, to issue his warrant for the amount," but not until six months after the judgment was recovered. It was the duty of the treasurer to pay all warrants drawn on him by the comptroller, but the constitution provided expressly that no money should be drawn from the treasury but in consequence of appropriations made by law. While proceedings were pending against the state under these laws, and before final hearing, they were repealed, and the proceedings dismissed. It was decided that this repealing statute was valid and constitutional as against the plaintiff in the proceedings, there having not been granted any such remedy for the enforcement of the contracts of the state as might not, under the constitution of the United States, be taken away. *Railroad Co. v. Alabama*, * 11 Otto, 832. See §§ 1792-93.

§ 1912. **Contract by a state in rebellion.**—The political society which came into the Union, in 1796, by the name of the state of Tennessee, has always remained a state of the Union, and remained so during the rebellion. She never escaped the obligations of the constitution, though for a while she may have evaded their enforcement. The contracts made by her with her citizens, before the rebellion, bound her during and after the rebellion, and were at all times protected by the constitution of the United States. *Keith v. Clark*, * 7 Otto, 454.

§ 1913. **Repeal of gratuitous act.**—It seems that it is competent for a legislature to repeal an act which was a mere gratuity, provided that while it was in existence no vested rights were acquired under it. *Memphis v. United States*, 7 Otto, 297 (§§ 1888-94).

§ 1914. **Grant of an exclusive right to an invention.**—The grant of an exclusive privilege to an invention for a limited time, by a state, implies no binding and irrevocable contract with the people, that at the expiration of that period the invention shall become their property. No contract is impaired by a renewal of the privilege at the end of that period. *Evans v. Eaton*, Pet. C. C., 322.

§ 1915. **Imposition of toll contrary to contract.**—A law of the state of Pennsylvania, which provided that carriages carrying the United States mails over the Cumberland road should only pay one-half the toll demanded from other like vehicles, was in conflict with the stipulation of the state, "that no toll shall be received or collected for the passage of any wagon or carriage laden with the property of the United States," etc., contained in the act which accepted from the United States that portion of the road lying within the limits of the state. *Searight v. Stokes*, 3 How., 164.

§ 1916. **Eminent domain—Setting aside inquisition.**—A railroad company was given the general authority to condemn private property for its purposes, and to pay the damages either agreed upon, or to be ascertained by inquisition specially provided for in the charter. For many years the railroad company neglected to pay the damages assessed by the tribunal for a particular tract of land so condemned, or to even tender payment thereof, and the legislature in the mean time passed a law ordering such inquisition to be set aside, and a new inquisition to be had under the general laws. The railroad company tendered the amount of the award, with interest, before the actual vacation by the court of the inquisition. *Held*, that it acquired no vested right in the said tract until paid for according to the award, and as the legislature substantially ordered a new trial before any rights became vested, the whole proceeding was to be tried anew, and the obligation of the contract of the charter was in no wise impaired. *Baltimore, etc., R. Co. v. Nesbit*, 10 How., 393 (§§ 603-607).

§ 1917. **Louisiana funding act.**—By the act of January 24, 1875, called the "Funding Act," the state of Louisiana agreed to issue consolidated bonds to a certain amount, "or so much thereof as might be necessary," with which to pay off, at the rate of sixty cents on the dollar, the then outstanding bonds and warrants of the state. As an inducement to the holders of the outstanding bonds and warrants to surrender the same and receive instead the consolidated bonds, the act provided that the consolidated bonds should be used for no other purpose than this, and also provided for the levy and collection of an annual tax to be set apart for the payment of the consolidated bonds. The act declared these provisions to be a contract between the state and the holders of the consolidated bonds. It was held that this contract

was, contrary to the constitution, impaired by a subsequent act authorizing the use of the consolidated bonds to pay general creditors of the state at par. *McComb v. Board of Liquidation*, * 2 Woods, 48.

§ 1918. Grant of land.—The charter of a railroad company, providing that all vacant lands within eight miles on each side of the extension line of the road shall be exempt from location or entry from and after the time when such line shall be designated by survey; that the lands so exempted shall be surveyed by the company, at its own expense, and the odd sections reserved for the company, and the even sections for the use of the state; and that upon the grading of successive sections, it shall be the duty of the commissioner of the land office to issue to the company, in its corporate name, certificates for eight sections for each mile so graded, and certificates for the other eight sections upon the completion of the successive sections, becomes, upon its acceptance and the commencement and continuance of the performance of the conditions, a contract which the state cannot violate by granting certificates for the same land to others. *Gray v. Davis*, * 1 Woods, 420. Affirmed, 16 Wall., 208. See § 1778.

§ 1919. Remedies against a city.—The act of Louisiana of 1870 divests the courts of the state of authority to issue *mandamus* against the officers of the city of New Orleans, or to compel the issue of a warrant for the payment of money due from the city. It requires proceedings for the recovery of money claimed to be owing by the city to be conducted in the ordinary form of action against the corporation. It provides that no writ of execution or *feri facias* shall issue against the city, but that a final judgment against it, which has become executory, shall have the effect of fixing the amount of the plaintiff's demand, and that he may cause a certified copy of it to be filed in the office of the comptroller, and that thereupon that officer shall issue a warrant upon the treasurer, without any specific appropriation therefor, provided there be sufficient money in the treasury specially set apart for that purpose in the annual budget. The act further provides that in case the amount designated in the annual budget for the payment of judgments shall have been exhausted, the common council may, if they deem proper, appropriate to the payment of the judgment the amount set apart in the annual budget for contingent expenses; but if no such appropriation is made all judgments shall be paid in the order in which they shall be filed and registered in the office of the comptroller from the first money next annually set apart for that purpose. *Held*, that these provisions do not impair the obligation of contracts. *Louisiana v. New Orleans*, * 12 Otto, 208.

§ 1920. Lottery license.—Where a license to draw lotteries has been acted upon, and under it rights have been vested, it cannot be withdrawn by the legislature to the prejudice of these rights, and the power of the legislature to recall or modify it is to that extent gone. *State Lottery Co. v. Fitzpatrick*, * 3 Woods, 232. See § 1781.

§ 1921. Assessment for draining swamp lands.—There is no contract in a law imposing an assessment for a particular purpose — *e. g.*, for draining swamp lands — that there shall be no subsequent assessment for the same purpose. *Davidson v. New Orleans*, 6 Otto, 97 (§§ 701-709).

§ 1922. Grant of swamp lands to a state.—It seems that a grant of swamp lands to a state, on condition that they be appropriated to the purpose of reclaiming them, is, when accepted by the state, a contract whose obligation cannot be impaired. *McGee v. Mathis*, 4 Wall., 148 (§§ 2296-98). See § 1931.

§ 1923. Liquidation of state debts.—A statute appointing a board of liquidation to liquidate the debt of the state, and to make arrangements with the state's creditors for the taking up of old bonds and the issuance of new bonds, is no part of the contract of the old bonds. A subsequent act forbidding the board to receive the old bonds as valid in the scheme of liquidation does not therefore impair any contract. If they are valid such act does not make them void. *Durkee v. Board of Liquidation*, * 13 Otto, 646.

§ 1924. Grant of ferry privilege by court.—Where an act authorized inferior courts to establish ferries and bridges, with the proviso that the legislature should at all times retain the power of making such alterations in the establishments made by the justices of the inferior courts as they might deem proper, the inferior courts did not thereby acquire the authority to grant an exclusive franchise to maintain a bridge or ferry; and a subsequent act of the legislature granting the same right to another did not impair the obligation of any contract the inferior courts may have made in granting an exclusive privilege. *Wright v. Nagle*, * 11 Otto, 791.

§ 1925. Coupons receivable for taxes.—The state of Virginia, in pursuance of the provisions of a funding act of its legislature, issued its coupon bonds, payable to bearer, of which it was provided by law that the coupons should be receivable for all taxes, debts, dues and demands due the state. A subsequent law provided that before such coupons should be taken for taxes, the taxes due on the bond from which they were cut should be deducted. *Held*, that this law was void as against an owner of the coupons who was not the holder of the

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bond from which it was cut, on the ground that it impaired the obligation of the contract between the state and the person taking the coupons. *Hartman v. Greenhow*, 12 Otto, 635.

§ 1926. *Lands held under patent*.—An invasion or illegal seizure of land held under a patent, on pretense of exercising the right of eminent domain, and claimed to be done under authority of a state law, is not a violation of any contract within the meaning of the constitution. *Mills v. County of St. Clair*, 8 How., 569. See § 1776.

§ 1927. *Bank bills receivable for taxes*.—The charter of the Bank of South Carolina provided that its bills should be received by all tax collectors in payment of taxes. In 1877 the legislature provided a mode in which the validity of bills offered and refused should be determined and their acceptance compelled. A tax-payer whose bills had been refused took steps preliminary to proceedings to establish their validity, but the law was repealed before the proceedings were instituted. *Held*, that the act of 1877 created no new contract with the holder of the bills, but simply provided a new mode of enforcing an existing one; and that as the repealing act did not abrogate, but only changed, the remedies of the bill-holder, it was valid and effectual, and that the holder of the bills could not institute proceedings under the act after it was repealed. *South Carolina v. Gaillard*, 11 Otto, 437. See § 1770.

§ 1928. Although a stipulation in the charter of a bank owned by the state, that its notes shall be receivable in payment of all debts due the state, is a contract with the holders of such notes that cannot be impaired by a repeal of the stipulation subsequent to the issue of the notes, yet this does not apply to debts due the state as a trustee and not in its own right, or to debts due upon contracts expressly payable in specie or its equivalent. *Paup v. Drew*,* 10 How., 218; *Trigg v. Drew*,* 10 How., 224.

§ 1929. Where a bank is owned by a state and conducted by its agents under the supervision of the legislature, it is held that a stipulation in its charter, that its notes shall be receivable for all debts due the state, is a contract with every one who may take such notes that they shall be so received; and a repeal of such provision cannot deprive the holders of notes, issued prior to the repeal, of their right to use them in discharge of debts due the state. (CATRON, DANIEL, NELSON and GRIER, JJ., dissent in this case, upon the ground that the action is upon the treasurer's official bond payable in lawful money, given before the incorporation of the bank, to recover the amount of judgment rendered against the treasurer, no tender of payment in such notes being made before judgment, and the treasurer having received for the use of the state money not notes of the bank.) *Woodruff v. Trapnall*,* 10 How., 190.

§ 1930. The provision in the charter of the Bank of Tennessee, enacted in 1838, declaring that the notes of the bank should be receivable for taxes, is a contract between every holder of such notes and the state that they will be received in payment for taxes at their par value. And the provision of the constitution of that state of 1865, declaring the notes of the bank issued during the insurrectionary period void and not receivable for taxes, is void as impairing the obligation of this contract. The notes issued during this period are valid, and must be received in payment for taxes, unless they were issued for the purpose of aiding the rebellion, or in violation of the laws and constitution of the United States. *Keith v. Clark*,* 7 Otto, 454.

§ 1931. *Miscellaneous*.—It is held that the statute of California with reference to the reclamation of swamp lands does not impair the obligation of any contract, either between the United States and California, or the United States and her patentees or grantees, or between the state of California and purchasers from her, or grantees of the United States. Nor is there any contract found in the charter of reclamation district No. 103, the obligation of which could be impaired, within the meaning of the constitution, by reason of the fact that an assessment was levied in violation of the provisions of section 7 of the by-laws, which provides that "the trustees shall allow no indebtedness to accrue in excess of the amount of assessment levied." *Reclamation District v. Hagar*,* 6 Saw., 567. See § 1922.

§ 1932. The supreme court of California having settled the question that, under the state constitution, the legislature has power to authorize the formation of districts for the reclamation of swamp lands within the state, at the expense of the lands so reclaimed, it cannot be doubted that it has authority to include swamp lands held under Spanish grants, or under any other patent from the United States, as well as those the titles to which are derived through the state under the Arkansas act granting the swamp lands to the several states in which they are situated. *Ibid*.

§ 1933. A state statute providing that whatever interest the state had in certain lands escheated to the state should be released to certain persons did not impair the obligation of a contract between the state auditor and an attorney, by which the latter was to have one-half the lands if he recovered them for the state. If he thus owned half the lands, the state had by such act merely released its interest, whatever it might be. *Mulligan v. Corbins*,* 7 Wall., 487.

3. *State Insolvent Laws.*

[See DEBTOR AND CREDITOR.]

SUMMARY — *Power of the states to pass bankrupt laws*, § 1934. — *Law discharging prior debts*, § 1935. — *Resident and non-resident creditors*, § 1936.

§ 1934. Until the power to pass uniform laws on the subject of bankruptcies be exercised by congress, the states are not forbidden to pass bankrupt laws, provided they do not impair the obligation of contracts. *Sturges v. Crowninshield*, §§ 1937-39.

§ 1935. In this case it is held that a state law discharging a debtor from liability on a note executed before the law was passed impaired the obligation of the contract. *Ibid.* See § 2017.

§ 1936. As between citizens of the same state, a discharge of a bankrupt by the laws of that state is valid, as it affects contracts made after the enactment of the law; as against creditors who are citizens of other states, it is invalid as to all contracts. *Ogden v. Saunders*, §§ 1940-2003. See § 2001.

[NOTES. — See §§ 2004-2018.]

STURGES v. CROWNINSHIELD.

(4 Wheaton, 122-208. 1819.)

CERTIFICATE OF DIVISION from U. S. Circuit Court, District of Massachusetts.

STATEMENT OF FACTS. — *Assumpsit* on two notes, dated at New York in March, 1811, and payable in August, 1811. The New York legislature passed an insolvent law in April, 1811, under which the defendant pleaded a discharge. The questions certified were, (1) whether the states can pass bankrupt laws; (2) whether the New York law was a bankrupt law; (3) whether it impaired the obligation of a contract; (4) whether the plea was a good plea in bar.

Opinion by MARSHALL, C. J.

This case is adjourned from the court of the United States for the first circuit and the district of Massachusetts, on several points on which the judges of that court were divided, which are stated in the record, for the opinion of this court. The first is: Whether, since the adoption of the constitution of the United States, any state has authority to pass a bankrupt law, or whether the power is exclusively vested in the congress of the United States? This question depends on the following clause in the eighth section of the first article of the constitution of the United States: "The congress shall have power," etc., to "establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States."

The counsel for the plaintiff contend that the grant of this power to congress, without limitation, takes it entirely from the several states. In support of this proposition they argue that every power given to congress is necessarily supreme; and if, from its nature, or from the words of grant, it is apparently intended to be exclusive, it is as much so as if the states were expressly forbidden to exercise it. These propositions have been enforced and illustrated by many arguments, drawn from different parts of the constitution. That the power is both unlimited and supreme is not questioned. That it is exclusive is denied by the counsel for the defendant. In considering this question, it must be recollected that, previous to the formation of the new constitution, we were divided into independent states, united for some purposes, but, in most respects, sovereign. These states could exercise almost every legislative power, and, among others, that of passing bankrupt laws. When the American people created a national legislature, with certain enumerated powers, it was neither necessary nor proper to define the powers retained by the states. These powers proceed,

not from the people of America, but from the people of the several states; and remain, after the adoption of the constitution, what they were before, except so far as they may be abridged by that instrument. In some instances, as in making treaties, we find an express prohibition; and this shows the sense of the convention to have been, that the mere grant of a power to congress did not imply a prohibition on the states to exercise the same power. But it has never been supposed that this concurrent power of legislation extended to every possible case in which its exercise by the states has not been expressly prohibited. The confusion resulting from such a practice would be endless. The principle laid down by the counsel for the plaintiff, in this respect, is undoubtedly correct. Whenever the terms in which a power is granted to congress, or the nature of the power, require that it should be exercised exclusively by congress, the subject is as completely taken from the state legislatures as if they had been expressly forbidden to act on it.

Is the power to establish uniform laws on the subject of bankruptcies, throughout the United States, of this description? The peculiar terms of the grant certainly deserve notice. Congress is not authorized merely to pass laws the operation of which shall be uniform, but to establish uniform laws on the subject throughout the United States. This establishment of uniformity is, perhaps, incompatible with state legislation on that part of the subject to which the acts of congress may extend. But the subject is divisible in its nature into bankrupt and insolvent laws, though the line of partition between them is not so distinctly marked as to enable any person to say, with positive precision, what belongs exclusively to the one, and not to the other class of laws. It is said, for example, that laws which merely liberate the person are insolvent laws, and those which discharge the contract are bankrupt laws. But if an act of congress should discharge the person of the bankrupt, and leave his future acquisitions liable to his creditors, we should feel much hesitation in saying that this was an insolvent, not a bankrupt, act; and, therefore, unconstitutional. Another distinction has been stated, and has been uniformly observed. Insolvent laws operate at the instance of an imprisoned debtor; bankrupt laws at the instance of a creditor. But should an act of congress authorize a commission of bankruptcy to issue on the application of a debtor, a court would scarcely be warranted in saying that the law was unconstitutional, and the commission a nullity. When laws of each description may be passed by the same legislature, it is unnecessary to draw a precise line between them. The difficulty can arise only in our complex system, where the legislature of the Union possesses the power of enacting bankrupt laws, and those of the states the power of enacting insolvent laws. If it be determined that they are not laws of the same character, but are as distinct as bankrupt laws and laws which regulate the course of descents, a distinct line of separation must be drawn, and the power of each government marked with precision. But all perceive that this line must be, in a great degree, arbitrary. Although the two systems have existed apart from each other, there is such a connection between them as to render it difficult to say how far they may be blended together. The bankrupt law is said to grow out of the exigencies of commerce, and to be applicable solely to traders; but it is not easy to say who must be excluded from, or may be included within, this description. It is, like every other part of the subject, one on which the legislature may exercise an extensive discretion.

This difficulty of discriminating with any accuracy between insolvent and

bankrupt laws would lead to the opinion that a bankrupt law may contain those regulations which are generally found in insolvent laws, and that an insolvent law may contain those which are common to a bankrupt law. If this be correct, it is obvious that much inconvenience would result from that construction of the constitution which should deny to the state legislatures the power of acting on this subject, in consequence of the grant to congress. It may be thought more convenient that much of it should be regulated by state legislation, and congress may purposely omit to provide for many cases to which their power extends. It does not appear to be a violent construction of the constitution, and is certainly a convenient one, to consider the power of the states as existing over such cases as the laws of the Union may not reach. But be this as it may, the power granted to congress may be exercised or declined, as the wisdom of that body shall decide. If, in the opinion of congress, uniform laws concerning bankruptcies ought not to be established, it does not follow that partial laws may not exist, or that state legislation on the subject must cease. It is not the mere existence of the power, but its exercise, which is incompatible with the exercise of the same power by the states. It is not the right to establish these uniform laws, but their actual establishment, which is inconsistent with the partial acts of the states.

It has been said that congress has exercised this power, and, by doing so, has extinguished the power of the states, which cannot be revived by repealing the law of congress. We do not think so. If the right of the states to pass a bankrupt law is not taken away by the mere grant of that power to congress, it cannot be extinguished, it can only be suspended, by the enactment of a general bankrupt law. The repeal of that law cannot, it is true, confer the power on the states; but it removes a disability to its exercise which was created by the act of congress.

§ 1937. *The states may pass bankrupt laws in the absence of legislation by congress.*

Without entering further into the delicate inquiry respecting the precise limitations which the several grants of power to congress, contained in the constitution, may impose on the state legislatures, than is necessary for the decision of the question before the court, it is sufficient to say, that, until the power to pass uniform laws on the subject of bankruptcies be exercised by congress, the states are not forbidden to pass a bankrupt law, provided it contain no principle which violates the tenth section of the first article of the constitution of the United States. This opinion renders it totally unnecessary to consider the question whether the law of New York is, or is not, a bankrupt law.

§ 1938. *A state law discharging debts created before its passage is invalid. Obligation of contracts defined.*

We proceed to the great question on which the cause must depend. Does the law of New York, which is pleaded in this case, impair the obligation of contracts, within the meaning of the constitution of the United States? This act liberates the person of the debtor, and discharges him from all liability for any debt previously contracted, on his surrendering his property in the manner it prescribes. In discussing the question whether a state is prohibited from passing such a law as this, our first inquiry is into the meaning of words in common use. What is the obligation of a contract? and what will impair it? It would seem difficult to substitute words which are more intelligible, or less liable to misconception, than those which are to be explained. A contract is

an agreement in which a party undertakes to do, or not to do, a particular thing. The law binds him to perform his undertaking, and this is, of course, the obligation of his contract. In the case at bar, the defendant has given his promissory note to pay the plaintiff a sum of money on or before a certain day. The contract binds him to pay that sum on that day; and this is its obligation. Any law which releases a part of this obligation must, in the literal sense of the word, impair it. Much more must a law impair it which makes it totally invalid, and entirely discharges it. The words of the constitution, then, are express, and incapable of being misunderstood. They admit of no variety of construction, and are acknowledged to apply to that species of contract, an engagement between man and man, for the payment of money, which has been entered into by these parties. Yet the opinion that this law is not within the prohibition of the constitution has been entertained by those who are entitled to great respect, and has been supported by arguments which deserve to be seriously considered.

It has been contended that, as a contract can only bind a man to pay to the full extent of his property, it is an implied condition that he may be discharged on surrendering the whole of it. But it is not true that the parties have in view only the property in possession when the contract is formed, or that its obligation does not extend to future acquisitions. Industry, talents and integrity constitute a fund which is as confidently trusted as property itself. Future acquisitions are, therefore, liable for contracts; and to release them from this liability impairs their obligation. It has been argued that the states are not prohibited from passing bankrupt laws, and that the essential principle of such laws is to discharge the bankrupt from all past obligations; that the states have been in the constant practice of passing insolvent laws such as that of New York, and if the framers of the constitution had intended to deprive them of this power, insolvent laws would have been mentioned in the prohibition; that the prevailing evil of the times, which produced this clause in the constitution, was the practice of emitting paper money, of making property which was useless to the creditor a discharge of his debt, and of changing the time of payment by authorizing distant instalments. Laws of this description, not insolvent laws, constituted, it is said, the mischief to be remedied; and laws of this description, not insolvent laws, are within the true spirit of the prohibition.

The constitution does not grant to the states the power of passing bankrupt laws, or any other power; but finds them in possession of it, and may either prohibit its future exercise entirely, or restrain it so far as national policy may require. It has so far restrained it as to prohibit the passage of any law impairing the obligation of contracts. Although, then, the states may, until that power shall be exercised by congress, pass laws concerning bankrupts, yet they cannot constitutionally introduce into such laws a clause which discharges the obligations the bankrupt has entered into. It is not admitted that, without this principle, an act cannot be a bankrupt law; and if it were, that admission would not change the constitution, nor exempt such acts from its prohibitions. The argument drawn from the omission in the constitution to prohibit the states from passing insolvent laws admits of several satisfactory answers. It was not necessary, nor would it have been safe, had it even been the intention of the framers of the constitution to prohibit the passage of all insolvent laws, to enumerate particular subjects to which the principle they intended to establish should apply. The principle was the inviolability of contracts. This principle

was to be protected in whatsoever form it might be assailed. To what purpose enumerate the particular modes of violation which should be forbidden, when it was intended to forbid all? Had an enumeration of all the laws which might violate contracts been attempted, the provision must have been less complete, and involved in more perplexity than it now is. The plain and simple declaration, that no state shall pass any law impairing the obligation of contracts, includes insolvent laws and all other laws, so far as they infringe the principle the convention intended to hold sacred, and no further.

But a still more satisfactory answer to this argument is that the convention did not intend to prohibit the passage of all insolvent laws. To punish honest insolvency by imprisonment for life, and to make this a constitutional principle, would be an excess of inhumanity which will not readily be imputed to the illustrious patriots who framed our constitution, nor to the people who adopted it. The distinction between the obligation of a contract, and the remedy given by the legislature to enforce that obligation, has been taken at the bar, and exists in the nature of things. Without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation shall direct. Confinement of the debtor may be a punishment for not performing his contract, or may be allowed as a means of inducing him to perform it. But the state may refuse to inflict this punishment, or may withhold this means, and leave the contract in full force. Imprisonment is no part of the contract, and simply to release the prisoner does not impair its obligation. No argument can be fairly drawn from the sixty-first section of the act for establishing a uniform system of bankruptcy (2 Stats. at Large, 36) which militates against this reasoning. That section declares that the act shall not be construed to repeal or annul the laws of any state then in force for the relief of insolvent debtors, except so far as may respect persons and cases clearly within its purview; and in such cases it affords its sanction to the relief given by the insolvent laws of the state, if the creditor of the prisoner shall not, within three months, proceed against him as a bankrupt.

The insertion of this section indicates an opinion in congress that insolvent laws might be considered as a branch of the bankrupt system, to be repealed or annulled by an act for establishing that system, although not within its purview. It was for that reason only that a provision against this construction could be necessary. The last member of the section adopts the provisions of the state laws so far as they apply to cases within the purview of the act. This section certainly attempts no construction of the constitution, nor does it suppose any provision in the insolvent laws impairing the obligation of contracts. It leaves them to operate, so far as constitutionally they may, unaffected by the act of congress, except where that act may apply to individual cases.

The argument which has been pressed most earnestly at the bar is that, although all legislative acts which discharge the obligation of a contract without performance are within the very words of the constitution, yet an insolvent act containing this principle is not within its spirit, because such acts have been passed by colonial and state legislatures from the first settlement of the country, and because we know from the history of the times that the mind of the convention was directed to other laws, which were fraudulent in their character, which enabled the debtor to escape from his obligation, and yet hold his property; not to this, which is beneficial in its operation. Before discussing this argument, it may not be improper to premise that, although the spirit of

an instrument, especially of a constitution, is to be respected not less than its letter, yet the spirit is to be collected chiefly from its words. It would be dangerous in the extreme to infer from extrinsic circumstances that a case for which the words of an instrument expressly provide shall be exempted from its operation. Where words conflict with each other, where the different clauses of an instrument bear upon each other, and would be inconsistent unless the natural and common import of words be varied, construction becomes necessary, and a departure from the obvious meaning of words is justifiable. But if, in any case, the plain meaning of a provision, not contradicted by any other provision in the same instrument, is to be disregarded, because we believe the framers of that instrument could not intend what they say, it must be one in which the absurdity and injustice of applying the provision to the case would be so monstrous that all mankind would, without hesitation, unite in rejecting the application.

This is certainly not such a case. It is said the colonial and state legislatures have been in the habit of passing laws of this description for more than a century; that they have never been the subject of complaint, and, consequently, could not be within the view of the general convention. The fact is too broadly stated. The insolvent laws of many, indeed, of by far the greater number, of the states do not contain this principle. They discharge the person of the debtor, but leave his obligation to pay in full force. To this the constitution is not opposed. But were it even true that this principle had been introduced generally into those laws, it would not justify our varying the construction of the section. Every state in the Union, both while a colony and after becoming independent, had been in the practice of issuing paper money; yet this practice is, in terms, prohibited. If the long exercise of the power to emit bills of credit did not restrain the convention from prohibiting its future exercise, neither can it be said that the long exercise of the power to impair the obligation of contracts should prevent a similar prohibition. It is not admitted that the prohibition is more express in the one case than in the other. It does not, indeed, extend to insolvent laws by name, because it is not a law by name, but a principle which is to be forbidden; and this principle is described in as appropriate terms as our language affords.

Neither, as we conceive, will any admissible rule of construction justify us in limiting the prohibition under consideration to the particular laws which have been described at the bar, and which furnished such cause for general alarm. What were those laws? We are told they were such as grew out of the general distress following the war in which our independence was established. To relieve this distress paper money was issued; worthless lands, and other property of no use to the creditor, were made a tender in payment of debts; and the time of payment stipulated in the contract was extended by law. These were the peculiar evils of the day. So much mischief was done, and so much more was apprehended, that general distrust prevailed, and all confidence between man and man was destroyed. To laws of this description, therefore, it is said, the prohibition to pass laws impairing the obligation of contracts ought to be confined. Let this argument be tried by the words of the section under consideration. Was this general prohibition intended to prevent paper money? We are not allowed to say so, because it is expressly provided that no state shall "emit bills of credit;" neither could these words be intended to restrain the states from enabling debtors to discharge their debts by the tender of property of no real value to the creditor, because for that sub-

ject also particular provision is made. Nothing but gold and silver coin can be made a tender in payment of debts.

It remains to inquire whether the prohibition under consideration could be intended for the single case of a law directing that judgments should be carried into execution by instalments? This question will scarcely admit of discussion. If this was the only remaining mischief against which the constitution intended to provide, it would undoubtedly have been, like paper money and tender laws, expressly forbidden. At any rate, terms more directly applicable to the subject, more appropriately expressing the intention of the convention, would have been used. It seems scarcely possible to suppose that the framers of the constitution, if intending to prohibit only laws authorizing the payment of debts by instalment, would have expressed that intention by saying, "no state shall pass any law impairing the obligation of contracts." No men would so express such an intention. No men would use terms embracing a whole class of laws, for the purpose of designating a single individual of that class. No court can be justified in restricting such comprehensive words to a particular mischief to which no allusion is made.

The fair and, we think, the necessary construction of the sentence requires that we should give these words their full and obvious meaning. A general dissatisfaction with that lax system of legislation which followed the war of our Revolution undoubtedly directed the mind of the convention to this subject. It is probable that laws such as those which have been stated in argument produced the loudest complaints were most immediately felt. The attention of the convention, therefore, was particularly directed to paper money, and to acts which enabled the debtor to discharge his debt otherwise than was stipulated in the contract. Had nothing more been intended, nothing more would have been expressed. But, in the opinion of the convention, much more remained to be done. The same mischief might be effected by other means. To restore public confidence completely, it was necessary not only to prohibit the use of particular means by which it might be effected, but to prohibit the use of any means by which the same mischief might be produced. The convention appears to have intended to establish a great principle, that contracts should be inviolable. The constitution, therefore, declares that no state shall pass "any law impairing the obligation of contracts." If, as we think, it must be admitted that this intention might actuate the convention; that it is not only consistent with, but is apparently manifested by, all that part of the section which respects this subject; that the words used are well adapted to the expression of it; that violence would be done to their plain meaning by understanding them in a more limited sense,—those rules of construction which have been consecrated by the wisdom of ages compel us to say that these words prohibit the passage of any law discharging a contract without performance.

§ 1939. *Power of the states to pass limitation and usury laws.*

By way of analogy, the statutes of limitations, and against usury, have been referred to in argument; and it has been supposed that the construction of the constitution which this opinion maintains would apply to them also, and must therefore be too extensive to be correct. We do not think so. Statutes of limitations relate to the remedies which are furnished in the courts. They rather establish that certain circumstances shall amount to evidence that a contract has been performed, than dispense with its performance. If, in a state where six years may be pleaded in bar to an action of *assumpsit*, a law

should pass declaring that contracts already in existence, not barred by the statute, should be construed to be within it, there could be little doubt of its unconstitutionality. So with respect to the laws against usury. If the law be that no person shall take more than six per centum per annum for the use of money, and that, if more be reserved, the contract shall be void, a contract made thereafter, reserving seven per cent., would have no obligation in its commencement; but if a law should declare that contracts already entered into, and reserving the legal interest, should be usurious and void, either in the whole or in part, it would impair the obligation of the contract and would be clearly unconstitutional.

This opinion is confined to the case actually under consideration. It is confined to a case in which a creditor sues in a court, the proceedings of which the legislature whose act is pleaded had not a right to control, and to a case where the creditor had not proceeded to execution against the body of his debtor within the state whose law attempts to absolve a confined insolvent debtor from his obligation. When such a case arises, it will be considered. It is the opinion of the court that the act of the state of New York which is pleaded by the defendant in this cause, so far as it attempts to discharge this defendant from the debt in the declaration mentioned, is contrary to the constitution of the United States, and that the plea is no bar to the action. (a)

OGDEN v. SAUNDERS.

(12 Wheaton, 213-369. 1827.)

ERROR to the District Court for Louisiana.

STATEMENT OF FACTS.— One Jordan, in 1806, at Lexington, Kentucky, drew certain bills upon Ogden, who was a resident of New York, and the bills were there accepted by him. Saunders, a citizen of Kentucky, brought suit on these bills against Ogden, who was then a citizen of Louisiana. Ogden pleaded a discharge under the insolvent law of New York of April 3, 1801. There were other cases argued with this one, involving the validity of state insolvent laws.

Opinion by MR. JUSTICE WASHINGTON.

The first and most important point to be decided in this cause turns essentially upon the question whether the obligation of a contract is impaired by a state bankrupt or insolvent law which discharges the person and the future acquisitions of the debtor from his liability under a contract entered into in that state after the passage of the act.

§ 1940. *M'Millan v. M'Neill explained.*

This question has never before been distinctly presented to the consideration of this court and decided, although it has been supposed by the judges of a highly respectable state court that it was decided in the case of *M'Millan v. M'Neill*, 4 Wheat., 209. That was the case of a debt contracted by two citizens of South Carolina, in that state, the discharge of which had a view to no other state. The debtor afterwards removed to the territory of Louisiana, where he was regularly discharged, as an insolvent, from all his debts, under an act of the legislature of that state passed prior to the time when the debt in question was contracted. To an action brought by the creditor in the district

(a) *M'Millan*, residing at Charleston, South Carolina, executed bonds there, with *M'Neill* as surety. These bonds were paid by *M'Neill* after suit and judgment, after which *M'Millan* removed to Louisiana, where he was discharged under a state law from all debts, etc. *M'Neill* sued him, and he pleaded his discharge. Held, that the case did not differ in principle from *Sturges v. Crowninshield*. That the fact that the state law was passed before the debt was contracted made no difference in the application of the principle. *M'Millan v. M'Neill*,* 4 Wheat., 209. See § 1940.

court of Louisiana, the defendant plead in bar his discharge under the law of that territory, and it was contended by the counsel for the debtor in this court that the law under which the debtor was discharged, having passed before the contract was made, it could not be said to impair its obligation. The cause was argued on one side only, and it would seem from the report of the case that no written opinion was prepared by the court. The chief justice stated that the circumstance of the state law under which the debt was attempted to be discharged having been passed before the debt was contracted, made no difference in the application of the principle which had been asserted by the court in the case of *Sturges v. Crowninshield*, 4 Wheat., 122 (§§ 1937-39, *supra*). The correctness of this position is believed to be incontrovertible. The principle alluded to was, that a state bankrupt law which impairs the obligation of a contract is unconstitutional in its application to such contract. In that case, it is true, the contract preceded in order of time the act of assembly under which the debtor was discharged, although it was not thought necessary to notice that circumstance in the opinion which was pronounced. The principle, however, remained, in the opinion of the court delivered in *M'Millan v. M'Neill*, unaffected by the circumstance that the law of Louisiana preceded a contract made in another state; since that law, having no extraterritorial force, never did at any time govern or affect the obligation of such contract. It could not, therefore, be correctly said to be prior to the contract, in reference to its obligation; since if, upon legal principles, it could affect the contract, that could not happen until the debtor became a citizen of Louisiana, and that was subsequent to the contract.

§ 1941. *A discharge under the bankrupt law of one government does not affect contracts to be executed under another government.*

But I hold the principle to be well established, that a discharge under the bankrupt laws of one government does not affect contracts made or to be executed under another, whether the law be prior or subsequent in the date to that of the contract; and this I take to be the only point really decided in the case alluded to. Whether the chief justice was correctly understood by the reporter, when he is supposed to have said "that this case was not distinguishable in principle from the preceding case of *Sturges v. Crowninshield*," it is not material at this time to inquire, because I understand the meaning of these expressions to go no further than to intimate that there was no distinction between the cases as to the constitutional objection, since it professed to discharge a debt contracted in another state, which, at the time it was contracted, was not within its operation, nor subject to be discharged by it. The case now to be decided is that of a debt contracted in the state of New York by a citizen of that state, from which he was discharged, so far as he constitutionally could be, under a bankrupt law of that state, in force at the time when the debt was contracted. It is a case, therefore, that bears no resemblance to the one just noticed.

I come now to the consideration of the question, which, for the first time, has been directly brought before this court for judgment. I approach it with more than ordinary sensibility, not only on account of its importance, which must be acknowledged by all, but of its intrinsic difficulty, which every step I have taken in arriving at a conclusion with which my judgment could in any way be satisfied has convinced me attends it. I have examined both sides of this great question with the most sedulous care, and the most anxious desire to discover which of them, when adopted, would be most likely to fulfil the in-

tentions of those who framed the constitution of the United States. I am far from asserting that my labors have resulted in entire success. They have led me to the only conclusion by which I can stand with any degree of confidence; and yet, I should be disingenuous were I to declare, from this place, that I embrace it without hesitation, and without a doubt of its correctness. The most that candor will permit me to say upon the subject is, that I see, or think I see, my way more clear on the side which my judgment leads me to adopt, than on the other, and it must remain for others to decide whether the guide I have chosen has been a safe one or not.

§ 1942. *A law which changes the intention of an agreement impairs the contract, not necessarily the obligation of the contract.*

It has constantly appeared to me, throughout the different investigations of this question to which it has been my duty to attend, that the error of those who controvert the constitutionality of the bankrupt law under consideration, in its application to this case, if they be in error at all, has arisen from not distinguishing accurately between a law which impairs a contract, and one which impairs its obligation. A contract is defined by all to be an agreement to do or not to do some particular act; and in the construction of this agreement, depending essentially upon the will of the parties between whom it is formed, we seek for their intention with a view to fulfil it. Any law, then, which enlarges, abridges, or in any manner changes this intention, when it is discovered, necessarily impairs the contract itself, which is but the evidence of that intention. The manner or the degree in which this change is effected can in no respect influence this conclusion; for whether the law affect the validity, the construction, the duration, the mode of discharge, or the evidence of the agreement, it impairs the contract, though it may not do so to the same extent in all the supposed cases. Thus, a law which declares that no action shall be brought whereby to charge a person upon his agreement to pay the debt of another, or upon an agreement relating to lands, unless the same be reduced to writing, impairs a contract made by parol, whether the law precede or follow the making of such contract; and if the argument that this law also impairs, in the former case, the obligation of the contract, be sound, it must follow that the statute of frauds, and all other statutes which in any manner meddle with contracts, impair their obligation, and are consequently within the operation of this section and article of the constitution. It will not do to answer that, in the particular case put, and in others of the same nature, there is no contract to impair, since the pre-existing law denies all remedy for its enforcement, or forbids the making of it, since it is impossible to deny that the parties have expressed their will in the form of a contract, notwithstanding the law denies to it any valid obligation.

§ 1943. *The constitution forbids the passage of laws which impair the obligation of contracts, not those which impair the contracts themselves.*

This leads us to a critical examination of the particular phraseology of that part of the above section which relates to contracts. It is a law which impairs the obligation of contracts, and not the contracts themselves, which is interdicted. It is not to be doubted that this term obligation, when applied to contracts, was well considered and weighed by those who framed the constitution, and was intended to convey a different meaning from what the prohibition would have imported without it. It is this meaning of which we are all in search.

§ 1944. *The obligation of a contract is the law that binds parties to perform their agreements.*

What is it, then, which constitutes the obligation of a contract? The answer is given by the chief justice, in the case of *Sturges v. Crowninshield*, to which I readily assent now, as I did then; it is the law which binds the parties to perform their agreement. The law, then, which has this binding obligation must govern and control the contract in every shape in which it is intended to bear upon it, whether it affect its validity, construction or discharge. But the question, which law is referred to in the above definition, still remains to be solved. It cannot, for a moment, be conceded that the mere moral law is intended, since the obligation which that imposes is altogether of the imperfect kind, which the parties to it are free to obey or not, as they please. It cannot be supposed that it was with this law the grave authors of this instrument were dealing.

§ 1945. — *what law is meant.*

The universal law of all civilized nations, which declares that men shall perform that to which they have agreed, has been supposed by the counsel who have argued this cause for the defendant in error to be the law which is alluded to; and I have no objection to acknowledging its obligation, whilst I must deny that it is that which exclusively governs the contract. It is upon this law that the obligation which nations acknowledge to perform their compacts with each other is founded, and I therefore feel no objection to answer the question asked by the same counsel — what law it is which constitutes the obligation of the compact between Virginia and Kentucky — by admitting that it is this common law of nations which requires them to perform it. I admit further that it is this law which creates the obligation of a contract made upon a desert spot, where no municipal law exists, and (which was another case put by the same counsel) which contract, by the tacit assent of all nations, their tribunals are authorized to enforce.

But can it be seriously insisted that this, any more than the moral law upon which it is founded, was exclusively in the contemplation of those who framed this constitution? What is the language of this universal law? It is simply that all men are bound to perform their contracts. The injunction is as absolute as the contracts to which it applies. It admits of no qualification and no restraint, either as to its validity, construction or discharge, further than may be necessary to develop the intention of the parties to the contract. And if it be true that this is exclusively the law to which the constitution refers us, it is very apparent that the sphere of state legislation upon subjects connected with the contracts of individuals would be abridged beyond what it can for a moment be believed the sovereign states of this Union would have consented to; for it will be found, upon examination, that there are few laws which concern the general police of a state, or the government of its citizens, in their intercourse with each other or with strangers, which may not in some way or other affect the contracts which they have entered into, or may thereafter form. For what are laws of evidence, or which concern remedies — frauds and perjuries — laws of registration, and those which affect landlord and tenant, sales at auction, acts of limitation, and those which limit the fees of professional men, and the charges of tavern keepers, and a multitude of others which crowd the codes of every state, but laws which may affect the validity, construction or duration, or discharge of contracts? Whilst I admit, then, that this common law of nations, which has been mentioned, may form, in part, the obligation of

a contract, I must unhesitatingly insist that this law is to be taken in strict subordination to the municipal laws of the land where the contract is made, or is to be executed. The former can be satisfied by nothing short of performance; the latter may affect and control the validity, construction, evidence, remedy, performance and discharge of the contract. The former is the common law of all civilized nations, and of each of them; the latter is the peculiar law of each, and is paramount to the former whenever they come in collision with each other.

§ 1946. — *it is the municipal law of the state where the contract is made.*

It is, then, the municipal law of the state, whether that be written or unwritten, which is emphatically the law of the contract made within the state, and must govern it throughout, wherever its performance is sought to be enforced. It forms, in my humble opinion, a part of the contract, and travels with it wherever the parties to it may be found. It is so regarded by all the civilized nations of the world, and is enforced by the tribunals of those nations according to its own forms, unless the parties to it have otherwise agreed, as where the contract is to be executed in, or refers to the laws of, some other country than that in which it is formed, or where it is of an immoral character, or contravenes the policy of the nation to whose tribunals the appeal is made; in which latter cases the remedy which the comity of nations affords for enforcing the obligation of contracts, wherever formed, is denied. Free from these objections, this law, which accompanies the contract as forming a part of it, is regarded and enforced everywhere, whether it affect the validity, construction or discharge of the contract. It is upon this principle of universal law that the discharge of the contract, or of one of the parties to it, by the bankrupt laws of the country where it was made, operates as a discharge everywhere. If, then, it be true that the law of the country where the contract is made or to be executed forms a part of that contract and of its obligation, it would seem to be somewhat of a solecism to say that it does, at the same time, impair that obligation.

But it is contended that, if the municipal law of the state where the contract is so made forms a part of it, so does that clause of the constitution which prohibits the states from passing laws to impair the obligation of contracts; and, consequently, that the law is rendered inoperative by force of its controlling associate. All this I admit, provided it be first proved that the law so incorporated with, and forming a part of, the contract does, in effect, impair its obligation; and before this can be proved, it must be affirmed, and satisfactorily made out, that if, by the terms of the contract, it is agreed that, on the happening of a certain event, as upon the future insolvency of one of the parties and his surrender of all his property for the benefit of his creditors, the contract shall be considered as performed and at an end, this stipulation would impair the obligation of the contract. If this proposition can be successfully affirmed, I can only say that the soundness of it is beyond the reach of my mind to understand.

§ 1947. *Repeal of laws.*

Again, it is insisted that, if the law of the contract forms a part of it, the law itself cannot be repealed without impairing the obligation of the contract. This proposition I must be permitted to deny. It may be repealed at any time, at the will of the legislature, and then it ceases to form any part of those contracts which may afterwards be entered into. The repeal is no more void than a new law would be which operates upon contracts to affect their validity,

construction or duration. Both are valid (if the view which I take of this case be correct), as they may affect contracts afterwards formed; but neither are so if they bear upon existing contracts; and, in the former case, in which the repeal contains no enactment, the constitution would forbid the application of the repealing law to past contracts, and to those only.

§ 1948. *Usury and limitation laws, statute of frauds, etc., considered.*

To illustrate this argument, let us take four laws which, either by new enactments, or by the repeal of former laws, may affect contracts as to their validity, construction, evidence or remedy. Laws against usury are of the first description. A law which converts a penalty, stipulated for by the parties as the only atonement for a breach of the contract, into a mere agreement for a just compensation, to be measured by the legal rate of interest, is of the second. The statute of frauds and the statute of limitations may be cited as examples of the last two. The validity of these laws can never be questioned by those who accompany me in the view which I take of the question under consideration, unless they operate, by their express provisions, upon contracts previously entered into; and even then they are void only so far as they do so operate; because, in that case, and in that case only, do they impair the obligation of those contracts. But if they equally impair the obligation of contracts subsequently made, which they must do if this be the operation of a bankrupt law upon such contracts, it would seem to follow that all such laws, whether in the form of new enactments or of repealing laws, producing the same legal consequences, are made void by the constitution; and yet the counsel for the defendants in error have not ventured to maintain so alarming a proposition.

If it be conceded that those laws are not repugnant to the constitution, so far as they apply to subsequent contracts, I am yet to be instructed how to distinguish between those laws and the one now under consideration. How has this been attempted by the learned counsel who have argued this cause upon the ground of such a distinction? They have insisted that the effect of the law first supposed is to annihilate the contract in its birth, or rather to prevent it from having a legal existence, and consequently that there is no obligation to be impaired. But this is clearly not so, since it may legitimately avoid all contracts afterwards entered into which reserve to the lender a higher rate of interest than this law permits.

The validity of the second law is admitted, and yet this can only be in its application to subsequent contracts; for it has not, and I think it cannot, for a moment, be maintained, that a law which, in express terms, varies the construction of an existing contract, or which, repealing a former law, is made to produce the same effect, does not impair the obligation of that contract. The statute of frauds, and the statute of limitations, which have been put as examples of the third and fourth classes of laws, are also admitted to be valid, because they merely concern the modes of proceeding in the trial of causes. The former, supplying a rule of evidence, and the latter, forming a part of the remedy given by the legislature to enforce the obligation, and likewise providing a rule of evidence. All this I admit. But how does it happen that these laws, like those which affect the validity and construction of contracts, are valid as to subsequent, and yet void as to prior and subsisting, contracts? For we are informed by the learned judge who delivered the opinion of this court in the case of *Sturges v. Crowninshield*, 4 Wheat., 122 (§§ 1937-39, *supra*), that "if, in a state where six years may be pleaded in bar to an action of *assumpsit*, a law should pass declaring that contracts already in existence, not barred by

the statute, should be construed within it, there could be little doubt of its unconstitutionality." It is thus most apparent that, whichever way we turn, whether to laws affecting the validity, construction or discharges of contracts, or the evidence or remedy to be employed in enforcing them, we are met by this overruling and admitted distinction between those which operate retrospectively and those which operate prospectively. In all of them the law is pronounced to be void in the first class of cases, and not so in the second.

§ 1949. *Analogy between bankrupt laws and the statute of limitations.*

Let us stop, then, to make a more critical examination of the act of limitations, which, although it concerns the remedy, or, if it must be conceded, the evidence, is yet void or otherwise as it is made to apply retroactively, or prospectively, and see if it can, upon any intelligible principle, be distinguished from a bankrupt law when applied in the same manner. What is the effect of the former? The answer is, to discharge the debtor and all his future acquisitions from his contract; because he is permitted to plead it in bar of any remedy which can be instituted against him, and consequently in bar or destruction of the obligation which his contract imposed upon him. What is the effect of a discharge under a bankrupt law? I can answer this question in no other terms than those which are given to the former question. If there be a difference, it is one which, in the eye of justice, at least, is more favorable to the validity of the latter than of the former; for in the one the debtor surrenders everything which he possesses towards the discharge of his obligation, and in the other he surrenders nothing, and sullenly shelters himself behind a legal objection with which the law has provided him, for the purpose of protecting his person, and his present as well as his future acquisitions, against the performance of his contract.

It is said that the former does not discharge him absolutely from his contract, because it leaves a shadow sufficiently substantial to raise a consideration for a new promise to pay. And is not this equally the case with a certificated bankrupt, who afterwards promises to pay a debt from which his certificate had discharged him? In the former case, it is said the defendant must plead the statute in order to bar the remedy and to exempt him from his obligation. And so, I answer, he must plead his discharge under the bankrupt law, and his conformity to it, in order to bar the remedy of his creditor, and to secure to himself a like exemption. I have, in short, sought in vain for some other grounds on which to distinguish the two laws from each other than those which were suggested at the bar. I can imagine no other, and I confidently believe that none exist, which will bear the test of a critical examination. To the decision of this court, made in the case of *Sturges v. Crowninshield*, and to the reasoning of the learned judge who delivered that opinion, I entirely submit; although I did not then, nor can I now, bring my mind to concur in that part of it which admits the constitutional power of the state legislatures to pass bankrupt laws, by which I understand those laws which discharge the person and the future acquisitions of the bankrupt from his debts. I have always thought that the power to pass such a law was exclusively vested by the constitution in the legislature of the United States. But it becomes me to believe that this opinion was and is incorrect, since it stands condemned by the decision of a majority of this court, solemnly pronounced.

§ 1950. *A bankrupt law of a state which acts prospectively, or so far as it so acts, is not repugnant to the constitution of the United States.*

After making this acknowledgment, I refer again to the above decision with

some degree of confidence in support of the opinion to which I am now inclined to come, that a bankrupt law which operates prospectively, or in so far as it does so operate, does not violate the constitution of the United States. It is there stated "that, until the power to pass uniform laws on the subject of bankruptcies be exercised by congress, the states are not forbidden to pass a bankrupt law, provided it contain no principle which violates the tenth section of the first article of the constitution of the United States." The question in that case was, whether the law of New York, passed on the 3d of April, 1811, which liberates not only the person of the debtor, but discharges him from all liability for any debt contracted previous as well as subsequent to his discharge, on his surrendering his property for the use of his creditors, was a valid law, under the constitution, in its application to a debt contracted prior to its passage. The court decided that it was not, upon the single ground that it impaired the obligation of that contract. And if it be true that the states cannot pass a similar law to operate upon contracts subsequently entered into, it follows inevitably, either that they cannot pass such laws at all, contrary to the express declaration of the court, as before quoted, or that such laws do not impair the obligation of contracts subsequently entered into; in fine, it is a self-evident proposition that every contract that can be formed must either precede or follow any law by which it may be affected.

I have, throughout the preceding part of this opinion, considered the municipal law of the country where the contract is made as incorporated with the contract, whether it affects its validity, construction or discharge. But I think it quite immaterial to stickle for this position, if it be conceded to me, what can scarcely be denied, that this municipal law constitutes the law of the contract so formed, and must govern it throughout. I hold the legal consequences to be the same in whichever view the law, as it affects the contract, is considered. I come now to a more particular examination and construction of the section under which this question arises; and I am free to acknowledge that the collocation of the subjects for which it provides has made an irresistible impression upon my mind, much stronger, I am persuaded, than I can find language to communicate to the minds of others.

§ 1951. *The constitution of the United States designs and provides a uniform standard of value for the whole country.*

It declares that "no state shall coin money, emit bills of credit, make anything but gold and silver coin a tender in payment of debts." These prohibitions, associated with the powers granted to congress "to coin money, and to regulate the value thereof, and of foreign coin," most obviously constitute members of the same family, being upon the same subject and governed by the same policy. This policy was to provide a fixed and uniform standard of value throughout the United States, by which the commercial and other dealings between the citizens thereof, or between them and foreigners, as well as the moneyed transactions of the government, should be regulated. For it might well be asked, why vest in congress the power to establish a uniform standard of value by the means pointed out, if the states might use the same means, and thus defeat the uniformity of the standard; and, consequently, the standard itself? And why establish a standard at all, for the government of the various contracts which might be entered into, if those contracts might afterwards be discharged by a different standard, or by that which is not money, under the authority of state tender laws? It is obvious, therefore, that these prohibitions in the tenth section are entirely homogeneous, and are essen-

tial to the establishment of a uniform standard of value in the formation and discharge of contracts. It is for this reason, independent of the general phraseology which is employed, that the prohibition in regard to state tender laws will admit of no construction which would confine it to state laws which have a retrospective operation.

§ 1952. *Retrospective laws affecting rights are prohibited.*

The next class of prohibitions contained in this section consists of bills of attainder, *ex post facto* laws, and laws impairing the obligation of contracts. Here, too, we observe, as I think, members of the same family, brought together in the most intimate connection with each other. The states are forbidden to pass any bill of attainder or *ex post facto* law, by which a man shall be punished criminally or penally, by loss of life, of his liberty, property or reputation, for an act which, at the time of its commission, violated no existing law of the land. Why did the authors of the constitution turn their attention to this subject, which, at the first blush, would appear to be peculiarly fit to be left to the discretion of those who have the police and good government of the state under their management and control? The only answer to be given is, because laws of this character are oppressive, unjust and tyrannical; and, as such, are condemned by the universal sentence of civilized man. The injustice and tyranny which characterizes *ex post facto* laws consists altogether in their retrospective operation, which applies with equal force, although not exclusively, to bills of attainder.

But if it was deemed wise and proper to prohibit state legislation as to retrospective laws, which concern, almost exclusively, the citizens and inhabitants of the particular state in which this legislation takes place, how much more did it concern the private and political interests of the citizens of all the states, in their commercial and ordinary intercourse with each other, that the same prohibition should be extended civilly to the contracts which they might enter into? If it were proper to prohibit a state legislature to pass a retrospective law which should take from the pocket of one of its own citizens a single dollar as a punishment for an act which was innocent at the time it was committed, how much more proper was it to prohibit laws of the same character precisely, which might deprive the citizens of other states, and foreigners as well as citizens of the same state, of thousands, to which, by their contracts, they were justly entitled, and which they might possibly have realized but for such state interference? How natural, then, was it, under the influence of these considerations, to interdict similar legislation in regard to contracts, by providing that no state should pass laws impairing the obligation of past contracts? It is true that the first two of these prohibitions apply to laws of a criminal, and the last to laws of a civil, character; but if I am correct in my view of the spirit and motives of these prohibitions, they agree in the principle which suggested them. They are founded upon the same reason, and the application of it is at least as strong to the last as it is to the first two prohibitions.

§ 1953. *Laws having a prospective operation are not prohibited.*

But these reasons are altogether inapplicable to laws of a prospective character. There is nothing unjust or tyrannical in punishing offenses prohibited by law and committed in violation of that law. Nor can it be unjust or oppressive to declare by law that contracts subsequently entered into may be discharged in a way different from that which the parties have provided, but which they know, or may know, are liable, under certain circumstances, to be discharged in a manner contrary to the provisions of their contract. Thinking,

as I have always done, that the power to pass bankrupt laws was intended by the authors of the constitution to be exclusive in congress, or, at least, that they expected the power vested in that body would be exercised so as effectually to prevent its exercise by the states, it is the more probable that, in reference to all other interferences of the state legislatures upon the subject of contracts, retrospective laws were alone in the contemplation of the convention.

§ 1954. *Transposition of the provisions of a law for purposes of construction.*

In the construction of this clause of the tenth section of the constitution, one of the counsel for the defendant supposed himself at liberty so to transpose the provisions contained in it as to place the prohibition to pass laws impairing the obligation of contracts in juxtaposition with the other prohibition to pass laws making anything but gold and silver coin a tender in payment of debts, inasmuch as the two provisions relate to the subject of contracts.

That the derangement of the words and even sentences of a law may sometimes be tolerated in order to arrive at the apparent meaning of the legislature, to be gathered from other parts, or from the entire scope of the law, I shall not deny. But I should deem it a very hazardous rule to adopt in the construction of an instrument so maturely considered as this constitution was by the enlightened statesmen who framed it, and so severely examined and criticised by its opponents in the numerous state conventions which finally adopted it. And if, by the construction of this sentence, arranged as it is, or as the learned counsel would have it to be, it could have been made out that the power to pass prospective laws affecting contracts was denied to the states, it is most wonderful that not one voice was raised against the provision in any of those conventions by the jealous advocates of state rights, nor even an amendment proposed to explain the clause and to exclude a construction which trenches so extensively upon the sphere of state legislation.

But, although the transposition which is contended for may be tolerated in cases where the obvious intention of the legislature can in no other way be fulfilled, it can never be admitted in those where consistent meaning can be given to the whole clause as its authors thought proper to arrange it, and where the only doubt is whether the construction which the transposition countenances, or that which results from the reading which the legislature has thought proper to adopt, is most likely to fulfil the supposed intention of the legislature. Now, although it is true that the prohibition to pass tender laws of a particular description, and laws impairing the obligation of contracts, relate, both of them, to contracts, yet the principle which governs each of them, clearly to be inferred from the subjects with which they stand associated, is altogether different; that of the first forming part of a system for fixing a uniform standard of value, and, of the last, being founded on a denunciation of retrospective laws. It is, therefore, the safest course, in my humble opinion, to construe this clause of the section according to the arrangement which the convention has thought proper to make of its different provisions. To insist upon a transposition, with a view to warrant one construction rather than the other, falls little short, in my opinion, of a begging of the whole question in controversy.

§ 1955. *The provision under consideration and the legal tender provision considered.*

But why, it has been asked, forbid the states to pass laws making anything but gold and silver coin a tender in payment of debts contracted subsequent as

well as prior to the law which authorizes it, and yet confine the prohibition to pass laws impairing the obligation of contracts to past contracts, or, in other words, to future bankrupt laws, when the consequence resulting from each is the same; the latter being considered by the counsel as being, in truth, nothing less than tender laws in disguise. An answer to this question has, in part, been anticipated by some of the preceding observations. The power to pass bankrupt laws having been vested in congress, either as an exclusive power, or under the belief that it would certainly be exercised, it is highly probable that state legislation upon that subject was not within the contemplation of the convention; or, if it was, it is quite unlikely that the exercise of the power, by the state legislatures, would have been prohibited by the use of terms which, I have endeavored to show, are inapplicable to laws intended to operate prospectively. For had the prohibition been to pass laws impairing contracts, instead of the obligation of contracts, I admit that it would have borne the construction which is contended for, since it is clear that the agreement of the parties in the first case would be impaired as much by a prior as it would be by a subsequent bankrupt law. It has, besides, been attempted to be shown that the limited restriction upon state legislation, imposed by the former prohibition, might be submitted to by the states, whilst the extensive operation of the latter would have hazarded, to say the least of it, the adoption of the constitution by the state conventions.

But an answer, still more satisfactory to my mind, is this: tender laws, of the description stated in this section, are always unjust; and, where there is an existing bankrupt law at the time the contract is made, they can seldom be useful to the honest debtor. They violate the agreement of the parties to it, without the semblance of an apology for the measure, since they operate to discharge the debtor from his undertaking, upon terms variant from those by which he bound himself, to the injury of the creditor, and unsupported, in many cases, by the plea of necessity. They extend relief to the opulent debtor, who does not stand in need of it, as well as to the one who is, by misfortunes, often unavoidable, reduced to poverty, and disabled from complying with his engagements. In relation to subsequent contracts, they are unjust when extended to the former class of debtors, and useless to the second, since they may be relieved by conforming to the requisitions of the state bankrupt law, where there is one. Being discharged by this law from all his antecedent debts, and having his future acquisitions secured to him, an opportunity is afforded him to become once more a useful member of society. If this view of the subject be correct, it will be difficult to prove that a prospective bankrupt law resembles, in any of its features, a law which should make anything but gold and silver coin a tender in payment of debts.

I shall now conclude this opinion by repeating the acknowledgment which candor compelled me to make in its commencement, that the question which I have been examining is involved in difficulty and doubt. But if I could rest my opinion in favor of the constitutionality of the law on which the question arises on no other ground than this doubt so felt and acknowledged, that alone would, in my estimation, be a satisfactory vindication of it. It is but a decent respect due to the wisdom, the integrity and the patriotism of the legislative body by which any law is passed, to presume in favor of its validity until its violation of the constitution is proved beyond all reasonable doubt. This has always been the language of this court, when that subject has called for its decision; and I know that it expresses the honest sentiments of each and every

member of this bench. I am perfectly satisfied that it is entertained by those of them from whom it is the misfortune of the majority of the court to differ on the present occasion, and that they feel no reasonable doubt of the correctness of the conclusion to which their best judgment has conducted them.

My opinion is, that the judgment of the court below ought to be reversed, and judgment given for the plaintiff in error.

Opinion by MR. JUSTICE JOHNSON.

This suit was instituted in Louisiana, in the circuit court of the United States, by Saunders, the defendant here, against Ogden, upon certain bills of exchange. Ogden, the defendant there, pleads, in bar to the action, a discharge obtained, in due form of law, from the courts of the state of New York, which discharge purports to release him from all debts and demands existing against him on a specified day. This demand is one of that description; and the act under which the discharge was obtained was the act of New York of 1801, a date long prior to that of the cause of action on which this suit was instituted. The discharge is set forth in the plea, and represents Ogden as "an insolvent debtor, being, on the day and year thereafter mentioned, in prison, in the city and county of New York, on execution issued against him on some civil action," etc. It does not appear that any suit had ever been instituted against him by this party or on this cause of action prior to the present. The cause below was decided upon a special verdict, in which the jury find: 1. That the acceptance of the bills on which the action was instituted was made by Ogden, in the city of New York, on the days they severally bear date, the said defendant then residing in the city of New York, and continuing to reside there until a day not specified. 2. That under the laws of the state of New York in such case provided, and referred to in the discharge (which laws are specially found, etc., meaning the state law of 1801), application was made for, and the defendant obtained, the discharge hereunto annexed. 3. That by the laws of New York actions on bills of exchange and acceptances thereof are limited to the term of six years; and 4. That at the time the said bills were drawn and accepted, the drawee and the drawer of the same were residents and citizens of the state of Kentucky.

On this state of facts the court below gave judgment against Ogden, the discharged debtor. We are not in possession of the grounds of the decision below; and it has been argued here as having been given upon the general nullity of the discharge, on the ground of its unconstitutionality. But it is obvious that it might also have proceeded upon the ground of its nullity as to citizens of other states who have never, by any act of their own, submitted themselves to the *lex fori* of the state that gives the discharge—considering the right given by the constitution to go into the courts of the United States upon any contracts, whatever be their *lex loci*, as modifying and limiting the general power which states are acknowledged to possess over contracts formed under control of their peculiar laws. This question, however, has not been argued, and must not now be considered as disposed of by this decision.

§ 1956. *Insolvent laws have no extraterritorial operation.*

The abstract question of the general power of the states to pass laws for the relief of insolvent debtors will be alone considered. And here, in order to ascertain with precision what we are to decide, it is first proper to consider what this court has already decided on this subject. And this brings under review the two cases of *Sturges v. Crowninshield* and *M'Millan v. M'Neill*, adjudged

in the year 1819, and contained in the fourth volume of Wheaton's Reports, 122 and 209. If the marginal note to the report or summary of the effect of the case of *M'Millan v. M'Neill* presented a correct view of the report of that decision, it is obvious that there would remain very little, if anything, for this court to decide. But by comparing the note of the reporter with the facts of the case, it will be found that there is a generality of expression admitted into the former which the case itself does not justify. The principle recognized and affirmed in *M'Millan v. M'Neill* is one of universal law, and so obvious and incontestable that it need be only understood to be assented to. It is nothing more than this: "that insolvent laws have no extraterritorial operation upon the contracts of other states; that the principle is applicable as well to the discharges given under the laws of the states as of foreign countries; and that the anterior or posterior character of the law under which the discharge is given, with reference to the date of the contract, makes no discrimination in the application of that principle."

§ 1957. *Points decided by Sturges v. Crowninshield.*

The report of the case of *Sturges v. Crowninshield* needs also some explanation. The court was, in that case, greatly divided in their views of the doctrine, and the judgment partakes as much of a compromise as of a legal adjudication. The minority thought it better to yield something than risk the whole. And, although their course of reasoning led them to the general maintenance of the state power over the subject, controlled and limited alone by the oath administered to all their public functionaries to maintain the constitution of the United States, yet as denying the power to act upon anterior contracts could do no harm, but, in fact, imposed a restriction conceived in the true spirit of the constitution, they were satisfied to acquiesce in it, provided the decision were so guarded as to secure the power over posterior contracts as well from the positive terms of the adjudication as from inferences deducible from the reasoning of the court.

The case of *Sturges v. Crowninshield*, then, must, in its authority, be limited to the terms of the certificate, and that certificate affirms two propositions: 1. That a state has authority to pass a bankrupt law, provided such law does not impair the obligation of contracts within the meaning of the constitution, and provided there be no act of congress in force to establish an uniform system of bankruptcy conflicting with such law. 2. That a law of this description, acting upon prior acts, is a law impairing the obligation of contracts within the meaning of the constitution.

Whatever inferences or whatever doctrines the opinion of the court in that case may seem to support, the concluding words of that opinion were intended to control and to confine the authority of the adjudication to the limits of the certificate.

§ 1958. *The states may pass bankrupt laws.*

I should, therefore, have supposed that the question of exclusive power in congress to pass a bankrupt law was not now open; but it has been often glanced at in argument, and I have no objection to express my individual opinion upon it. Not having recorded my views on this point in the case of *Crowninshield*, I avail myself of this occasion to do so.

So far, then, am I from admitting that the constitution affords any ground for this doctrine, that I never had a doubt that the leading object of the constitution was to bring in aid of the states a power over this subject which their individual powers never could attain to; so far from limiting, modifying and

attenuating legislative power in its known and ordinary exercise in favor of unfortunate debtors, that its sole object was to extend and perfect it, as far as the combined powers of the states, represented by the general government, could extend it. Without that provision, no power would have existed that could extend a discharge beyond the limits of the state in which it was given, but with that provision it might be made co-extensive with the United States. This was conducing to one of the great ends of the constitution, one which it never loses sight of in any of its provisions, that of making an American citizen as free in one state as he was in another. And when we are told that this instrument is to be construed with a view to its federative objects, I reply that this view alone of the subject is in accordance with its federative character.

Another object in perfect accordance with this may have been that of exercising a salutary control over the power of the states, whenever that power should be exercised without due regard to the fair exercise of distributive justice. The general tendency of the legislation of the states at that time to favor the debtor was a consideration which entered deeply into many of the provisions of the constitution. And as the power of the states over the law of their respective forums remained untouched by any other provision of the constitution, when vesting in congress the power to pass a bankrupt law, it was worthy of the wisdom of the convention to add to it the power to make that system uniform and universal. Yet, on this subject, the use of the term uniform, instead of general, may well raise a doubt whether it meant more than that such a law should not be partial, but have an equal and uniform application in every part of the Union. This is in perfect accordance with the spirit in which various other provisions of the constitution are conceived.

For these two objects there appears to have been much reason for vesting this power in congress; but for extending to the grant the effect of exclusiveness over the power of the states, appears to me not only without reason, but to be repelled by weighty considerations.

1. There is nothing which, on the face of the constitution, bears the semblance of direct prohibition on the states to exercise this power; and it would seem strange that, if such a prohibition had been in the contemplation of the convention, when appropriating an entire section to the enumeration of prohibitions on the states, they had forgotten this, if they had intended to enact it. The antithetical language adopted in that section, as to every other subject to which the power of congress had been previously extended, affords a strong reason to conclude that some direct and express allusion to the power to pass a bankrupt law would have been here inserted also, if they had not intended that this power should be concurrently, or, at least, subordinately exercised by the states. It cannot be correct reasoning to rely upon this fact as a ground to infer that the prohibition must be found in some provision not having that antithetical character, since this supposes an intention to insert the prohibition, which intention can only be assumed. Its omission is a just reason for forming no other conclusion than that it was purposely omitted. But,

2. It is insisted that, though not express, the prohibition is to be inferred from the grant to congress to establish uniform laws on the subject of bankruptcies throughout the United States; and that this grant, standing in connection with that to establish an uniform rule of naturalization, which is, in its nature, exclusive, must receive a similar construction. There are many answers to be given to this argument; and the first is, that a mere grant of a state power does not, in itself, necessarily imply an abandonment or relinquishment

of the power granted, or we should be involved in the absurdity of denying to the states the power of taxation, and sundry other powers ceded to the general government. But much less can such a consequence follow from vesting in the general government a power which no state possessed, and which all of them combined could not exercise to meet the end proposed in the constitution. For, if every state in the Union were to pass a bankrupt law in the same unvarying words, although this would, undoubtedly, be an uniform system of bankruptcy in its literal sense, it would be very far from answering the grant to congress. There would still need some act of congress, or some treaty under sanction of an act of congress, to give discharges in one state a full operation in the other. Thus, then, the inference which we are called upon to make will be found not to rest upon any actual cession of state power, but upon the creation of a new power which no state ever pretended to possess; a power which so far from necessarily diminishing or impairing the state power over the subject, might find its full exercise in simply recognizing as valid, in every state, all discharges which shall be honestly obtained under the existing laws of any state.

Again: the inference proposed to be deduced from this grant to congress will be found much broader than the principle in which the deduction is claimed. For, in this, as in many other instances in the constitution, the grant implies only the right to assume and exercise a power over the subject. Why, then, should the state powers cease before congress shall have acted upon the subject? or why should that be converted into a present and absolute relinquishment of power which is, in its nature, merely potential, and dependent on the discretion of congress whether, and when, to enter on the exercise of a power that may supersede it? Let any one turn his eye back to the time when this grant was made, and say if the situation of the people admitted of an abandonment of a power so familiar to the jurisprudence of every state; so universally sustained in its reasonable exercise by the opinion and practice of mankind, and so vitally important to a people overwhelmed in debt, and urged to enterprise by the activity of mind that is generated by revolution and free governments.

I will with confidence affirm that the constitution had never been adopted, had it then been imagined that this question would ever have been made, or that the exercise of this power in the states should ever have depended upon the views of the tribunals to which that constitution was about to give existence. The argument proposed to be drawn from a comparison of this power with that of congress over naturalization is not a fair one, for the cases are not parallel; and if they were, it is by no means settled that the states would have been precluded from this power, if congress had not assumed it. But admitting, *argumenti gratia*, that they would, still there are considerations bearing upon the one power which have no application to the other. Our foreign intercourse being exclusively committed to the general government, it is peculiarly their province to determine who are entitled to the privileges of American citizens and the protection of the American government. And the citizens of any one state being entitled by the constitution to enjoy the rights of citizenship in every other state, that fact creates an interest in this particular in each other's acts which does not exist with regard to their bankrupt laws; since state acts of naturalization would thus be extraterritorial in their operation, and have an influence on the most vital interests of other states. On these grounds, state laws of naturalization may be brought under one of the four heads or classes of powers precluded to the states, to wit: that of incom-

patibility; and on this ground alone, if any, could the states be debarred from exercising this power, had congress not proceeded to assume it. There is, therefore, nothing in that argument.

The argument deduced from the commercial character of bankrupt laws is still more unfortunate. It is but necessary to follow it out, and the inference, if any, deducible from it will be found to be direct and conclusive in favor of the state rights over this subject. For if, in consideration of the power vested in congress over foreign commerce and the commerce between the states, it was proper to vest a power over bankruptcies that should pervade the states, it would seem that, by leaving the regulation of internal commerce in the power of the states, it became equally proper to leave the exercise of this power within their own limits unimpaired. With regard to the universal understanding of the American people on this subject, there cannot be two opinions. If ever contemporaneous exposition and the clear understanding of the contracting parties, or of the legislative power (it is no matter in which light it be considered), could be resorted to as the means of expounding an instrument, the continuing and unimpaired existence of this power in the states ought never to have been controverted. Nor was it controverted until the repeal of the bankrupt act of 1800 (2 Stats. at Large, 19), or until a state of things arose in which the means of compelling a resort to the exercise of this power by the United States became a subject of much interest. Previously to that period, the states remained in the peaceable exercise of this power, under circumstances entitled to great consideration. In every state in the Union was the adoption of the constitution resisted by men of the keenest and most comprehensive minds; and if an argument such as this, so calculated to fasten on the minds of a people jealous of state rights, and deeply involved in debt, could have been imagined, it never would have escaped them. Yet nowhere does it appear to have been thought of; and, after adopting the constitution in every part of the Union, we find the very framers of it everywhere among the leading men in public life, and legislating or adjudicating under the most solemn oath to maintain the constitution of the United States, yet nowhere imagining that in the exercise of this power they violated their oaths, or transcended their rights. Everywhere, too, the principle was practically acquiesced in, that taking away the power to pass a law on a particular subject was equivalent to a repeal of existing laws on that subject. Yet in no instance was it contended that the bankrupt laws of the states were repealed, while those on navigation, commerce, the admiralty jurisdiction, and various others, were at once abandoned without the formality of a repeal. With regard to their bankrupt or insolvent laws, they went on carrying them into effect, and abrogating and re-enacting them, without a doubt of their full and unimpaired power over the subject. Finally, when the bankrupt law of 1800 was enacted, the only power that seemed interested in denying the right to the states formally pronounced a full and absolute recognition of that right. It is impossible for language to be more full and explicit on the subject than is the sixth section of this act of congress. It acknowledges both the validity of existing laws and the right of passing future laws. The practical construction given by that act to the constitution is precisely this: that it amounts only to a right to assume the power to legislate on the subject, and, therefore, abrogates or suspends the existing laws only so far as they may clash with the provisions of the act of congress. This construction was universally acquiesced in, for it was that on which there had previously prevailed but one opinion from the date of the constitution.

Much alarm has been expressed respecting the inharmoonious operation of so many systems, all operating at the same time. But I must say that I cannot discover any real ground for these apprehensions. Nothing but a future operation is here contended for; and nothing is easier than to avoid those rocks and quicksands which are visible to all. Most of the dangers are imaginary; for the interests of each community, its respect for the opinion of mankind, and a remnant of moral feeling, which will not cease to operate in the worst of times, will always present important barriers against the gross violation of principle. How is the general government itself made up, but of the same materials which separately make up the governments of the states?

It is a very important fact, and calculated to dissipate the fears of those who seriously apprehend danger from this quarter, that the powers assumed and exercised by the states over this subject did not compose any part of the grounds of complaint by Great Britain, when negotiating with our government on the subject of violations of the treaty of peace. Nor is it immaterial, as an historical fact, to show the evils against which the constitution really intended to provide a remedy. Indeed, it is a solecism to suppose that the permanent laws of any government, particularly those which relate to the administration of justice between individuals, can be radically unequal, or even unwise. It is scarcely ever so in despotic governments, much less in those in which the good of the whole is the predominating principle. The danger to be apprehended is from temporary provisions and desultory legislation; and this seldom has a view to future contracts.

At all events, whatever be the degree of evil to be produced by such laws, the limits of its action are necessarily confined to the territory of those who inflict it. The ultimate object in denying to the states this power would seem to be, to give the evil a wider range, if it be one, by extending the benefit of discharges over the whole of the Union. But it is impossible to suppose that the framers of the constitution could have regarded the exercise of this power as an evil in the abstract, else they would hardly have engrafted it upon that instrument which was to become the great safeguard of public justice and public morals. And, had they been so jealous of the exercise of this power in the states, it is not credible that they would have left unimpaired those unquestionable powers over the administration of justice which the states do exercise, and which, in their immoral exercise, might leave to the creditor the mere shadow of justice. The debtor's person, no one doubts, may be exempted from execution. But there is high precedent for exempting his lands; and public feeling would fully sustain an exemption of his slaves. What is to prevent the extension of exemption, until nothing is left but the mere mockery of a judgment, without the means of enforcing its satisfaction?

But it is not only in their execution laws that the creditor has been left to the justice and honor of the states for his security. Every judiciary in the Union owes its existence to some legislative act; what is to prevent a repeal of that act? and then, what becomes of his remedy, if he has not access to the courts of the Union? Or what is to prevent the extension of the right to imparl? of the time to plead? of the interval between the sittings of the state courts? Where is the remedy against all this? and why were not these powers taken also from the states, if they could not be trusted with the subordinate and incidental power here denied them? The truth is, the convention saw all this, and saw the impossibility of providing an adequate remedy for such mischiefs, if it was not to be found, ultimately, in the wisdom and virtue of the

state rulers, under the salutary control of that republican form of government which it guaranties to every state. For the foreigner and the citizens of other states, it provides the safeguard of a tribunal which cannot be controlled by state laws in the application of the remedy; and, for the protection of all, was interposed that oath which it requires to be administered to all the public functionaries, as well of the states as the United States. It may be called the ruling principle of the constitution, to interfere as little as possible between the citizen and his own state government; and hence, with a few safeguards of a very general nature, the executive, legislative and judicial functions of the states are left as they were, as to their own citizens, and as to all internal concerns. It is not pretended that this discharge could operate upon the rights of the citizen of any other state, unless his contract was entered into in the state that gave it, or unless he had voluntarily submitted himself to the *lex fori* of the state before the discharge; in both which instances he is subjected to its effects by his own voluntary act. For these considerations, I pronounce the exclusive power of congress over the relief of insolvents untenable, and the dangers apprehended from the contrary doctrine unreal.

§ 1959. *The obligation of a contract is the legal right which one party by it bestows upon the other.*

We will next inquire whether the states are precluded from the exercise of this power by that clause in the constitution which declares that no state shall "pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts." This law of the state of New York is supposed to have violated the obligation of a contract by releasing Ogden from a debt which he had not satisfied; and the decision turns upon the question, first, in what consists the obligation of a contract? and, secondly, whether the act of New York will amount to a violation of that obligation, in the sense of the constitution? The first of these questions has been so often examined and considered, in this and other courts of the United States, and so little progress has yet been made in fixing the precise meaning of the words "obligation of a contract," that I should turn in despair from the inquiry were I not convinced that the difficulties the question presents are mostly factitious, and the result of refinement and technicality; or of attempts at definition, made in terms defective, both in precision and comprehensiveness. Right or wrong, I come to my conclusion on their meaning, as applied to executory contracts, the subject now before us, by a simple and short-handed exposition.

Right and obligation are considered, by all ethical writers, as correlative terms. Whatever I, by my contract, give another a right to require of me, I, by that act, lay myself under an obligation to yield or bestow. The obligation of every contract will then consist of that right or power over my will or actions which I, by my contract, confer on another. And that right and power will be found to be measured neither by moral law alone, nor universal law alone, nor by the laws of society alone, but by a combination of the three; an operation in which the moral law is explained and applied by the law of nature, and both modified and adapted to the exigencies of society by positive law. The constitution was framed for society, and an advanced state of society, in which, I will undertake to say, that all the contracts of men receive a relative, and not a positive, interpretation; for the rights of all must be held and enjoyed in subserviency to the good of the whole. The state construes them, the state applies them, the state controls them, and the state decides how far the social exercise of the rights they give us over each other can be justly asserted. I say

the social exercise of these rights; because, in a state of nature, they are asserted over a fellow-creature, but in a state of society, over a fellow-citizen. Yet it is worthy of observation how closely the analogy is preserved between the assertion of these rights in a state of nature and a state of society, in their application to the class of contracts under consideration.

Two men, A and B, having no previous connection with each other (we may suppose them even of hostile nations), are thrown upon a desert island. The first, having had the good fortune to procure food, bestows a part of it upon the other, and he contracts to return an equivalent in kind. It is obvious here that B subjects himself to something more than the moral obligation of his contract, and that the law of nature and the sense of mankind would justify A in resorting to any means in his power to compel a compliance with this contract. But if it should appear that B, by sickness, by accident or circumstances beyond human control, however superinduced, could not possibly comply with his contract, the decision would be otherwise, and the exercise of compulsory power over B would be followed with the indignation of mankind. He has carried the power conferred on him over the will or actions of another beyond their legitimate extent, and done injustice in his turn. "*Summum jus est summa injuria.*"

The progress of parties, from the initiation to the consummation of their rights, is exactly parallel to this in a state of society. With this difference, that in the concoction of their contracts, they are controlled by the laws of the society of which they are members; and for the construction and enforcement of their contracts they rest upon the functionaries of its government. They can enter into no contract which the laws of that community forbid, and the validity and effect of their contracts is what the existing laws give to them. The remedy is no longer retained in their own hands, but surrendered to the community, to a power competent to do justice, and bound to discharge towards them the acknowledged duties of government to society, according to received principles of equal justice. The public duty, in this respect, is the substitute for that right which they possessed in a state of nature, to enforce the fulfillment of contracts; and if, even in a state of nature, limits were prescribed, by the reason and nature of things, to the exercise of individual power in enacting the fulfillment of contracts, much more will they be in a state of society. For it is among the duties of society to enforce the rights of humanity; and both the debtor and the society have their interests in the administration of justice, and in the general good; interests which must not be swallowed up and lost sight of while yielding attention to the claim of the creditor. The debtor may plead the visitations of providence, and the society has an interest in preserving every member of the community from despondency — in relieving him from a hopeless state of prostration, in which he would be useless to himself, his family, and the community. When that state of things has arrived in which the community has fairly and fully discharged its duties to the creditor, and in which, pursuing the debtor any longer would destroy the one without benefiting the other, must always be a question to be determined by the common guardian of the rights of both; and in this originates the power exercised by governments in favor of insolvents. It grows out of the administration of justice, and is a necessary appendage to it.

There was a time when a different idea prevailed, and then it was supposed that the rights of the creditor required the sale of the debtor and his family. A similar notion now prevails on the coast of Africa, and is often exercised

there by brute force. It is worthy only of the country in which it now exists, and of that state of society in which it once originated and prevailed. "*Lex non cogit ad impossibilia*," is a maxim applied by law to the contracts of parties in a hundred ways. And where is the objection, in a moral or political view, to applying it to the exercise of the power to relieve insolvents? It is in analogy with this maxim that the power to relieve them is exercised; and if it never was imagined that in other cases this maxim violated the obligation of contracts, I see no reason why the fair, ordinary and reasonable exercise of it, in this instance, should be subjected to that imputation. If it be objected to these views of the subject that they are as applicable to contracts prior to the law as to those posterior to it, and therefore inconsistent with the decision in the case of *Sturges v. Crowninshield*, my reply is, that I think this no objection to its correctness. I entertained this opinion then, and have seen no reason to doubt it since. But, if applicable to the case of prior debts, *multo fortiori*, will it be so to those contracted subsequent to such a law; the posterior date of the contract removes all doubt of its being in the fair and unexceptionable administration of justice that the discharge is awarded.

§ 1960. *The law of the contract remains the same everywhere; the remedy varies.*

I must not be understood here as reasoning upon the assumption that the remedy is grafted into the contract. I hold the doctrine untenable, and infinitely more restrictive on state power than the doctrine contended for by the opposite party. Since, if the remedy enters into the contract, then the states lose all power to alter their laws for the administration of justice. Yet I freely admit that the remedy enters into the views of the parties when contracting; that the constitution pledges the states to every creditor for the full and fair and candid exercise of state power to the ends of justice, according to its ordinary administration, uninfluenced by views to lighten, or lessen, or defer the obligation to which each contract fairly and legally subjects the individual who enters into it. Whenever an individual enters into a contract, I think his assent is to be inferred to abide by those rules in the administration of justice which belong to the jurisprudence of the country of the contract. And when compelled to pursue his debtor in other states, he is equally bound to acquiesce in the law of the forum to which he subjects himself. The law of the contract remains the same everywhere, and it will be the same in every tribunal; but the remedy necessarily varies, and with it the effect of the constitutional pledge, which can only have relation to the laws of distributive justice known to the policy of each state severally. It is very true that inconveniences may occasionally grow out of irregularities in the administration of justice by the states. But the citizen of the same state is referred to his influence over his own institutions for his security, and the citizens of the other states have the institutions and powers of the general government to resort to. And this is all the security the constitution ever intended to hold out against the undue exercise of the power of the states over their own contracts, and their own jurisprudence.

But, since a knowledge of the laws, policy and jurisprudence of a state is necessarily imputed to every one entering into contracts within its jurisdiction, of what surprise can he complain, or what violation of public faith, who still enters into contracts under that knowledge? It is no reply to urge that, at the same time knowing of the constitution, he had a right to suppose the discharge void and inoperative, since this would be but speculating on a legal opinion, in which, if he proves mistaken, he has still nothing to complain of but his own

temerity, and concerning which all that come after this decision, at least, cannot complain of being misled by their ignorance or misapprehensions. Their knowledge of the existing laws of the state will henceforward be unqualified, and was so in the view of the law before this decision was made. It is now about twelve or fourteen years since I was called upon, on my circuit, in the case of Gell, Canonge & Co. v. L. Jacobs, to review all this doctrine. The cause was ably argued by gentlemen whose talents are well known in this capitol, and the opinions which I then formed I have seen no reason since to distrust.

§ 1961. *The provision against ex post facto laws, etc., considered.*

It appears to me that a great part of the difficulties of the cause arise from not giving sufficient weight to the general intent of this clause in the constitution, and subjecting it to a severe literal construction, which would be better adapted to special pleadings. By classing bills of attainder, *ex post facto* laws and laws impairing the obligation of contracts together, the general intent becomes very apparent; it is a general provision against arbitrary and tyrannical legislation over existing rights, whether of person or property. It is true that some confusion has arisen from an opinion which seems early, and without due examination, to have found its way into this court, that the phrase "*ex post facto*" was confined to laws affecting criminal acts alone. The fact, upon examination, will be found otherwise; for neither in its signification or uses is it thus restricted. It applies to civil as well as to criminal acts (1 Shep. Touch., 68, 70, 73); and with this enlarged signification attached to that phrase, the purport of the clause would be "that the states shall pass no law attaching to the acts of individuals other effects or consequences than those attached to them by the laws existing at their date; and all contracts thus construed shall be enforced according to their just and reasonable purport."

§ 1962. *Modifications of contracts by legal construction and intendment.*

But to assign to contracts, universally, a literal purport, and to exact for them a rigid literal fulfillment, could not have been the intent of the constitution. It is repelled by a hundred examples. Societies exercise a positive control as well over the inception, construction and fulfillment of contracts as over the form and measure of the remedy to enforce them. As instances of the first, take the contract imputed to the drawer of a bill, or indorser of a note, with its modifications; the deviations of the law from the literal contract of the parties to a penal bond, a mortgage, a policy of insurance, bottomry bond, and various others that might be enumerated. And, for instances of discretion exercised in applying the remedy, take the time for which executors are exempted from suit; the exemption of members of legislatures; of judges; of persons attending courts or going to elections; the preferences given in the marshaling of assets; sales on credit for a present debt; shutting of courts altogether against gaming debts and usurious contracts, and above all, acts of limitation. I hold it impossible to maintain the constitutionality of an act of limitation if the modification of the remedy against debtors, implied in the discharge of insolvents, is unconstitutional. I have seen no distinction between the cases that can bear examination.

It is in vain to say that acts of limitation appertain to the remedy only; both descriptions of laws appertain to the remedy, and exactly in the same way; they put a period to the remedy, and upon the same terms, by what has been called a tender of paper money in the form of a plea, and to the advantage of the insolvent laws, since, if the debtor can pay, he has been made to

pay. But the door of justice is shut in the face of the creditor in the other instance, without an inquiry on the subject of the debtor's capacity to pay. And it is equally vain to say that the act of limitation raises a presumption of payment, since it cannot be taken advantage of on the general issue without provision by statute; and the only legal form of a plea implies an acknowledgment that the debt has not been paid. Yet so universal is the assent of mankind in favor of limitation acts, that it is the opinion of profound politicians that no nation could subsist without one.

§ 1963. *The right of the creditor liable to modification by public policy or necessity.*

The right, then, of the creditor to the aid of the public arm for the recovery of contracts is not absolute and unlimited, but may be modified by the necessities or policy of societies. And this, together with the contract itself, must be taken by the individual, subject to such restrictions and conditions as are imposed by the laws of the country. The right to pass bankrupt laws is asserted by every civilized nation in the world. And in no writer, I will venture to say, has it ever been suggested that the power of annulling such contracts, universally exercised under their bankrupt or insolvent systems, involves a violation of the obligation of contracts. In international law, the subject is perfectly understood, and the right generally acquiesced in; and yet the denial of justice is, by the same code, an acknowledged cause of war. But it is contended that, if the obligation of a contract has relation at all to the laws which give or modify the remedy, then the obligation of a contract is ambulatory and uncertain, and will mean a different thing in every state in which it may be necessary to enforce the contract.

There is no question that this effect follows; and yet, after this concession, it will still remain to be shown how any violation of the obligation of the contract can arise from that cause. It is a casualty well known to the creditor when he enters into the contract; and if obliged to prosecute his rights in another state, what more can he claim of that state than that its courts shall be open to him on the same terms on which they are open to other individuals? It is only by voluntarily subjecting himself to the *lex fori* of a state that he can be brought within the provisions of its statutes in favor of debtors; since in no other instance does any state pretend to a right to discharge the contracts entered into in another state. He who enters into a pecuniary contract, knowing that he may have to pursue his debtor if he flees from justice, casts himself, in fact, upon the justice of nations.

§ 1964. *Insolvent laws and legal tender laws compared.*

It has also been urged, with an earnestness that could only proceed from deep conviction, that insolvent laws were tender laws of the worst description, and that it is impossible to maintain the constitutionality of insolvent laws that have a future operation, without asserting the right of the states to pass tender laws, provided such laws are confined to a future operation. Yet to all this there appears to be a simple and conclusive answer. The prohibition in the constitution to make anything but gold or silver coin a tender in payment of debts is express and universal. The framers of the constitution regarded it as an evil to be repelled without modification; they have therefore left nothing to be inferred or deduced from construction on this subject. But the contrary is the fact with regard to insolvent laws; it contains no express prohibition to pass such laws, and we are called upon here to deduce such a prohibition from a clause which is anything but explicit, and which already has been judicially

declared to embrace a great variety of other subjects. The inquiry, then, is open and indispensable in relation to insolvent laws, prospective or retrospective, whether they do, in the sense of the constitution, violate the obligation of contracts. There would be much in the argument if there was no express prohibition against passing tender laws, but with such express prohibition the cases have no analogy. And independent of the different provisions in the constitution there is a distinction existing between tender laws and insolvent laws, in their object and policy, which sufficiently points out the principle upon which the constitution acts upon them as several and distinct; a tender law supposes a capacity in the debtor to pay and satisfy the debt in some way, but the discharge of an insolvent is founded in his incapacity ever to pay, which incapacity is judicially determined according to the laws of the state that passes it. The one imports a positive violation of the contract, since all contracts to pay, not expressed otherwise, have relation to payment in the current coin of the country; the other imports an impossibility that the debtor ever can fulfil the contract.

§ 1965. *It is competent for the government of a state to withdraw future acquisitions of its citizens from consideration as a basis of credit and a fund for the payment of debts.*

If it be urged that to assume this impossibility is itself an arbitrary act; that parties have in view something more than present possessions; that they look to future acquisitions; that industry, talents and integrity are as confidently trusted as property itself; and, to release them from this liability, impairs the obligation of contracts, plausible as the argument may seem, I think the answer is obvious and incontrovertible. Why may not the community set bounds to the will of the contracting parties in this as in every other instance? That will is controlled in the instances of gaming debts, usurious contracts, marriage brokage bonds and various others; and why may not the community also declare that, "look to what you will, no contract formed within the territory which we govern shall be valid as against future acquisitions;" "we have an interest in the happiness and services and families of this community which shall not be superseded by individual views?" Who can doubt the power of the state to prohibit her citizens from running in debt altogether? A measure a thousand times wiser than that impulse to speculation and ruin, which has hitherto been communicated to individuals by our public policy. And if to be prohibited altogether, where is the limit which may not be set, both to the acts and the views of the contracting parties?

When considering the first question in this cause, I took occasion to remark on the evidence of contemporaneous exposition deducible from well known facts. Every candid mind will admit that this is a very different thing from contending that the frequent repetition of wrong will create a right. It proceeds upon the presumption that the contemporaries of the constitution have claims to our deference on the question of right, because they had the best opportunities of informing themselves of the understanding of the framers of the constitution, and of the sense put upon it by the people when it was adopted by them; and in this point of view it is obvious that the consideration bears as strongly upon the second point in the cause as on the first. For had there been any possible ground to think otherwise, who could suppose that such men, and so many of them, acting under the most solemn oath, and generally acting rather under a feeling of jealousy of the power of the general government than otherwise, would universally have acted upon the conviction that the

power to relieve insolvents by a discharge from the debt had not been taken from the states by the article prohibiting the violation of contracts? The whole history of the times, up to a time subsequent to the repeal of the bankrupt law, indicates a settled knowledge of the contrary.

If it be objected to the views which I have taken of this subject, that they imply a departure from the direct and literal meaning of terms, in order to substitute an artificial or complicated exposition, my reply is, that the error is on the other side, *qui hæret in litera, hæret in cortice*. All the notions of society, particularly in their jurisprudence, are more or less artificial; our constitution nowhere speaks the language of men in a state of nature; let any one attempt a literal exposition of the phrase which immediately precedes the one under consideration,—I mean *ex post facto*,—and he will soon acknowledge a failure. Or let him reflect on the mysteries that hang around the little slip of paper which lawyers know by the title of a bail-piece. The truth is that, even compared with the principles of natural law, scarcely any contract imposes an obligation conformable to the literal meaning of terms. He who enters into a contract to follow the plough for the year is not held to its literal performance, since many casualties may intervene which would release him from the obligation without actual performance. There is a very striking illustration of this principle to be found in many instances in the books; I mean those cases in which parties are released from their contracts by a declaration of war, or where laws are passed rendering that unlawful, even incidentally, which was lawful at the time of the contract. Now in both these instances it is the government that puts an end to the contract, and yet no one ever imagined that it thereby violates the obligation of a contract. It is, therefore, far from being true, as a general proposition, "that a government necessarily violates the obligation of a contract which it puts an end to without performance." It is the motive, the policy, the object, that must characterize the legislative act, to affect it with the imputation of violating the obligation of contracts.

In the effort to get rid of the universal vote of mankind in favor of limitation acts, and laws against gaming, usury, marriage brokerage, buying and selling of offices, and many of the same description, we have heard it argued that, as to limitation acts, the creditor has nothing to complain of, because time is allowed him, of which, if he does not avail himself, it is his own neglect; and as to all others, there is no contract violated, because there was none ever incurred. But it is obvious that this mode of answering the argument involves a surrender to us of our whole ground. It admits the right of the government to limit and define the power of contracting, and the extent of the creditor's remedy against his debtor; to regard other rights besides his, and to modify his rights so as not to let them override entirely the general interests of society, the interests of the community itself in the talents and services of the debtor, the regard due to his happiness, and to the claims of his family upon him and upon the government.

No one questions the duty of the government to protect and enforce the just rights of every individual over all within its control. What we contend for is no more than this: that it is equally the duty and right of governments to impose limits to the avarice and tyranny of individuals, so as not to suffer oppression to be exercised under the semblance of right and justice. It is true that, in the exercise of this power, governments themselves may sometimes be the authors of oppression and injustice; but, wherever the constitution could impose limits to such power, it has done so; and if it has not been able to impose

effectual and universal restraints, it arises only from the extreme difficulty of regulating the movements of sovereign power; and the absolute necessity, after every effort that can be made to govern effectually, that will still exist, to leave some space for the exercise of discretion, and the influence of justice and wisdom.

Opinion by MR. JUSTICE THOMPSON.

This action is founded on several bills of exchange, bearing date in September, 1806, drawn by J. Jordan, upon Ogden, the plaintiff in error, in favor of Saunders, the defendant in error. The drawer and payee, at the date of the bills, were citizens of and resident in Kentucky. Ogden was a citizen of and resident in New York, where the bills were presented and accepted by him, but were not paid when they came to maturity, and are still unpaid. Ogden sets up, in bar of this action, his discharge under the insolvent law of the state of New York, passed in April, 1801, as one of the revised laws of that state. His discharge was duly obtained, on the 19th of April, 1808, he having assigned all his property for the benefit of his creditors, and having, in all respects, complied with the laws of New York for giving relief in cases of insolvency. These proceedings, according to those laws, discharged the insolvent from all debts due at the time of the assignment, or contracted for before that time, though payable afterwards, except in some specified cases, which do not affect the present question. From this brief statement it appears that Ogden, being sued upon his acceptances of the bills in question, the contract was made and to be executed within the state of New York, and was made subsequent to the passage of the law under which he was discharged.

§ 1966. *The insolvent law of New York of 1801 is not void as contravening the provision of the constitution which forbids the passage by the states of laws impairing the obligation of contracts.*

Under these circumstances, the general question presented for decision is, whether this discharge can be set up in bar of the present suit. It is not pretended but that if the law under which the discharge was obtained is valid, and the discharge is to have its effect according to the provisions of that law, it is an effectual bar to any recovery against Ogden. But it is alleged that this law is void under the prohibition in the constitution of the United States, article 1, section 10, which declares that "no state shall pass any law impairing the obligation of contracts." So that the inquiry here is, whether the law of New York under which the discharge was obtained is repugnant to this clause in the constitution; and, upon the most mature consideration, I have arrived at the conclusion that the law is not void, and that the discharge set up by the plaintiff in error is an effectual protection against any liability upon the bills in question. In considering this question, I have assumed that the point now presented is altogether undecided, and entirely open for discussion. Although several cases have been before this court which may have a bearing upon the question, yet, upon the argument, the particular point now raised has been treated by the counsel as still open for decision and so considered by the court by permitting its discussion. Although the law under which Ogden was discharged appears, by the record, to have been passed in the year 1801, yet it is proper to notice that this was a mere revision and re-enactment of a law which was in force as early, at least, as from the year 1788, and which has continued in force from that time to the present (except from the 3d of April, 1811, until the 14th of February, 1812) in all its material provisions which

have any bearing upon the present question. To declare a law null and void after such a lapse of time, and thereby prostrate a system which has been in operation for nearly forty years, ought to be called for by some urgent necessity, and founded upon reasons and principles scarcely admitting of doubt. In our complex system of government, we must expect that questions involving the jurisdictional limits between the general and state governments will frequently arise; and they are always questions of great delicacy, and can never be met without feeling deeply and sensibly impressed with the sentiment that this is the point upon which the harmony of our system is most exposed to interruption. Whenever such a question is presented for decision, I cannot better express my views of the leading principles which ought to govern this court, than in the language of the court itself, in the case of *Fletcher v. Peck*, 6 Cranch, 128 (§§ 1805-12, *supra*). "The question (says the court) whether a law be void for its repugnancy to the constitution is, at all times, a question of much delicacy, which ought seldom, or ever, be decided in the affirmative in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station, could it be unmindful of the solemn obligation which that station imposes. But it is not on slight implication, and vague conjecture, that the legislature is to be pronounced to have transcended its powers, and its acts to be considered void. The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other." If such be the rule by which the examination of this case is to be governed and tried (and that it is no one can doubt), I am certainly not prepared to say that it is not, at least, a doubtful case, or that I feel a clear conviction that the law in question is incompatible with the constitution of the United States.

In the discussion at the bar, this has rightly been considered a question relating to the division of power between the general and state governments. And in the consideration of all such questions, it cannot be too often repeated (although universally admitted), or too deeply impressed on the mind, that all the powers of the general government are derived solely from the constitution; and that whatever power is not conferred by that charter is reserved to the states respectively, or to the people. The state of New York, when the law in question was passed (for I consider this a mere continuation of the insolvent act of 1788), was in the due and rightful exercise of its powers as an independent government; and unless this power has been surrendered by the constitution of the United States, it still remains in the state. And in this view, whether the law in question be called a bankrupt or an insolvent law is wholly immaterial; it was such a law as a sovereign state had a right to pass; and the simple inquiry is, whether that right has been surrendered. No difficulty arises here out of any inquiry about express or implied powers granted by the constitution. If the states have no authority to pass laws like this, it must be in consequence of the express provision "that no state shall pass any law impairing the obligation of contracts."

It is admitted, and has so been decided by this court, that a state law discharging insolvent debtors from their contracts, entered into antecedent to the passing of the law, falls within this clause in the constitution, and is void. In the case now before the court, the contract was made subsequent to the passage of the law; and this, it is believed, forms a solid ground of distinction, whether tested by the letter or the spirit and policy of the prohibition. It was not denied on the argument, and I presume cannot be, but that a law may be void

in part and good in part; or, in other words, that it may be void so far as it has a retrospective application to past contracts, and valid as applied prospectively to future contracts. The distinction was taken by the court in the third circuit, in the case of *Golden v. Prince*, 5 Hall L. J., 502, and which, I believe, was the first case that brought into discussion the validity of a state law analogous to the one now under consideration. It was there held that the law was unconstitutional in relation to that particular case, because it impaired the obligation of the contract, by discharging the debtor from the payment of his debts due or contracted for before the passage of the law. But it was admitted that a law prospective in its operation, under which a contract afterwards made might be avoided in a way different from that provided by the parties, would be clearly constitutional. And how is this distinction to be sustained, except on the ground that contracts are deemed to be made in reference to the existing law, and to be governed, regulated and controlled by its provisions? As the question before the court was the validity of an insolvent law which discharged the debtor from all contracts, the distinction must have been made in reference to the operation of the discharge upon contracts made before and such as were made after the passage of the law, and is, therefore, a case bearing directly upon the question now before the court. That the power given by the constitution to congress, to establish uniform laws on the subject of bankruptcies throughout the United States, does not withdraw the subject entirely from the states, is settled by the case of *Sturges v. Crowninshield*, 4 Wheat., 191 (§§ 1937-39, *supra*). It is there expressly held that "until the power to pass uniform laws on the subject of bankruptcies is exercised by congress, the states are not forbidden to pass a bankrupt law, provided it contain no principle which violates the tenth section of the first article of the constitution of the United States." And this case also decides that the right of the states to pass bankrupt laws is not extinguished, but is only suspended, by the enactment of a general bankrupt law by congress, and that a repeal of that law removes disability to the exercise of the power by the states; so that the question now before the court is narrowed down to the single inquiry, whether a state bankrupt law, operating prospectively upon contracts made after its enactment, impairs the obligation of such contract, within the sense and meaning of the constitution of the United States.

This clause in the constitution has given rise to much discussion, and great diversity of opinion has been entertained as to its true interpretation. Its application to some cases may be plain and palpable, to others more doubtful. But, so far as relates to the particular question now under consideration, the weight of judicial opinions in the state courts is altogether in favor of the constitutionality of the law, so far as my examination has extended. And, indeed, I am not aware of a single contrary opinion. 13 Mass., 1; 16 Johns., 233; 7 Johns. Ch., 299; 5 Binn., 264; 5 Hall L. J., 520, 6th ed., 475; Niles' Reg., 15th of September, 1821, *Townsend v. Townsend*.

§ 1967. *A contract is made with reference to the law of the country, so that the law is in effect a part of the contract.*

In proceeding to a more particular examination of the true import of the clause "no state shall pass any law impairing the obligation of contracts," the inquiries which seem naturally to arise are, what is a contract, what its obligation, and what may be said to impair it? As to what constitutes a contract, no diversity of opinion exists; all the elementary writers on the subject, sanctioned by judicial decisions, consider it briefly and simply an agreement in

which a competent party undertakes to do, or not to do, a particular thing; but all know that the agreement does not always, nay, seldom, if ever, upon its face, specify the full extent of the terms and conditions of the contract; many things are necessarily implied, and to be governed by some rule not contained in the agreement; and this rule can be no other than the existing law when the contract is made or to be executed. Take, for example, the familiar case of an agreement to pay a certain sum of money, with interest. The amount, or rate of such interest, is to be ascertained by some standard out of the agreement, and the law presumes the parties meant the common rate of interest established in the country where the contract was to be performed. This standard is not looked to for the purpose of removing any doubt or ambiguity arising on the contract itself, but to ascertain the extent of its obligation; or to put a case more analogous, suppose a statute should declare generally, that all contracts for the payment of money should bear interest after the day of payment fixed in the contract, and a note, where such law was in force, should be made payable in a given number of days after date. Such note would surely draw interest from the day it became payable, although the note upon its face made no provision for interest; and the obligation of the contract to pay the interest would be as complete and binding as to pay the principal; but such would not be its operation without looking out of the instrument itself, to the law which created the obligation to pay interest. The same rule applies to contracts of every description; and parties must be understood as making their contracts with reference to existing laws, and impliedly assenting that such contracts are to be construed, governed and controlled by such laws. Contracts absolute and unconditional upon their face are often considered subject to an implied condition which the law establishes as applicable to such cases. Suppose a state law should declare that in all conveyances thereafter to be made of real estate, the land should be held as security for the payment of the consideration money, and liable to be sold, in case default should be made in payment; would such a law be unconstitutional? And yet it would vary the contract from that which was made by the parties, if judged of by the face of the deed alone, and would be making a contract conditional which the parties had made absolute, and would certainly be impairing such contract, unless it was deemed to have been made subject to the provisions of such law, and with reference thereto, and that the law was impliedly adopted as forming the obligation and terms of the contract. The whole doctrine of the *lex loci* is founded on this principle.

The language of the court, in the third circuit, in the case of *Camfranke v. Burnell*, 1 Wash., 341, is very strong on this point. Those laws, say the court, which in any manner affect the contract, whether in its construction, the mode of discharging it, or which control the obligation which the contract imposes, are essentially incorporated with the contract itself. The contract is a law which the parties impose upon themselves, subject, however, to the paramount law — the law of the country where the contract is made. And when to be enforced by foreign tribunals, such tribunals aim only to give effect to the contracts according to the laws which gave them validity. So, also, in this court, in the case of *Renner v. Bank of Columbia*, 9 Wheat., 536, the language of the court is to the same effect, and shows that we may look out of the contract to any known law or custom with reference to which the parties may be presumed to have contracted, in order to ascertain their intention, and the legal and binding force and obligation of their contract. *Bank of Columbia v.*

Okely, 4 Wheat., 235 (§§ 2522–25, *infra*), is another case recognizing the same principle. And in the case of *Dartmouth College v. Woodward*, 4 Wheat., 695 (§§ 2099–2117, *infra*), it is well observed by one of the judges of this court “that all contracts recognized as valid in any country obtain their obligation and construction *jure loci contractus*.” And this doctrine is universally recognized, both in the English and American courts.

If contracts are not made with reference to existing laws, and to be governed and regulated by such laws, the agreement of parties, under the extended construction now claimed for this clause in the constitution, may control state laws on the subject of contracts altogether. A parol agreement for the sale of land is a contract, and if the agreement alone makes the contract, and it derives its obligation solely from such agreement, without reference to the existing law, it would seem to follow that any law which had declared such contract void, or had denied a remedy for breach thereof, would impair its obligation. A construction involving such consequences is certainly inadmissible. Any contract not sanctioned by existing laws creates no civil obligation; and any contract discharged in the mode and manner provided by the existing law where it was made cannot, upon any just principles of reasoning, be said to impair such contract.

It will, I believe, be found on examination that the course of legislation in some of the states between debtor and creditor, which formed the grounds of so much complaint, and which probably gave rise to this prohibition in the constitution, consisted principally, if not entirely, of laws having a retrospective operation upon antecedent debts.

If a contract does not derive its obligation from the positive law of the country where it is made, where is to be found the rule that such obligation does not attach until the contracting party has attained a certain age? In what code of natural law or in what system of universal law, out of which, it is said at the bar, spring the eternal and unalterable principles of right and of justice, will be found a rule that such obligation does not attach so as to bind a party under the age of twenty-one years? No one will pretend that a law exonerating a party from contracts entered into before arriving at such age would be invalid. And yet it would impair the obligation of the contract if such obligation is derived from any other source than the existing law of the place where made. Would it not be within the legitimate powers of a state legislature to declare prospectively that no one should be made responsible upon contracts entered into before arriving at the age of twenty-five years? This, I presume, cannot be doubted. But to apply such a law to past contracts, entered into when twenty-one years was the limit, would clearly be a violation of the obligation of the contract. No such distinction, however, could exist, unless the obligation of the contract grows out of the existing law, and with reference to which the contract must be deemed to have been made.

§ 1968. “*Obligation*,” as used in the constitution, refers to the civil and legal obligation, not the moral.

The true import of the term obligation, as used in the constitution, may admit of some doubt. That it refers to the civil, or legal, and not moral, obligation, is admitted by all. But whether the remedy upon the contract is entirely excluded from the operation of this provision is a point on which some diversity of opinion has been entertained. That it is not intended to interfere with or limit state legislation in relation to the remedy, in the ordinary prosecution of suits, no one can doubt. And, indeed, such a principle is indispen-

sable to facilitate commercial intercourse between the citizens or subjects of different governments, and is sanctioned by all civilized nations; and if, according to the language of these cases, this principle extends to the obligation as well as to the construction of contracts, it would seem to follow, as a necessary conclusion, that it must embrace all the consequences growing out of the laws of the country where the contract is made; for it is the law which creates the obligation; and whenever, therefore, the *lex loci* provides for the dissolution of the contract in any prescribed mode, the parties are presumed to have acted subject to such contingency. And hence, in the English courts, wherever the operation of a foreign discharge under a bankrupt law has been brought under consideration, they have given to it the same effect that it would have had in the country where the contract was made. And the same rule has been recognized and adopted in the courts of this country almost universally, where the question has arisen. But whether a law might not so change the nature and extent of existing remedies, and thereby so materially impair the right, as to fall within the scope of this prohibition, if it extended to remedies upon antecedent contracts, is by no means clear. If the law, whatever it may be, relating to the remedy, has a prospective operation only, no objection can arise to it under this clause in the constitution. It is a question that must rest in the sound discretion of the state legislature. But men, when entering into contracts, can hardly be presumed entirely regardless of the remedy which the law provides in case of a breach of the contract; and the means of obtaining satisfaction for such breach enters essentially into consideration in making the contract. If, at the time of making the contract, it be known that the person only of the debtor, and not his property, or his personal property only, and not his lands, or a certain part of either, is to be resorted to for satisfaction, no ground of complaint can exist, the contract having been made with full knowledge of all these things; but if, at the time the contract is made, not only the person, but all the property, both real and personal, of the debtor, might be resorted to for satisfaction, and a law should be passed placing beyond the reach of the creditor the whole or the principal part of the debtor's property, it would be difficult to sustain the constitutionality of such a law. The statute of limitations is conceded to relate to the remedy. Suppose, when a contract was made, the limitation was six years, and it should be reduced to six months, or any shorter period, and applied to antecedent contracts, would it not be repugnant to the constitution? But if the legislature of a state should choose to adopt, prospectively, six months as the limitation, who could question the authority so to do? And suppose further that the unconstitutionality of the law in question is admitted, could the state of New York pass a law limiting the right of recovery against any insolvent who had been duly discharged according to the provisions of the insolvent act, to ten days from the passage of such law? And yet this would be a statute of limitation, and affect the remedy only. The law now in question is nothing more than taking away all remedy; and whether it be the whole, or some material part thereof, would seem to differ in degree only, and not in principle; and if to have a retrospective operation, might well be considered as falling within the spirit and policy of the prohibition.

§ 1969. *The law of the contract forms its obligation.*

In the case of *Sturges v. Crowninshield*, 4 Wheat., 122 (§§ 1937-39, *supra*), the court, in explaining the meaning of the terms "obligation of a contract," say: "A contract is an agreement in which a party undertakes to do, or not to

do, a particular thing. The law binds him to perform his undertaking, and this is, of course, the obligation of his contract." That is, as I understand it, the law of the contract forms its obligation, and if so, the contract is fulfilled, and its obligation discharged, by complying with whatever the existing law required in relation to such contract; and it would seem to me to follow, that if the law, looking to the contingency of the debtor's becoming unable to pay the whole debt, should provide for his discharge on payment of a part, this would enter into the law of the contract, and the obligation to pay would, of course, be subject to such contingency.

It is unnecessary, however, on the present occasion, to attempt to draw, with precision, the line between the right and the remedy, or to determine whether the prohibition in the constitution extends to the former and not to the latter, or whether, to a certain extent, it embraces both; for the law in question strikes at the very root of the cause of action, and takes away both right and remedy, and the question still remains, does the prohibition extend to a state bankrupt or insolvent law, like the one in question, when applied to contracts entered into subsequent to its passage? Whether this is technically a bankrupt or an insolvent law is of little importance. Its operation, if valid, is to discharge the debtor absolutely from all future liability on surrendering up his property, and, in that respect, is a bankrupt law, according to the universal understanding in England, where a bankrupt system is in operation. It is not, however, limited to traders, but extends to every class of citizens, and, in this respect, is more analogous to the English insolvent laws, which only authorize the discharge of the debtor from imprisonment.

§ 1970. *The constitutional inhibition against the impairment of the obligation of contracts is confined to laws affecting contracts made antecedent to their passage.*

If this provision in the constitution was unambiguous, and its meaning entirely free from doubt, there would be no door left open for construction, or any proper ground upon which the intention of the framers of the constitution could be inquired into; this court would be bound to give to it its full operation, whatever might be the views entertained of its expediency. But the diversity of opinion entertained of its construction will fairly justify an inquiry into the intention as well as the reason and policy of the provision; all which, in my judgment, will warrant its being confined to laws affecting contracts made antecedent to the passage of such laws. Such would appear to be the plain and natural interpretation of the words, "No state shall pass any law impairing the obligation of contracts."

The law must have a present effect upon some contract in existence, to bring it within the plain meaning of the language employed. There would be no propriety in saying that a law impaired, or in any manner whatever modified or altered, what did not exist. The most obvious and natural application of the words themselves is to laws having a retrospective operation upon existing contracts; and this construction is fortified by the associate prohibitions, "No state shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts." The first two are confessedly restricted to retrospective laws, concerning crimes and penalties affecting the personal security of individuals. And no good reason is perceived why the last should not be restricted to retrospective laws relating to private rights growing out of the contracts of parties. The one provision is intended to protect the person of the citizen from punishment criminally for any act not unlawful when committed;

and the other to protect the rights of property as secured by contracts sanctioned by existing laws. No one supposes that a state legislature is under any restriction in declaring, prospectively, any acts criminal which its own wisdom and policy may deem expedient. And why not apply the same rule of construction and operation to the other provision relating to the rights of property? Neither provision can strictly be considered as introducing any new principle, but only for greater security and safety to incorporate into this charter provisions admitted by all to be among the first principles of our government. No state court would, I presume, sanction and enforce an *ex post facto* law, if no such prohibition was contained in the constitution of the United States; so, neither would retrospective laws, taking away vested rights, be enforced. Such laws are repugnant to those fundamental principles upon which every just system of laws is founded. It is an elementary principle, adopted and sanctioned by the courts of justice in this country and in Great Britain, whenever such laws have come under consideration, and yet retrospective laws are clearly within this prohibition. It is, therefore, no objection to the view I have taken of this clause in the constitution that the provision was unnecessary. The great principle asserted, no doubt, is, as laid down by the court in *Sturges v. Crowninshield*, the inviolability of contracts; and this principle is fully maintained by confining the prohibition to laws affecting antecedent contracts. It is the same principle, we find, contemporaneously, 13th July, 1787 (1 L. U. S., 475), asserted by the old congress, in an ordinance for the government of the territory of the United States northwest of the River Ohio. By one of the fundamental articles it is provided that "in the just preservation of rights and property, it is understood and declared that no law ought ever to be made or have force in the territory that shall in any manner whatever interfere with or affect private contracts or engagements, *bona fide*, and without fraud, previously made," thereby pointedly making a distinction between laws affecting contracts antecedently and subsequently made; and such a distinction seems to me to be founded upon the soundest principles of justice, if there is anything in the argument that contracts are made with reference to, and derive their obligation from, the existing law.

§ 1971. *The prohibition of any state passing laws impairing the obligation of contracts applies only to private rights, not to bankrupt laws.*

That the prohibition upon the states to pass laws impairing the obligation of contracts is applicable to private rights merely, without reference to bankrupt laws, was evidently the understanding of those distinguished commentators on the constitution who wrote the *Federalist*. In the forty-fourth number of that work, p. 281, it is said that "bills of attainder, *ex post facto* laws, and laws impairing the obligation of contracts, are contrary to the first principles of the social compact, and to every principle of sound legislation. The two former are expressly prohibited by the declarations prefixed to some of the state constitutions, and all of them are prohibited by the spirit and scope of these fundamental charters. Our own experience has taught us, nevertheless, that additional defenses against these dangers ought not to be omitted. Very properly, therefore, have the convention added this constitutional bulwark in favor of personal security and private rights." Had it been supposed that this restriction had for its object the taking from the states the right of passing insolvent laws, even when they went to discharge the contract, it is a little surprising that no intimation of its application to that subject should be found in these commentaries upon the constitution. And it is still more surprising that

if it had been thought susceptible of any such interpretation, that no objection should have been made in any of the states to the constitution on this ground, when the ingenuity of man was on the stretch in many states to defeat its adoption; and particularly in the state of New York, where the law now in question was in full force at the very time the state convention was deliberating upon the adoption of the constitution. But if the prohibition is confined to retrospective laws, as it naturally imports, it is not surprising that it should have passed without objection, as it is the assertion of a principle universally approved.

§ 1972. *There is no analogy between the inhibition of laws impairing the obligation of contracts and that of laws concerning legal tender.*

It was pressed upon the court with great confidence, and as it struck me at the time with much force, that if this restriction could not reach laws existing at the time the contract was made, state legislatures might evade the prohibition (immediately preceding) to make anything but gold and silver a tender in payment of debts, by making the law prospective in its operation, and applicable to contracts thereafter to be made. But on reflection, I think no such consequences are involved. When we look at the whole clause in which these restrictions are contained, it will be seen that the subjects embraced therein are evidently to be divided into two classes; the one of a public and national character, the power over which is entirely taken away from the states; and the other relating to private and personal rights, upon which the states may legislate under the restrictions specified. The former are, "no state shall enter into any treaty, alliance or confederation, grant letters of marque and reprisal, coin money, emit bills of credit." Thus far there can be no question that they relate to powers of a general and national character. The next in order is, or "make anything but gold and silver a tender in payment of debts;" this is founded upon the same principles of public and national policy as the prohibition to coin money and emit bills of credit, and is so considered in the commentary on this clause in the number of the Federalist I have referred to. It is there said, the power to make anything but gold and silver a tender in payment of debts is withdrawn from the states, on the same principles with that of issuing a paper currency. All these prohibitions, therefore, relate to powers of a public nature, and are general and universal in their application, and inseparably connected with national policy. The subject-matter is entirely withdrawn from state authority and state legislation. But the succeeding prohibitions are of a different character; they relate to personal security and private rights, namely, or "pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts." The subject-matter of such laws is not withdrawn from the states; but the legislation thereon must be under the restriction therein imposed. States may legislate on the subject of contracts, but the laws must not impair the obligation of such contracts. A tender of payment necessarily refers to the time when the tender is made, and has no relation to the time when the law authorizing it shall be passed, or when the debt was contracted. The prohibition is, therefore, general and unlimited in its application. It has been urged in argument that this prohibition to the states to pass laws impairing the obligation of contracts had in view an object of great national policy, connected with the power to regulate commerce; that the leading purpose was to take from the states the right of passing bankrupt laws. And to illustrate and enforce this position this clause has been collated with that which gives to congress the power of passing uniform laws on the

subject of bankruptcies; and by transposition of the clause, the constitution is made to read, congress shall have power to establish uniform laws on the subject of bankruptcies throughout the United States; but no state shall pass any law impairing the obligation of contracts; and this prohibition is made to mean, no state shall pass any bankrupt law.

§ 1973. *Bankrupt laws do not impair the obligation of contracts.*

No just objection can be made to this collocation, if the grant of the power to congress, and the prohibition in question to the states, relate to the same subject-matter, namely, bankrupt laws. But it appears to me very difficult to maintain this proposition. It is, in the first place, at variance with the decision in *Sturges v. Crowninshield*, where it is held that this power is not taken from the states absolutely, but only in a limited and modified sense. And in the next place it is not reasonable to suppose that a denial of this power to the states would have been couched in such ambiguous terms. If, as has been contended, the giving to congress the exclusive power to pass bankrupt laws was the great and leading object of this prohibition, and the preservation of private rights followed only as an incident of minor importance, it is difficult to assign any satisfactory reason why the denial of the power to the states was not expressed in plain and unambiguous terms, namely, no state shall pass any bankrupt law. This would have been a more natural, and certainly a less doubtful, form of expression; and, besides, if the object was to take from the states altogether the right of passing bankrupt laws, or insolvent laws having the like operation, why did not the denial of the power extend also to naturalization laws? The grant of the power to congress on this subject is contained in the same clause, and substantially in the same words: "To establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States." If the authority of congress on the subject of naturalization is exclusive, from the nature of the power, why is it not, also, with respect to bankruptcies? And if, in the one case, the denial of the power to the states was necessary, it was equally so in the other. I cannot think, therefore, that the prohibition to pass laws impairing the obligation of contracts had any reference to a general system of bankrupt or insolvent laws. Such a system, established by the sovereign legislative power of the general or state governments, cannot in any just sense be said to impair the obligation of contracts. In every government of laws there must be a power somewhere to regulate civil contracts; and where, under our system, is that power vested? It must be either in the general or state governments. There is certainly no such power granted to the general government, and all power not granted is reserved to the states. The whole subject, therefore, of the regulation of contracts must remain with the states, and be governed by their laws respectively; and to deny to them the right of prescribing the terms and conditions upon which persons shall be bound by their contracts thereafter made is imposing upon the states a limitation for which I find no authority in the constitution; and no contract can impose a civil obligation beyond that prescribed by the existing law when the contract was made, nor can such obligation be impaired by controlling and discharging the contract according to the provisions of such law. Suppose a contract for the payment of money should contain an express stipulation by the creditor to accept a proportional part, in case the debtor should become insolvent, and to discharge the contract; can there be a doubt that such contract would be enforced? And what is the law in question but such contract, when applied to the undertaking of Ogden by accepting these bills? It

is no strained construction of the transaction to consider the contract and the law inseparable, when judging of the obligation imposed upon the debtor; and, if so, the undertaking was conditional, and the holder of the bills agreed to accept a part in case of the inability of the acceptor, by reason of his insolvency, to pay the whole.

§ 1974. *It is not unconstitutional for a state insolvent law, operating prospectively, to release from execution after-acquired property of the discharged insolvent.*

The unconstitutionality of this law is said to arise from its exempting the property of the insolvent, acquired after his discharge, from the payment of his antecedent debts. A discharge of the person of the debtor is admitted to be no violation of the contract. If this objection is well founded, it must be on the ground that the obligation of every contract attaches upon the property of the debtor, and any law exonerating it violates this obligation. I do not mean that the position implies a lien, by way of mortgage or pledge, on any specific property, but that all the property which a debtor has, when called upon for payment, is liable to be taken in execution to satisfy the debt, and that a law releasing any portion of it impairs the obligation of the contract. The force and justice of this position, when applied to contracts existing at the time the law is passed, is not now drawn in question. But its correctness, when applied to contracts thereafter made, is denied. The mode and manner, and the extent to which property may be taken in satisfaction of debts, must be left to the sound discretion of the legislature, and regulated by its views of policy and expediency, in promoting the general welfare of the community, subject to such regulation. It was the policy of the common law, under the feudal system, to exempt lands altogether from being seized and applied in satisfaction of debts; not even possession could be taken from the tenant. There can be no natural right growing out of the relation of debtor and creditor that will give the latter an unlimited claim upon the property of the former. It is a matter entirely for the regulation of civil society; nor is there any fundamental principle of justice growing out of such relation that calls upon government to enforce the payment of debts to the uttermost farthing which the debtor may possess; and that the modification and extent of such liability is a subject within the authority of state legislation seems to be admitted by the uninterrupted exercise of it. I have not deemed it necessary to look into the statute books of all the states on this subject, but think it may be safely affirmed that in most, if not all, the states some limitation of the right of the creditor over the property of the debtor has been established. In New York, various articles of personal property are exempted from execution. In Rhode Island, real estate cannot at all be taken on judicial process, for satisfaction of a debt, so long as the body of the debtor is to be found within the state; and Virginia has adopted the English process of *elegit*, and a moiety only of the debtor's freehold is delivered to the creditor until, out of the rents and profits thereof, the debt is paid. Do these statute regulations impair the obligation of contracts? I presume this will not be contended for; and yet they would seem to me to fall within the principle urged on the part of the defendant in error.

It is no satisfactory answer to say that such laws relate to the remedy. The principle asserted is that the creditor has a right to his debtor's property, by virtue of the obligation of the contract, to the full satisfaction of the debt; and if so, a law which in any shape exempts any portion of it must impair the

obligation of the contract. Such a limitation and restriction upon the powers of the state governments cannot, in my judgment, be supported under the prohibition to pass laws impairing the obligation of contracts.

If the letter of the constitution does not imperiously demand a construction which denies to the states the power of passing insolvent laws like the one in question, policy and expediency require a contrary construction. Although there may be some diversity of opinion as to the policy of establishing a general bankrupt system in the United States, yet it is generally admitted that such laws are useful, if not absolutely necessary, in a commercial community. That it was the opinion of the framers of the constitution that the power to pass bankrupt laws ought somewhere to exist is clearly inferable from the grant of such power to congress. A contrary conclusion would involve the greatest absurdity. The specific power, however, granted to congress never did nor never could exist in the state governments. That power is to establish uniform laws on the subject of bankruptcies throughout the United States, which could only be done by a government having co-extensive jurisdiction. Congress not having as yet deemed it expedient to exercise the power of re-establishing a uniform system of bankruptcy, affords no well-founded argument against the expediency or necessity of such a system in any particular state. A bankrupt law is most necessary in a commercial community; and as different states in this respect do not stand on the same footing, a system which might be adapted to one might not suit all, which would naturally present difficulties in forming any uniform system; and congress may, as heretofore, deem it expedient to leave each state to establish such system as shall best suit its own local circumstances and views of policy, knowing, at the same time, that if any great public inconvenience shall grow out of the different state laws, the evils may be corrected by establishing a uniform system, according to the provision of the constitution, which will suspend the state laws on the subject. If such should be the views entertained by congress, and induce them to abstain from the exercise of the power, the importance to the state of New York, as well as other states, of establishing the validity of laws like the one in question, is greatly increased. The long continuance of it there clearly manifests the views of the state legislature with respect to the policy and expediency of the law. And I cannot but feel strongly impressed that the length of time which this law has been in undisputed operation, and the repeated sanction it has received from every department of the government, ought to have great weight when judging of its constitutionality.

The provisions of the sixty-first section of the bankrupt law of 1800 (2 Stats. at Large, 36) appear to me to contain a clear expression of the opinion of congress in favor of the validity of this and similar laws in other states. It cannot be presumed they were ignorant of the existence of these laws, or their extent and operation. And, indeed, the section expressly assumes the existence of such laws, by declaring that this act shall not repeal or annul the laws of any state now in force, or which may be thereafter enacted, for the relief of insolvent debtors, except so far as the same may affect persons within the purview of the bankrupt act; and even with respect to such persons it provides that, if the creditors shall not prosecute a commission of bankruptcy within a limited time, they shall be entitled to relief under the state laws for the relief of insolvent debtors. And what relief did such laws give? Was it merely from imprisonment only? Certainly not. The state laws here ratified and sanctioned, or, at least, some of them, were such as had the full effect and op-

eration of a bankrupt law, to wit, to discharge the debtor absolutely from all future responsibility. It is true, if these laws were unconstitutional and void, this section of the bankrupt law could give them no validity. But it is not in this light the argument is used. The reference is only to show the sense of congress with respect to the validity of such laws; and if it is fair to presume congress was acquainted with the extent and operation of these laws, this clause is a direct affirmation of their validity. For it cannot be presumed that body would have expressly ratified and sanctioned laws which they considered unconstitutional.

In the case of *Sturges v. Crowninshield*, 4 Wheat., 122, as I have before remarked, it is said that by this prohibition (art. 1, sec. 10) in the constitution, the convention appears to have intended to establish a great principle, "that contracts should be inviolable." This was certainly, though a great, yet not a new principle. It is a principle inherent in every sound and just system of laws, independent of express constitutional restraints. And if the assertion of this principle was the object of the clause, as I think it was, is it reasonable to conclude that the framers of the constitution supposed that a bankrupt or insolvent law, like the one in question, would violate this principle? Can it be supposed that the constitution would have reserved the right and impliedly enjoined the duty upon congress to pass a bankrupt law, if it had been thought that such law would violate this great principle. If the discharge of a party from the performance of his contracts, when he has by misfortunes become incapable of fulfilling them, is a violation of the eternal and unalterable principles of justice, growing out of what has been called at the bar the universal law, can it be that a power drawing after it such consequences has been recognized and reserved in our constitution? Certainly not. And is the discharge of a contract any greater violation of those sacred principles in a state legislature than in that of the United States? No such distinction will be pretended. But a bankrupt or insolvent law involves no such violation of the great principles of justice, and this is not the light in which it always has been and ought to be considered. Such law, in its principle and object, has in view the benefit of both debtor and creditor, and is no more than the just exercise of the sovereign legislative power of the government to relieve a debtor from his contracts when necessity and unforeseen misfortunes have rendered him incapable of performing them; and whether this power is to be exercised by the states individually, or by the United States, can make no difference in principle, in a government like ours, where sovereignty, to a modified extent, exists both in the states and in the United States. It was, in the formation of the constitution, a mere question of policy and expediency where this power should be exercised; and there can be no question but that, so far as respects a bankrupt law, properly speaking, the power ought to be exercised by the general government. It is naturally connected with commerce, and should be uniform throughout the United States. A bankrupt system deals with commercial men, but this affords no reason why a state should not exercise its sovereign power in relieving the necessities of men who do not fall within the class of traders, and who, from like misfortune, have become incapable of performing their contracts.

Without questioning the constitutional power of congress to extend a bankrupt law to all classes of debtors, the expediency of such a measure may well be doubted. There is not the same necessity of uniformity of system as to other classes than traders; their dealings are generally local, and different con-

siderations of policy may influence different states on this subject; and should congress pass a bankrupt law confined to traders, it would still leave the insolvent law of New York in force as to other classes of debtors, subject to such alteration as that state shall deem expedient. Upon the whole, therefore, it having been settled by this court that the states have a right to pass bankrupt laws, provided they do not violate the prohibition against impairing the obligation of contracts; and believing, as I do, for the reasons I have given, that the insolvent law in question, by which a debtor obtains a discharge from all future responsibility upon contracts entered into after the passage of the law, and before his discharge, does not impair the obligation of his contracts, I am of opinion that the judgment of the court below ought to be reversed.

Opinion by MR. JUSTICE TRIMBLE.

The question raised upon the record in this case, and which has been discussed at the bar, may be stated thus: Has a state, since the adoption of the constitution of the United States, authority to pass a bankrupt or insolvent law, discharging the bankrupt or insolvent from all contracts made within the state after the passage of the law, upon the bankrupt or insolvent surrendering his effects and obtaining a certificate of discharge from the constituted authorities of the state?

The counsel for the defendant in error have endeavored to maintain the negative of the proposition on two grounds: 1. That the power conferred on congress by the constitution "to establish uniform laws on the subject of bankruptcies throughout the United States," is, in its nature, an exclusive power; that, consequently, no state has authority to pass a bankrupt law; and that the law under consideration is a bankrupt law. 2. That it is a law impairing the obligation of contracts within the meaning of the constitution.

§ 1975. *The rulings in Sturges v. Crowninshield affirmed.*

In the case of *Sturges v. Crowninshield*, 4 Wheat., 122 (§§ 1937-39, *supra*), this court expressly decided "that since the adoption of the constitution of the United States a state has authority to pass a bankrupt law, provided such law does not impair the obligation of contracts, within the meaning of the constitution, and provided there be no act of congress in force to establish a uniform system of bankruptcy conflicting with such law." This being a direct judgment of the court, overruling the first position assumed in argument, that judgment ought to prevail, unless it be very clearly shown to be erroneous. Not having been a member of the court when that judgment was given, I will content myself with saying the argument has not convinced me it is erroneous; and that, on the contrary, I think the opinion is fully sustained by a sound construction of the constitution. There being no act of congress in force to establish a uniform system of bankruptcy, the first ground of argument must fail.

It is argued that the law under consideration is a law impairing the obligation of contracts within the meaning of the constitution. The tenth section of the first article of the constitution is in these words: "No state shall enter into any treaty, alliance or confederation, grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts; or grant any title of nobility."

In the case of *Sturges v. Crowninshield*, the defendant in the original suit had been discharged in New York, under an insolvent law of that state which pur-

ported to apply to past as well as future contracts; and being sued on a contract made within the state, prior to the passage of the law, he pleaded his certificate of discharge in bar of the action. In answer to the third and fourth questions, certified from the circuit court to this court, for its final decision, drawing in question the constitutionality of the law and the sufficiency of the plea in bar founded upon it, this court certified its opinion "that the act of New York, pleaded in this case, so far as it attempts to discharge the contract on which this suit was instituted, is a law impairing the obligation of contracts, within the meaning of the constitution of the United States; and that the plea of the defendant is not a good and sufficient bar of the plaintiff's action."

In the case of *M'Millan v. M'Neill*, 4 Wheat., 209, the defendant in the court below pleaded a discharge obtained by him in Louisiana, on the 23d of August, 1815, under the insolvent law of that state, passed in 1808, in bar of a suit instituted against him upon a contract made in South Carolina in the year 1813. This court decided that the plea was no bar to the action, and affirmed the judgment given below for the plaintiff.

These cases do not decide the case at bar. In the first, the discharge was pleaded in bar to a contract made prior to the passage of the law; and in the second, the discharge obtained in one state, under its laws, was pleaded to a contract made in another state. They leave the question open, whether a discharge obtained in a state, under an insolvent law of the state, is a good bar to an action brought on a contract made within the state after the passage of the law. In presenting this inquiry, it is immaterial whether the law purports to apply to past as well as future contracts, or is wholly prospective in its provisions.

§ 1976. *It is the effect of a law that is inhibited, not its terms.*

It is not the terms of the law, but its effect, that is inhibited by the constitution. A law may be in part constitutional and in part unconstitutional. It may, when applied to a given case, produce an effect which is prohibited by the constitution; but it may not, when applied to a case differently circumstanced, produce such prohibited effect. Whether the law under consideration, in its effects and operation upon the contracts sued on in this case, be a law impairing the obligation of this contract, is the only necessary inquiry.

§ 1977. *"Obligation of a contract" defined.*

In order to come to a just conclusion, we must ascertain, if we can, the sense in which the term "obligation of contracts" is used in the constitution. In attempting to do this, I will premise that, in construing an instrument of so much solemnity and importance, effect should be given, if possible, to every word. No expression should be regarded as a useless expletive; nor should it be supposed, without the most urgent necessity, that the illustrious framers of that instrument had, from ignorance or inattention, used different words, which are, in effect, merely tautologous.

I understand it to be admitted in argument, and if not admitted it could not be reasonably contested, that, in the nature of things, there is a difference between a contract and the obligation of the contract. The terms contract and obligation, although sometimes used loosely as convertible terms, do not properly impart the same idea. The constitution plainly presupposes that a contract and its obligation are different things. Were they the same thing, and the terms contract and obligation convertible, the constitution, instead of being read as it now is, "that no state shall pass any law impairing the obligation of contracts," might, with the same meaning, be read, "that no state shall pass

any law impairing the obligation of obligations," or "the contract of contracts;" and to give to the constitution the same meaning which either of these readings would import, would be ascribing to its framers a useless and palpably absurd tautology. The illustrious framers of the constitution could not be ignorant that there were or might be many contracts without obligation, and many obligations without contracts. • "A contract is defined to be an agreement in which a party undertakes to do, or not to do, a particular thing." *Sturges v. Crowninshield*, 4 Wheat., 197.

This definition is sufficient for all the purposes of the present investigation, and its general accuracy is not contested by either side.

From the very terms of the definition, it results incontestably that the contract is the sole act of the parties, and depends wholly on their will. The same words, used by the same parties, with the same objects in view, would be the same contract, whether made upon a desert island, in London, Constantinople, or New York. It would be the same contract, whether the law of the place where the contract was made recognized its validity and furnished remedies to enforce its performance, or prohibited the contract and withheld all remedy for its violation.

The language of the constitution plainly supposes that the obligation of a contract is something not wholly depending upon the will of the parties. It incontestably supposes the obligation to be something which attaches to and lays hold of the contract, and which, by some superior external power, regulates and controls the conduct of the parties in relation to the contract; it evidently supposes that superior external power to rest in the will of the legislature.

What, then, is the obligation of contracts, within the meaning of the constitution? From what source does that obligation arise? The learned chief justice, in delivering the opinion of the court, in *Sturges v. Crowninshield*, after having defined a contract to be "an agreement wherein a party undertakes to do, or not to do, a particular thing," proceeds to define the obligation of the contract in these words: "the law binds him to perform his engagement, and this is, of course, the obligation of the contract." The Institutes, lib. 3, tit. 14 (Cooper's translation), says, "an obligation is the chain of the law, by which we are necessarily bound to make some payment, according to the law of the land." Pothier, in his treatise concerning obligations, in speaking of the obligation of contracts, calls it *vinculum legis*, the chain of the law. Paley, p. 56, says, "to be obliged, is to be urged by a violent motive, resulting from the command of another." From these authorities, and many more might be cited, it may be fairly concluded that the obligation of the contract consists in the power and efficacy of the law which applies to and enforces performance of the contract, or the payment of an equivalent for non-performance. The obligation does not inhere and subsist in the contract itself, *proprio vigore*, but in the law applicable to the contract. This is the sense, I think, in which the constitution uses the term "obligation."

From what law, and how, is this obligation derived, within the meaning of the constitution? Even if it be admitted that the moral law necessarily attaches to the agreement, that would not bring it within the meaning of the constitution. Moral obligations are those arising from the admonitions of conscience and accountability to the Supreme Being. No human lawgiver can impair them. They are entirely foreign from the purposes of the constitution. The constitution evidently contemplates an obligation which might be impaired

by a law of the state, if not prohibited by the constitution. It is argued that the obligation of contracts is founded in and derived from general and universal law; that, by these laws, the obligation of contracts is co-extensive with the duty of performance, and, indeed, the same thing; that the obligation is not derived from nor depends upon the civil or municipal laws of the state; and that this general universal duty or obligation is what the constitution intends to guard and protect against the unjust encroachments of state legislation. In support of this doctrine, it is said that no state, perhaps, ever declared, by statute or positive law, that contracts shall be obligatory; but that all states, assuming the pre-existence of the obligation of contracts, have only superadded, by municipal law, the means of carrying the pre-existing obligation into effect.

This argument struck me, at first, with great force; but, upon reflection, I am convinced it is more specious than solid. If it were admitted that, in an enlarged and very general sense, obligations have their foundation in natural, or, what is called in the argument, universal law; that this natural obligation is, in the general, assumed by states as pre-existing, and, upon this assumption, they have not thought it necessary to pass declaratory laws in affirmance of the principles of universal law; yet nothing favorable to the argument can result from these admissions, unless it be further admitted or proved that a state has no authority to regulate, alter or in anywise control the operation of this universal law within the state, by its own peculiar municipal enactments. This is not admitted, and I think cannot be proved.

I admit that men have, by the laws of nature, the right of acquiring and possessing property, and the right of contracting engagements. I admit that these natural rights have their correspondent natural obligations. I admit that, in a state of nature, when men have not submitted themselves to the controlling authority of civil government, the natural obligation of contracts is co-extensive with the duty of performance. This natural obligation is founded solely in the principles of natural or universal law. What is this natural obligation? All writers who treat on the subject of obligations agree that it consists in the right of the one party to demand from the other party what is due; and if it be withheld, in his right and supposed capacity to enforce performance or to take an equivalent for non-performance by his own power. This natural obligation exists among sovereign and independent states and nations, and amongst men in a state of nature, who have no common superior, and over whom none claim or can exercise a controlling legislative authority.

But when men form a social compact and organize a civil government, they necessarily surrender the regulation and control of these natural rights and obligations into the hands of the government. Admitting it, then, to be true, that, in general, men derive the right of private property and of contracting engagements from the principles of natural, universal law; admitting that these rights are, in the general, not derived from or created by society, but are brought into it; and that no express, declaratory, municipal law, be necessary for their creation or recognition; yet it is equally true that these rights, and the obligations resulting from them, are subject to be regulated, modified and sometimes absolutely restrained by the positive enactments of municipal law. I think it incontestably true that the natural obligation of private contracts between individuals in society ceases, and is converted into a civil obligation, by the very act of surrendering the right and power of enforcing performance into the hands of the government. The right and power of enforcing performance ex-

ists, as I think all must admit, only in the law of the land; and the obligation resulting from this condition is a civil obligation.

§ 1978. *The obligation of a contract within a sovereign state is that allowed by the state and no other.*

As, in a state of nature, the natural obligation of a contract consists in the right and potential capacity of the individual to take, or enforce the delivery of the thing due to him by the contract, or its equivalent, so, in the social state, the obligation of a contract consists in the efficacy of the civil law, which attaches to the contract, and enforces its performance, or gives an equivalent in lieu of performance. From these principles it seems to result as a necessary corollary, that the obligation of a contract made within a sovereign state must be precisely that allowed by the law of the state, and none other. I say allowed; because, if there be nothing in the municipal law to the contrary, the civil obligation being, by the very nature of government, substituted for and put in the place of natural obligation, would be co-extensive with it; but if by positive enactments the civil obligation is regulated and modified so as that it does not correspond with the natural obligation, it is plain the extent of the obligation must depend wholly upon the municipal law. If the positive law of the state declares the contract shall have no obligation, it can have no obligation, whatever may be the principles of natural law in relation to such a contract. This doctrine has been held and maintained by all states and nations. The power of controlling, modifying, and even of taking away all obligation from such contracts as, independent of positive enactments to the contrary, would have been obligatory, has been exercised by all independent sovereigns; and it has been universally held that the courts of one sovereign will, upon principles of comity and common justice, enforce contracts made within the dominions of another sovereign, so far as they were obligatory by the law of the country where made; but no instance is recollected, and none is believed to exist, where the courts of one sovereign have held a contract made within the dominions of another, obligatory against or beyond the obligation assigned to it by the municipal law of its proper country. As a general proposition of law, it cannot be maintained that the obligation of contracts depends upon and is derived from universal law, independent of and against the civil law of the state in which they are made. In relation to the states of this Union, I am persuaded that the position that the obligation of contracts is derived from universal law, urged by the learned counsel in argument with great force, has been stated by them much too broadly. If true, the states can have no control over contracts. If it be true that the "obligation of contracts," within the meaning of the constitution, is derived solely from general and universal law, independent of the laws of the state, then it must follow that all contracts made in the same or similar terms, must, whenever or wherever made, have the same obligation. If this universal natural obligation is that intended by the constitution, as it is the same, not only everywhere but at all times, it must follow that every description of contract which could be enforced at any time or place, upon the principles of universal law, must necessarily be enforced at all other times and in every state, upon the same principles, in despite of any positive law of the state to the contrary.

The arguments based on the notion of the obligation of universal law, if adopted, would deprive the states of all power of legislation upon the subject of contracts, other than merely furnishing the remedies or means of carrying this obligation of universal law into effect. I cannot believe that such conse

quences were intended to be produced by the constitution. I conclude that, so far as relates to private contracts between individual and individual, it is the civil obligation of contracts; that obligation which is recognized by and results from the law of the state in which the contract is made, which is within the meaning of the constitution. If so, it follows that the states have, since the adoption of the constitution, the authority to prescribe and declare, by their laws, prospectively, what shall be the obligation of all contracts made within them. Such a power seems to be almost indispensable to the very existence of the states, and is necessary to the safety and welfare of the people. The whole frame and theory of the constitution seems to favor this construction. The states were in full enjoyment and exercise of all the powers of legislation on the subject of contracts before the adoption of the constitution. The people of the states, in that instrument, transfer to and vest in the congress no portion of this power, except in the single instance of the authority given to pass uniform laws on the subject of bankruptcies throughout the United States; to which may be added, such as results by necessary implication in carrying the granted power into effect. The whole of this power is left with the states, as the constitution found it, with the single exception that, in the exercise of their general authority, they shall pass no law "impairing the obligation of contracts."

The construction insisted upon by those who maintain that prospective laws of the sort now under consideration are unconstitutional, would, as I think, transform a special limitation upon the general powers of the states into a general restriction. It would convert, by construction, the exception into a general rule, against the best settled rules of construction. The people of the states, under every variety of change of circumstances, must remain unalterably, according to this construction, under the dominion of this supposed universal law, and the obligations resulting from it. Upon no acknowledged principle can a special exception, out of a general authority, be extended by construction so as to annihilate or embarrass the exercise of the general authority. But, to obviate the force of this view of the subject, the learned counsel admit that the legislature of a state has authority to provide by law what contracts shall not be obligatory, and to declare that no remedy shall exist for the enforcement of such as the legislative wisdom deems injurious. They say the obligation of a contract is coeval with its existence; that the moment an agreement is made, obligation attaches to it; and they endeavor to maintain a distinction between such laws as declare that certain contracts shall not be obligatory at all, and such as declare they shall not be obligatory, or (what is the same thing in effect) shall be discharged, upon the happening of a future event. The former, they say, were no contracts in contemplation of law, were wholly forbidden, and, therefore, never obligatory; the latter were obligatory at their creation, and that obligation is protected by the constitution from being impaired by any future operation of the law.

This course of reasoning is ingenious and perplexing; but I am greatly mistaken if it will not be found, upon examination, to be unsatisfactory and inconclusive. If it were admitted that, generally, the civil obligation of a contract made in a state attaches to it when it is made, and that this obligation, whatever it be, cannot be defeated by any effect or operation of law which does not attach to it at its creation, the admission would avail nothing. It is as well a maxim of political law as of reason, that the whole must necessarily contain all the parts; and, consequently, a power competent to declare a con-

tract shall have no obligation must necessarily be competent to declare it shall have only a conditional or qualified obligation.

§ 1979. *A contract may, by reason of a pre-existing law, have only a qualified obligation; such qualification is a condition subsequent annexed to the contract at the moment of its formation.*

If, as the argument admits, a contract never had any obligation, because the pre-existing law of the state declaring it should have none attached to it at the moment of its creation, why will not a pre-existing law declaring it shall have only a qualified obligation attach to it in like manner at the moment of its creation? A law declaring that a contract shall not be enforced upon the happening of a future event is a law declaring the contract shall have only a qualified or conditional obligation. If such law be passed before the contract is made, does not the same attach to it the moment it is made; and is not the obligation of the contract, whatever may be its terms, qualified from the beginning by force and operation of the existing law? If it is not, then it is absolute in despite of the law, and the obligation does not result from the law of the land, but from some other law. The passing of a law declaring that a contract shall have no obligation, or shall have obligation generally, but cease to be obligatory in specified events, is but the exertion of the same power. The difference exists, not in the character of the power, but the degree of its exertion and the manner of its operation.

In the case at bar, the contract was made in the state, and the law of the state at the time it was made, in effect, provided that the obligation of the contract should not be absolute, but qualified by the condition that the party should be discharged upon his becoming insolvent, and complying with the requisitions of the insolvent law. This qualification attached to the contract, by law, the moment the contract was made, became inseparable from it, and traveled with it through all its stages of existence, until the condition was consummated by the final certificate of discharge. It is argued that this cannot be so, because the contract would be enforced, and must necessarily be enforced, in other states, where no such insolvent law exists. This argument is founded upon a misapprehension of the nature of the qualification itself. It is in nature of a condition subsequent, annexed by operation of law to the contract at the moment of its creation. The condition is that upon the happening of all the events contemplated by the law, and upon their verification, in the manner prescribed by the law itself, by the constituted authorities of the state, the contract shall not thereafter be obligatory. Unless all these take place, unless the discharge is actually obtained within the state, according to its laws, the contingency has not happened, and the contract remains obligatory, both in the state and elsewhere.

It has been often said that the laws of a state in which a contract is made enter into and make part of the contract; and some who have advocated the constitutionality of prospective laws, of the character now under consideration, have placed the question on that ground. The advocates of the other side, availing themselves of the infirmity of this argument, have answered triumphantly, "admitting this to be so, the constitution is the supreme law of every state, and must, therefore, upon the same principle, enter into every contract, and overrule the local laws." My answer to this view of both sides of the question is, that the argument and the answer to it are equally destitute of truth.

I have already shown that the contract is nothing but the agreement of the

parties; and that if the parties, in making their agreement, use the same words, with the same object in view, where there is no law, or where the law recognizes the agreement and furnishes remedies for its enforcement, or where the law forbids or withholds all remedy for the enforcement of the agreement, it is the very same contract in all these predicaments. I have endeavored to show, and I think successfully, that the obligation of contracts, in the sense of the constitution, consists not in the contract itself, but in a superior external force controlling the conduct of the parties in relation to the contract; and that this superior external force is the law of the state, either tacitly or expressly recognizing the contract, and furnishing means whereby it may be enforced. It is this superior external force, existing potentially, or actually applied, "which binds a man to perform his engagements," which, according to Justinian, is "the chain of the law, by which we are necessarily bound to make some payment, according to the law of the land;" and which, according to Paley, being "a violent motive, resulting from the command of another," obliges the party to perform his contract. The law of the state, although it constitutes the obligation of the contract, is no part of the contract itself; nor is the constitution either a part of the contract, or the supreme law of the state, in the sense in which the argument supposes. The constitution is the supreme law of the land upon all subjects upon which it speaks. It is the sovereign will of the whole people. Whatever this sovereign will enjoins or forbids must necessarily be supreme, and must counteract the subordinate legislative will of the United States, and of the states.

But on subjects in relation to which the sovereign will is not declared, or fairly and necessarily implied, the constitution cannot, with any semblance of truth, be said to be the supreme law. It could not, with any semblance of truth, be said that the constitution of the United States is the supreme law of any state in relation to the solemnities requisite for conveying real estate, or the responsibilities or obligations consequent upon the use of certain words in such conveyance. The constitution contains no law, no declaration of the sovereign will, upon these subjects, and cannot, in the nature of things, in relation to them, be the supreme law. Even if it were true, then, that the law of a state in which a contract is made is part of the contract, it would not be true that the constitution would be part of the contract. The constitution nowhere professes to give the law of contracts, or to declare what shall or shall not be the obligation of contracts. It evidently presupposes the existence of contracts by the act of the parties, and the existence of their obligation, not by authority of the constitution, but by authority of law; and the pre-existence of both the contracts and their obligation being thus supposed, the sovereign will is announced that "no state shall pass any law impairing the obligation of contracts."

If it be once ascertained that a contract existed, and that an obligation, general or qualified, of whatsoever kind, had once attached or belonged to the contract by law, then, and not till then, does the supreme law speak, by declaring that obligation shall not be impaired. It is admitted in argument that statutes of frauds and perjuries, statutes of usury and of limitation, are not laws impairing the obligation of contracts. They are laws operating prospectively upon contracts thereafter made. It is said, however, they do not apply, in principle, to this case, because the statutes of frauds and perjuries apply only to the remedies; and because, in that case, and under the statutes of usury, the contracts were void from the beginning, were not recognized by law as

contracts, and had no obligation; and that the statutes of limitation create rules of evidence only.

Although these observations are true, they do not furnish the true reason, nor, indeed, any reason, why these laws do not impair the obligation of contracts. The true and only reason is, that they operate on contracts made after the passage of the laws, and not upon existing contracts. And hence the chief justice very properly remarks, of both usury laws and laws of limitation, in delivering the opinion in *Sturges v. Crowninshield*, that if they should be made to operate upon contracts already entered into, they would be unconstitutional and void. If a statute of frauds and perjuries should pass in a state formerly having no such laws, purporting to operate upon existing contracts, as well as upon those made after its passage, could it be doubted that, so far as the law applied to and operated upon existing contracts, it would be a law "impairing the obligation of contracts?" Here, then, we have the true reason and principle of the constitution. The great principle intended to be established by the constitution was the inviolability of the obligation of contracts, as the obligation existed and was recognized by the laws in force at the time the contracts were made. It furnished to the legislatures of the states a simple and obvious rule of justice, which, however theretofore violated, should by no means be thereafter violated; and whilst it leaves them at full liberty to legislate upon the subject of all future contracts, and assign to them either no obligation or such qualified obligation as, in their opinion, may consist with sound policy and the good of the people, it prohibits them from retrospecting upon existing obligations, upon any pretext whatever. Whether the law professes to apply to the contract itself, to fix a rule of evidence, a rule of interpretation, or to regulate the remedy, it is equally within the true meaning of the constitution, if it, in effect, impairs the obligation of existing contracts; and, in my opinion, is out of its true meaning if the law is made to operate on future contracts only. I do not mean to say that every alteration of the existing remedies would impair the obligation of contracts; but I do say, with great confidence, that a law taking away all remedy from existing contracts would be, manifestly, a law impairing the obligation of contracts. The moral obligation would remain, but the legal or civil obligation would be gone, if such a law should be permitted to operate. The natural obligation would be gone, because the laws forbid the party to enforce performance by his own power. On the other hand, a great variety of instances may readily be imagined, in which the legislature of a state might alter, modify or repeal existing remedies, and enact others in their stead, without the slightest ground for a supposition that the new law impaired the obligation of contracts. If there be intermediate cases of a more doubtful character, it will be time enough to decide them when they arise.

§ 1980. *No analogy between the provision relating to contracts and that in relation to the power to coin money.*

It is argued that, as the clause declaring that "no state shall pass any law impairing the obligation of contracts" is associated in the same section of the constitution with the prohibition to "coin money, emit bills of credit," or "make anything but gold and silver coin a legal tender in payment of debts;" and as these all evidently apply to legislation in reference to future as well as existing contracts, and operate prospectively, to prohibit the action of the law, without regard to the time of its passage, the same construction should be given to the clause under consideration. This argument admits of several an-

swers. First, as regards the prohibition to coin money and emit bills of credit. The constitution had already conferred on congress the whole power of coining money and regulating the current coin. The grant of this power to congress, and the prohibitions upon the states, evidently take away from the states all power of legislation and action on the subject, and must, of course, apply to the future action of laws, either then made or to be made. Indeed, the language plainly indicates that it is the act of "coining money," and the act of emitting bills of credit, which is forbidden, without any reference to the time of passing the law, whether before or after the adoption of the constitution. The other prohibition, to "make anything but gold or silver coin a tender in payment of debts," is but a member of the same subject of currency committed to the general government and prohibited to the states. And the same remark applies to it already made as to the other two. The prohibition is, not that no state shall pass any law, but that, even if a law does exist, the "state shall not make anything but gold and silver coin a legal tender." The language plainly imports that the prohibited tender shall not be made a legal tender, whether a law of the state exists or not. The whole subject of tender, except in gold and silver, is withdrawn from the states. These cases cannot, therefore, furnish a sound rule of interpretation for that clause which prohibits the states from passing laws "impairing the obligation of contracts." This clause relates to a subject confessedly left wholly with the states, with a single exception; they relate to subjects wholly withdrawn from the states, with the exception that they may pass laws on the subject of tender in gold and silver coin only.

The principle that the association of one clause with another of like kind may aid in its construction is deemed sound, but I think it has been misapplied in the argument. The principle applied to the immediate associates of the words under consideration is, I think, decisive of this question. The immediate associates are the prohibitions to pass bills of attainder and *ex post facto* laws. The language and order of the whole clause is, no state shall "pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts." If the maxim *noscitur a sociis* be applied to this case, there would seem to be an end of the question. The two former members of the clause undeniably prohibit retroactive legislation upon the existing state of things, at the passage of the prohibited laws. The associated idea is that the latter member of the same clause should have a similar effect upon the subject-matter to which it relates. I suppose this was the understanding of the American people when they adopted the constitution. I am justified in this supposition by the contemporary construction given to the whole of this clause by that justly celebrated work styled the Federalist, written at the time, for the purpose of recommending the constitution to the favor and acceptance of the people. In No. 44, p. 281, commenting upon this very clause and all its members, the following observations are made: "Bills of attainder, *ex post facto* laws, and laws impairing the obligation of contracts, are contrary to the first principles of the social compact, and to every principle of sound legislation. The two former are expressly prohibited by the declarations prefixed to some of the state constitutions, and all of them are prohibited by the spirit and scope of these fundamental charters."

Did the American people believe, could they believe, these heavy denunciations were leveled against laws which fairly prescribed and plainly pointed out to the people rules for their future conduct, and the rights, duties and obliga-

tions growing out of their future words or actions? They must have understood that these denunciations were just as regarded bills of attainder and *ex post facto* laws, because they were exercises of arbitrary power, perverting the justice and order of existing things by the reflex action of these laws. And would they not naturally and necessarily conclude the denunciations were equally just as regarded laws passed to impair the obligation of existing contracts, for the same reason?

The writer proceeds: "Our own experience has taught us, nevertheless, that additional fences against these dangers ought not to be omitted. Very properly, therefore, have the convention added this constitutional bulwark in favor of personal security and private rights; and I am much deceived if they have not, in so doing, as faithfully consulted the genuine sentiments as the undoubted interests of their constituents. The sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret and with indignation that sudden changes and legislative interferences, in cases affecting personal rights, become jobs in the hands of enterprising and influential speculators, and snares to the more industrious and less informed part of the community. They have seen, too, that one legislative interference is but the link of a long chain of repetitions; every subsequent interference being naturally produced by the effects of the preceding. They very rightly infer, therefore, that some thorough reform is wanting which will banish speculations on public measures, inspire a general prudence and industry, and give a regular course to the business of society."

I cannot understand this language otherwise than as putting bills of attainder, *ex post facto* laws, and laws impairing the obligation of contracts, all upon the same footing, and deprecating them all for the same cause. The language shows clearly that the whole clause was understood, at the time of the adoption of the constitution, to have been introduced into the instrument in the very same spirit and for the very same purpose, namely, for the protection of personal security and of private rights. The language repels the idea that the member of the clause immediately under consideration was introduced into the constitution upon any grand principle of national policy, independent of the protection of private rights, so far as such an idea can be repelled by the total omission to suggest any such independent grand principle of national policy, and by placing it upon totally different ground.

It proves that the sages who formed and recommended the constitution to the favor and adoption of the American people did not consider the protection of private rights, more than the protection of personal security, as too insignificant for their serious regard, as was urged with great earnestness in argument. In my judgment, the language of the authors of the Federalist proves that they, at least, understood that the protection of personal security and of private rights, from the despotic and iniquitous operation of retrospective legislation, was, itself and alone, the grand principle intended to be established. It was a principle of the utmost importance to a free people, about to establish a national government, "to establish justice," and "to secure to themselves and their posterity the blessings of liberty." This principle is, I think, fully and completely sustained by the construction of the constitution which I have endeavored to maintain.

§ 1981. *State insolvent laws are not prohibited.*

In my judgment, the most natural and obvious import of the words themselves prohibiting the passing of laws "impairing the obligation of contracts;"

the natural association of that member of the clause with the two immediately preceding members of the same clause, forbidding the passing of "bills of attainder and *ex post facto* laws;" the consecutive order of the several members of the clause; the manifest purposes and objects for which the whole clause was introduced into the constitution, and the contemporary exposition of the whole clause, all warrant the conclusion that a state has authority, since the adoption of the constitution, to pass a law whereby a contract made within the state, after the passage of the law, may be discharged, upon the party obtaining a certificate of discharge, as an insolvent, in the manner prescribed by the law of the state.

Dissenting opinion by MARSHALL, C. J.

It is well known that the court has been divided in opinion on this case. Three judges, Mr. Justice Duvall, Mr. Justice Story and myself, do not concur in the judgment which has been pronounced. We have taken a different view of the very interesting question which has been discussed with so much talent, as well as labor, at the bar, and I am directed to state the course of reasoning on which we have formed the opinion that the discharge pleaded by the defendant is no bar to the action.

The single question for consideration is, whether the act of the state of New York is consistent with or repugnant to the constitution of the United States. This court has so often expressed the sentiments of profound and respectful reverence with which it approaches questions of this character, as to make it unnecessary now to say more than that, if it be right that the power of preserving the constitution from legislative infraction should reside anywhere, it cannot be wrong, it must be right, that those on whom the delicate and important duty is conferred should perform it according to their best judgment.

Much, too, has been said concerning the principles of construction which ought to be applied to the constitution of the United States. On this subject, also, the court has taken such frequent occasion to declare its opinion, as to make it unnecessary, at least, to enter again into an elaborate discussion of it. To say that the intention of the instrument must prevail; that this intention must be collected from its words; that its words are to be understood in that sense in which they are generally used by those for whom the instrument was intended; that its provisions are neither to be restricted into insignificance, nor extended to objects not comprehended in them, nor contemplated by its framers, is to repeat what has been already said more at large, and is all that can be necessary.

As preliminary to a more particular investigation of the clause in the constitution on which the case now under consideration is supposed to depend, it may be proper to inquire how far it is affected by the former decisions of this court. In *Sturges v. Crowninshield*, 4 Wheat., 122 (§§ 1937-39, *supra*), it was determined that an act which discharged the debtor from a contract entered into previous to its passage was repugnant to the constitution. The reasoning which conducted the court to that conclusion might, perhaps, conduct it further; and with that reasoning (for myself alone this expression is used) I have never yet seen cause to be dissatisfied. But that decision is not supposed to be a precedent for *Ogden v. Saunders*, because the two cases differ from each other in a material fact; and it is a general rule, expressly recognized by the court in *Sturges v. Crowninshield*, that the positive authority of a decision is co-extensive only with the facts on which it is made. In *Sturges v. Crowninshield*, the law

acted on a contract which was made before its passage; in this case, the contract was entered into after the passage of the law.

In *M'Millan v. M'Neill*, 4 Wheat., 209, the contract, though subsequent to the passage of the act, was made in a different state, by persons residing in that state, and consequently without any view to the law, the benefit of which was claimed by the debtor. *Farmers' and Mechanics' Bank of Pennsylvania v. Smith*, 6 Wheat., 131, differed from *Sturges v. Crowninshield* only in this: that the plaintiff and defendant were both residents of the state in which the law was enacted, and in which it was applied. The court was of opinion that this difference was unimportant.

It has then been decided that an act which discharges the debtor from pre-existing contracts is void; and that an act which operates on future contracts is inapplicable to a contract made in a different state, at whatever time it may have been entered into. Neither of these decisions comprehends the question now presented to the court. It is, consequently, open for discussion. The provision of the constitution is that "no state shall pass any law" "impairing the obligation of contracts." The plaintiff in error contends that this provision inhibits the passage of retrospective laws only — of such as act on contracts in existence at their passage. The defendant in error maintains that it comprehends all future laws, whether prospective or retrospective, and withdraws every contract from state legislation, the obligation of which has become complete.

That there is an essential difference in principle between laws which act on past and those which act on future contracts; that those of the first description can seldom be justified, while those of the last are proper subjects of ordinary legislative discretion, must be admitted. A constitutional restriction, therefore, on the power to pass laws of the one class may very well consist with entire legislative freedom respecting those of the other. Yet, when we consider the nature of our Union, that it is intended to make us, in a great measure, one people, as to commercial objects; that, so far as respects the intercommunication of individuals, the lines of separation between states are, in many respects, obliterated, it would not be matter of surprise if, on the delicate subject of contracts once formed, the interference of state legislation should be greatly abridged or entirely forbidden. In the nature of the provision, then, there seems to be nothing which ought to influence our construction of the words; and, in making that construction, the whole clause, which consists of a single sentence, is to be taken together, and the intention is to be collected from the whole.

The first paragraph of the tenth section of the first article, which comprehends the provision under consideration, contains an enumeration of those cases in which the action of the state legislature is entirely prohibited. The second enumerates those in which the prohibition is modified. The first paragraph, consisting of total prohibitions, comprehends two classes of powers. Those of the first are political and general in their nature, being an exercise of sovereignty without affecting the rights of individuals. These are, the powers "to enter into any treaty, alliance or confederation, grant letters of marque or reprisal, coin money, emit bills of credit." The second class of prohibited laws comprehends those whose operation consists in their action on individuals. These are laws which make anything but gold and silver coin a tender in payment of debts, bills of attainder, *ex post facto* laws, or laws impairing the obligation of contracts, or which grant any title of nobility. In all these cases, whether the thing prohibited be the exercise of mere political power, or

legislative action on individuals, the prohibition is complete and total. There is no exception from it. Legislation of every description is comprehended within it. A state is as entirely forbidden to pass laws impairing the obligation of contracts as to make treaties or coin money. The question recurs, what is a law impairing the obligation of contracts?

§ 1982. *A contract, and the obligation of a contract, defined.*

In solving this question, all the acumen which controversy can give to the human mind has been employed in scanning the whole sentence, and every word of it. Arguments have been drawn from the context, and from the particular terms in which the prohibition is expressed, for the purpose, on the one part, of showing its application to all laws which act upon contracts, whether prospectively or retrospectively; and on the other, of limiting it to laws which act on contracts previously formed. The first impression which the words make on the mind would probably be that the prohibition was intended to be general. A contract is commonly understood to be the agreement of the parties, and, if it be not illegal, to bind them to the extent of their stipulations. It requires reflection, it requires some intellectual effort, to efface this impression, and to come to the conclusion that the words contract and obligation, as used in the constitution, are not used in this sense. If, however, the result of this mental effort, fairly made, be the correction of this impression, it ought to be corrected.

So much of this prohibition as restrains the power of the states to punish offenders in criminal cases, the prohibition to pass bills of attainder and *ex post facto* laws, is, in its very terms, confined to pre-existing cases. A bill of attainder can be only for crimes already committed; and a law is not *ex post facto* unless it looks back to an act done before its passage. Language is incapable of expressing, in plainer terms, that the mind of the convention was directed to retroactive legislation. The thing forbidden is retroaction.

§ 1983. *Analogy between the making of something other than gold or silver a legal tender, and the release of debtors under insolvency laws.*

But that part of the clause which relates to the civil transactions of individuals is expressed in more general terms; in terms which comprehend, in their ordinary signification, cases which occur after, as well as those which occur before, the passage of the act. It forbids a state to make anything but gold and silver coin a tender in payment of debts, or to pass any law impairing the obligation of contracts. These prohibitions relate to kindred subjects. They contemplate legislative interference with private rights, and restrain that interference. In construing that part of the clause which respects tender laws, a distinction has never been attempted between debts existing at the time the law may be passed, and debts afterwards created. The prohibition has been considered as total; and yet the difference in principle between making property a tender in payment of debts, contracted after the passage of the act, and discharging those debts without payment, or by the surrender of property, between an absolute right to tender in payment, and a contingent right to tender in payment, or in discharge of the debt, is not clearly discernible. Nor is the difference in language so obvious as to denote plainly a difference of intention in the framers of the instrument. "No state shall make anything but gold and silver coin a tender in payment of debts." Does the word "debts" mean, generally, those due when the law applies to the case, or is it limited to debts due at the passage of the act? The same train of reasoning which would confine the subsequent words to contracts existing at the

passage of the law would go far in confining these words to debts existing at that time. Yet this distinction has never, we believe, occurred to any person. How soon it may occur is not for us to determine. We think it would unquestionably defeat the object of the clause.

§ 1984. *Insolvent laws do not act on the contract when it is formed, but when such laws are applied to the contract, then, if ever, they impair its obligation.*

The counsel for the plaintiff insist that the word "impairing," in the present tense, limits the signification of the provision to the operation of the act at the time of its passage; that no law can be accurately said to impair the obligation of contracts unless the contracts exist at the time. The law cannot impair what does not exist. It cannot act on nonentities. There might be weight in this argument, if the prohibited laws were such only as operated of themselves, and immediately on the contract. But insolvent laws are to operate on a future, contingent, unforeseen event. The time to which the word "impairing" applies is not the time of the passage of the act, but of its action on the contract. That is, the time present in contemplation of the prohibition. The law, at its passage, has no effect whatever on the contract. Thus, if a note be given in New York, for the payment of money, and the debtor removes out of that state into Connecticut, and becomes insolvent, it is not pretended that his debt can be discharged by the law of New York. Consequently, that law did not operate on the contract at its formation. When, then, does its operation commence? We answer, when it is applied to the contract. Then, if ever, and not till then, it acts on the contract, and becomes a law impairing its obligation. Were its constitutionality, with respect to previous contracts, to be admitted, it would not impair their obligation until an insolvency should take place, and a certificate of discharge be granted. Till these events occur, its impairing faculty is suspended. A law, then, of this description, if it derogates from the obligation of a contract, when applied to it, is, grammatically speaking, as much a law impairing that obligation, though made previous to its formation, as if made subsequently.

§ 1985. *Whatever lessens the obligation of a contract impairs it.*

A question of more difficulty has been pressed with great earnestness. It is, what is the original obligation of a contract made after the passage of such an act as the insolvent law of New York? Is it unconditional to perform the very thing stipulated, or is the condition implied that in the event of insolvency the contract shall be satisfied by the surrender of the property? The original obligation, whatever that may be, must be preserved by the constitution. Any law which lessens must impair it. All admit that the constitution refers to and preserves the legal, not the moral, obligation of a contract. Obligations purely moral are to be enforced by the operation of internal and invisible agents, not by the agency of human laws. The restraints imposed on states by the constitution are intended for those objects which would, if not restrained, be the subject of state legislation. What, then, was the original legal obligation of the contract now under the consideration of the court?

§ 1986. *Whether the law is a part of the contract.*

The plaintiff insists that the law enters into the contract so completely as to become a constituent part of it. That it is to be construed as if it contained an express stipulation to be discharged, should the debtor become insolvent, by the surrender of all his property for the benefit of his creditors, in pursuance of the act of the legislature. That is, unquestionably, pressing the argument very

far; and the establishment of the principle leads inevitably to consequences which would affect society deeply and seriously.

Had an express condition been inserted in the contract, declaring that the debtor might be discharged from it at any time by surrendering all his property to his creditors, this condition would have bound the creditor. It would have constituted the obligation of his contract; and a legislative act, annulling the condition, would impair the contract. Such an act would, as is admitted by all, be unconstitutional, because it operates on pre-existing agreements. If a law authorizing debtors to discharge themselves from their debts by surrendering their property, enters into the contract and forms a part of it, if it is equivalent to a stipulation between the parties, no repeal of the law can affect contracts made during its existence. The effort to give it that effect would impair their obligation. The counsel for the plaintiff perceive and avow this consequence in effect when they contend that to deny the operation of the law on the contract under consideration is to impair its obligation. Are gentlemen prepared to say that an insolvent law once enacted must, to a considerable extent, be permanent? That the legislature is incapable of varying it, so far as respects existing contracts?

§ 1387. *If an insolvent act may be part of the contract, so may a law prescribing a tender in discharge of the debt other than gold or silver.*

So, too, if one of the conditions of an obligation for the payment of money be, that on the insolvency of the obligor, or on any event agreed on by the parties, he should be at liberty to discharge it by the tender of all or part of his property, no question could exist respecting the validity of the contract, or respecting its security from legislative interference. If it should be determined that a law authorizing the same tender, on the same contingency, enters into and forms a part of the contract, then a tender law, though expressly forbidden, with an obvious view to its prospective as well as retrospective operation, would, by becoming the contract of the parties, subject all contracts made after its passage to its control. If it be said that such a law would be obviously unconstitutional and void, and, therefore, could not be a constituent part of the contract, we answer that, if the insolvent law be unconstitutional, it is equally void, and equally incapable of becoming, by mere implication, a part of the contract. The plainness of the repugnancy does not change the question. That may be very clear to one intellect which is far from being so to another. The law now under consideration is, in the opinion of one party, clearly consistent with the constitution, and, in the opinion of the other, as clearly repugnant to it. We do not admit the correctness of that reasoning which would settle this question by introducing into the contract a stipulation not admitted by the parties.

§ 1388. *If one law can be held as part of the contract, so may other laws.*

This idea admits of being pressed still further. If one law enters into all subsequent contracts, so does every other law which relates to the subject. A legislative act, then, declaring that all contracts should be subject to legislative control, and should be discharged as the legislature might prescribe, would become a component part of every contract, and be one of its conditions. Thus, one of the most important features in the constitution of the United States, one which the state of the times most urgently required, one on which the good and the wise reposed confidently for securing the prosperity and harmony of our citizens, would lie prostrate, and be construed into an inanimate, inopera-

tive, unmeaning clause. Gentlemen are struck with the enormity of this result, and deny that their principle leads to it. They distinguish, or attempt to distinguish, between the incorporation of a general law, such as has been stated, and the incorporation of a particular law, such as the insolvent law of New York, into the contract. But will reason sustain this distinction? They say that men cannot be supposed to agree to so indefinite an article as such a general law would be, but may well be supposed to agree to an article, reasonable in itself, and the full extent of which is understood. But the principle contended for does not make the insertion of this new term or condition into the contract to depend upon its reasonableness. It is inserted because the legislature has so enacted. If the enactment of the legislature becomes a condition of the contract because it is an enactment, then it is a high prerogative, indeed, to decide that one enactment shall enter the contract, while another, proceeding from the same authority, shall be excluded from it.

The counsel for the plaintiff illustrates and supports this position by several legal principles, and by some decisions of this court, which have been relied on as being applicable to it. The first case put is interest on a bond, payable on demand, which does not stipulate interest. This, he says, is not a part of the remedy, but a new term in the contract. Let the correctness of this averment be tried by the course of proceeding in such cases. The failure to pay, according to stipulation, is a breach of the contract, and the means used to enforce it constitute the remedy which society affords the injured party. If the obligation contains a penalty, this remedy is universally so regulated that the judgment shall be entered for the penalty, to be discharged by the payment of the principal and interest. But the case on which counsel has reasoned is a single bill. In this case, the party who has broken his contract is liable for damages. The proceeding to obtain those damages is as much a part of the remedy as the proceeding to obtain the debt. They are claimed in the same declaration, and as being distinct from each other. The damages must be assessed by a jury; whereas, if interest formed a part of the debt, it would be recovered as part of it. The declaration would claim it as a part of the debt; and yet, if a suitor were to declare on such a bond as containing this new term for the payment of interest, he would not be permitted to give a bond in evidence in which this supposed term was not written. Any law regulating the proceedings of courts on this subject would be a law regulating the remedy.

The liability of the drawer of a bill of exchange stands upon the same principle with every other implied contract. He has received the money of the person in whose favor the bill is drawn, and promises that it shall be returned by the drawee. If the drawee fail to pay the bill, then the promise of the drawer is broken, and for this breach of contract he is liable. The same principle applies to the indorser. His contract is not written, but his name is evidence of his promise that the bill shall be paid, and of his having received value for it. He is, in effect, a new drawer, and has made a new contract. The law does not require that this contract shall be in writing; and, in determining what evidence shall be sufficient to prove it, does not introduce new conditions not actually made by the parties. The same reasoning applies to the principle which requires notice. The original contract is not written at large. It is founded on the acts of the parties, and its extent is measured by those acts. A draws on B in favor of C, for value received. The bill is evidence that he has received value, and has promised that it shall be paid. He has funds in the hands of the drawer, and has a right to expect that his

promise will be performed. He has, also, a right to expect notice of its non-performance, because his conduct may be materially influenced by this failure of the drawee. He ought to have notice that his bill is disgraced, because this notice enables him to take measures for his own security. It is reasonable that he should stipulate for this notice, and the law presumes that he did stipulate for it.

A great mass of human transactions depends upon implied contracts; upon contracts which are not written, but which grow out of the acts of the parties. In such cases the parties are supposed to have made those stipulations which, as honest, fair and just men, they ought to have made. When the law assumes that they have made these stipulations, it does not vary their contract or introduce new terms into it, but declares that certain acts, unexplained by compact, impose certain duties, and that the parties had stipulated for their performance. The difference is obvious between this and the introduction of a new condition into a contract drawn out in writing, in which the parties have expressed everything that is to be done by either.

The usage of banks, by which days of grace are allowed on notes payable and negotiable in bank, is of the same character. Days of grace, from their very term, originate partly in convenience, and partly in the indulgence of the creditor. By the terms of the note, the debtor has to the last hour of the day on which it becomes payable to comply with it; and it would often be inconvenient to take any steps after the close of day. It is often convenient to postpone subsequent proceedings till the next day. Usage has extended this time of grace generally to three days, and in some banks to four. This usage is made a part of the contract, not by the interference of the legislature, but by the act of the parties. The case cited from 9 Wheat., 581, *Renner v. Bank of Columbia*, is a note discounted in bank. In all such cases the bank receives and the maker of the note pays interest for the days of grace. This would be illegal and usurious if the money was not lent for these additional days. The extent of the loan, therefore, is regulated by the act of the parties, and this part of the contract is founded on their act. Since by contract the maker is not liable for his note until the days of grace are expired, he has not broken his contract until they expire. The duty of giving notice to the indorser of his failure does not arise until the failure has taken place; and, consequently, the promise of the bank to give such notice is performed, if it be given when the event has happened.

The case of *Bank of Columbia v. Okely*, 4 Wheat., 235 (§§ 2522-25, *infra*), was one in which the legislature had given a summary remedy to the bank for a broken contract, and had placed that remedy in the hands of the bank itself. The case did not turn on the question whether the law of Maryland was introduced into the contract, but whether a party might not, by his own conduct, renounce his claim to the trial by jury in a particular case. The court likened it to submissions to arbitration, and to stipulation and forthcoming bonds. The principle settled in that case is, that a party may renounce a benefit, and that Okely had exercised this right. The cases from *Strange* and *East* turn upon a principle which is generally recognized, but which is entirely distinct from that which they are cited to support. It is, that a man who is discharged by the tribunals of his own country, acting under its laws, may plead that discharge in any other country. The principle is, that the laws act upon a contract, not that they enter into it and become a stipulation of the parties. Society affords a remedy for breaches of contract. If that remedy has been applied, the

claim to it is extinguished. The external action of law upon contracts, by administering the remedy for their breach, or otherwise, is the usual exercise of legislative power. The interference with those contracts, by introducing conditions into them not agreed to by the parties, would be a very unusual and a very extraordinary exercise of the legislative power, which ought not to be gratuitously attributed to laws that do not profess to claim it. If the law becomes a part of the contract, change of place would not expunge the condition. A contract made in New York would be the same in any other state as in New York, and would still retain the stipulation originally introduced into it, that the debtor should be discharged by the surrender of his estate. It is not, we think, true that contracts are entered into in contemplation of the insolvency of the obligor. They are framed with the expectation that they will be literally performed. Insolvency is undoubtedly a casualty which is possible, but is never expected. In the ordinary course of human transactions, if even suspected, provision is made for it by taking security against it. When it comes unlooked for, it would be entirely contrary to reason to consider it as a part of the contract.

§ 1989. *The law does not become a part of the contract.*

We have, then, no hesitation in saying that, however law may act upon contracts, it does not enter into them, and become a part of the agreement. The effect of such a principle would be a mischievous abridgment of legislative power over subjects within the proper jurisdiction of states, by arresting their power to repeal or modify such laws with respect to existing contracts. But although the argument is not sustainable in this form, it assumes another in which it is more plausible. Contract, it is said, being the creature of society, derives its obligation from the law; and, although the law may not enter into the agreement so as to form a constituent part of it, still, it acts externally upon the contract, and determines how far the principle of coercion shall be applied to it; and this being universally understood, no individual can complain justly of its application to himself, in a case where it was known when the contract was formed.

This argument has been illustrated by references to the statutes of frauds, of usury, and of limitations. The construction of the words in the constitution, respecting contracts, for which the defendants contend, would, it has been said, withdraw all these subjects from state legislation. The acknowledgment that they remain within it is urged as an admission that contract is not withdrawn by the constitution, but remains under state control, subject to this restriction only, that no law shall be passed impairing the obligation of contracts in existence at its passage. The defendants maintain that an error lies at the very foundation of this argument. It assumes that contract is the mere creature of society, and derives all its obligation from human legislation. That it is not the stipulation an individual makes which binds him, but some declaration of the supreme power of a state to which he belongs, that he shall perform what he has undertaken to perform. That, though this original declaration may be lost in remote antiquity, it must be presumed as the origin of the obligation of contracts. This postulate the defendants deny, and, we think, with great reason.

It is an argument of no inconsiderable weight against it, that we find no trace of such an enactment. So far back as human research carries us, we find the judicial power as a part of the executive, administering justice by the application of remedies to violated rights or broken contracts. We find that power

applying these remedies on the idea of a pre-existing obligation on every man to do what he has promised on consideration to do; that the breach of this obligation is an injury for which the injured party has a just claim to compensation, and that society ought to afford him a remedy for that injury. We find allusions to the mode of acquiring property, but we find no allusion, from the earliest time, to any supposed act of the governing power giving obligation to contracts. On the contrary, the proceedings respecting them, of which we know anything, evince the idea of a pre-existing intrinsic obligation which human law enforces. If, on tracing the right to contract, and the obligations created by contract, to their source, we find them to exist anterior to and independent of society, we may reasonably conclude that those original and pre-existing principles are, like many other natural rights, brought with man into society; and, although they may be controlled, are not given by human legislation.

In the rudest state of nature a man governs himself, and labors for his own purposes. That which he acquires is his own, at least while in his possession, and he may transfer it to another. This transfer passes his right to that other. Hence the right to barter. One man may have acquired more skins than are necessary for his protection from the cold; another more food than is necessary for his immediate use. They agree each to supply the wants of the other from his surplus. Is this contract without obligation? If one of them, having received and eaten the food he needed, refuses to deliver the skin, may not the other rightfully compel him to deliver it? Or two persons agree to unite their strength and skill to hunt together for their mutual advantage, engaging to divide the animal they shall master. Can one of them rightfully take the whole? or, should he attempt it, may not the other force him to a division? If the answer to these questions must affirm the duty of keeping faith between these parties, and the right to enforce it if violated, the answer admits the obligation of contracts, because upon that obligation depends the right to enforce them. Superior strength may give the power, but cannot give the right. The rightfulness of coercion must depend on the pre-existing obligation to do that for which compulsion is used. It is no objection to the principle, that the injured party may be the weakest. In society, the wrong-doer may be too powerful for the law. He may deride its coercive power, yet his contracts are obligatory; and, if society acquire the power of coercion, that power will be applied without previously enacting that his contract is obligatory.

Independent nations are individuals in a state of nature. Whence is derived the obligation of their contracts? They admit the existence of no superior legislative power which is to give them validity, yet their validity is acknowledged by all. If one of these contracts be broken, all admit the right of the injured party to demand reparation for the injury, and to enforce that reparation if it be withheld. He may not have the power to enforce it, but the whole civilized world concurs in saying that the power, if possessed, is rightfully used. In a state of nature, these individuals may contract, their contracts are obligatory, and force may rightfully be employed to coerce the party who has broken his engagement.

What is the effect of society upon these rights? When men unite together and form a government, do they surrender their right to contract, as well as their right to enforce the observance of contracts? For what purpose should they make this surrender? Government cannot exercise this power for individuals. It is better that they should exercise it for themselves. For what pur-

pose, then, should the surrender be made? It can only be, that government may give it back again. As we have no evidence of the surrender, or of the restoration of the right; as this operation of surrender and restoration would be an idle and useless ceremony, the rational inference seems to be that neither has ever been made; that individuals do not derive from government their right to contract, but bring that right with them into society; that obligation is not conferred on contracts by positive law, but is intrinsic, and is conferred by the act of the parties. This results from the right which every man retains to acquire property, to dispose of that property according to his own judgment, and to pledge himself for a future act. These rights are not given by society, but are brought into it. The right of coercion is necessarily surrendered to government, and this surrender imposes on government the correlative duty of furnishing a remedy. The right to regulate contracts, to prescribe rules by which they shall be evidenced, to prohibit such as may be deemed mischievous, is unquestionable, and has been universally exercised. So far as this power has restrained the original right of individuals to bind themselves by contract, it is restrained; but beyond these actual restraints the original power remains unimpaired. This reasoning is undoubtedly much strengthened by the authority of those writers on natural and national law whose opinions have been viewed with profound respect by the wisest men of the present and of past ages.

Supposing the obligation of the contract to be derived from the agreement of the parties, we will inquire how far law acts externally on it, and may control that obligation. That law may have, on future contracts, all the effect which the counsel for the plaintiff in error claim, will not be denied. That it is capable of discharging the debtor, under the circumstances and on the conditions prescribed in the statute which has been pleaded in this case, will not be controverted. But as this is an operation which was not intended by the parties, nor contemplated by them, the particular act can be entitled to this operation only when it has the full force of law. A law may determine the obligation of a contract on the happening of a contingency, because it is the law. If it be not the law, it cannot have this effect. When its existence as law is denied, that existence cannot be proved by showing what are the qualities of a law. Law has been defined by a writer, whose definitions especially have been the theme of almost universal panegyric, "to be a rule of civil conduct prescribed by the supreme power in a state."

§ 1990. *Statutes of frauds and of usury do not form part of the contract. They prescribe conditions upon which the obligation of the contract can come into existence.*

In our system, the legislature of a state is the supreme power in all cases where its action is not restrained by the constitution of the United States. Where it is so restrained, the legislature ceases to be the supreme power, and its acts are not law. It is, then, begging the question to say that, because contracts may be discharged by a law previously enacted, this contract may be discharged by this act of the legislature of New York; for the question returns upon us, is this act a law? Is it consistent with or repugnant to the constitution of the United States? This question is to be solved only by the constitution itself. In examining it, we readily admit that the whole subject of contracts is under the control of society, and that all the power of society over it resides in the state legislatures, except in those special cases where restraint is imposed by the constitution of the United States. The particular restraint now under consideration is on the power to impair the obligation of contracts.

The extent of this restraint cannot be ascertained by showing that the legislature may prescribe the circumstances on which the original validity of a contract shall be made to depend. If the legislative will be that certain agreements shall be in writing, that they shall be sealed, that they shall be attested by a certain number of witnesses, that they shall be recorded, or that they shall assume any prescribed form before they become obligatory, all these are regulations which society may rightfully make, and which do not come within the restrictions of the constitution, because they do not impair the obligation of the contract. The obligation must exist before it can be impaired; and a prohibition to impair it, when made, does not imply an inability to prescribe those circumstances which shall create its obligation. The statutes of frauds, therefore, which have been enacted in the several states, and which are acknowledged to flow from the proper exercise of state sovereignty, prescribe regulations which must precede the obligation of the contract, and, consequently, cannot impair that obligation. Acts of this description, therefore, are most clearly not within the prohibition of the constitution. The acts against usury are of the same character. They declare the contract to be void in the beginning. They deny that the instrument ever became a contract. They deny it all original obligation, and cannot impair that which never came into existence.

§ 1991. *Effect of statutes of limitation.*

Acts of limitations approach more nearly to the subject of consideration, but are not identified with it. They defeat a contract once obligatory, and may, therefore, be supposed to partake of the character of laws which impair its obligation. But a practical view of the subject will show us that the two laws stand upon distinct principles. In the case of *Sturges v. Crowninshield*, it was observed by the court that these statutes relate only to the remedies which are furnished in the courts; and their language is generally confined to the remedy. They do not purport to dispense with the performance of a contract, but proceed on the presumption that a certain length of time, unexplained by circumstances, is reasonable evidence of a performance. It is on this idea alone that it is possible to sustain the decision that a bare acknowledgment of the debt, unaccompanied with any new promise, shall remove the bar created by the act. It would be a mischief not to be tolerated, if contracts might be set up at any distance of time, when the evidence of payment might be lost, and the estates of the dead, or even of the living, be subjected to these stale obligations. The principle is, without the aid of a statute, adopted by the courts as a rule of justice. The legislature has enacted no statute of limitations as a bar to suits on sealed instruments. Yet twenty years of unexplained silence on the part of the creditor is evidence of payment. On parol contracts, or on written contracts not under seal, which are considered in a less solemn point of view than sealed instruments, the legislature has supposed that a shorter time might amount to evidence of performance, and has so enacted. All have acquiesced in these enactments, but have never considered them as being of that class of laws which impair the obligation of contracts. In prescribing the evidence which shall be received in its courts, and the effect of that evidence, the state is exercising its acknowledged powers. It is likewise in the exercise of its legitimate powers, when it is regulating the remedy and mode of proceedings in its courts.

§ 1992. *Obligation and remedy not identical; the former is coeval with a contract, the latter becomes operative only when the contract is broken.*

The counsel for the plaintiff in error insist that the right to regulate the

remedy and to modify the obligation of the contract are the same; that obligation and remedy are identical, that they are synonymous—two words conveying the same idea. The answer given to this proposition by the defendant's counsel seems to be conclusive. They originate at different times. The obligation to perform is coeval with the undertaking to perform; it originates with the contract itself, and operates anterior to the time of performance. The remedy acts upon a broken contract and enforces a pre-existing obligation.

If there be anything in the observations made in a preceding part of this opinion respecting the source from which contracts derive their obligation, the proposition we are now considering cannot be true. It was shown, we think, satisfactorily, that the right to contract is the attribute of a free agent, and that he may rightfully coerce performance from another free agent who violates his faith. Contracts have, consequently, an intrinsic obligation. When men come into society, they can no longer exercise this original and natural right of coercion. It would be incompatible with general peace, and is, therefore, surrendered. Society prohibits the use of private individual coercion, and gives in its place a more safe and more certain remedy. But the right to contract is not surrendered with the right to coerce performance. It is still incident to that degree of free agency which the laws leave to every individual, and the obligation of the contract is a necessary consequence of the right to make it. Laws regulate this right, but, where not regulated, it is retained in its original extent. Obligation and remedy, then, are not identical; they originate at different times and are derived from different sources. But, although the identity of obligation and remedy be disproved, it may be, and has been, urged that they are precisely commensurate with each other, and are such sympathetic essences, if the expression may be allowed, that the action of law upon the remedy is immediately felt by the obligation—that they live, languish and die together. The use made of this argument is to show the absurdity and self-contradiction of the construction which maintains the inviolability of obligation, while it leaves the remedy to the state governments. We do not perceive this absurdity or self-contradiction.

§ 1993. *The states may regulate the remedy as they please, so long as they do not substantially impair the obligation of contracts by rendering it valueless.*

Our country exhibits the extraordinary spectacle of distinct, and, in many respects, independent governments over the same territory and the same people. The local governments are restrained from impairing the obligation of contracts, but they furnish the remedy to enforce them, and administer that remedy in tribunals constituted by themselves. It has been shown that the obligation is distinct from the remedy, and, it would seem to follow, that law might act on the remedy without acting on the obligation. To afford a remedy is certainly the high duty of those who govern to those who are governed. A failure in the performance of this duty subjects the government to the just reproach of the world. But the constitution has not undertaken to enforce its performance. That instrument treats the states with the respect which is due to intelligent beings, understanding their duties, and willing to perform them; not as insane beings, who must be compelled to act for self-preservation. Its language is the language of restraint, not of coercion. It prohibits the states from passing any law impairing the obligation of contracts; it does not enjoin them to enforce contracts. Should a state be sufficiently insane to shut up or abolish its courts, and thereby withhold all remedy, would this annihilation of remedy annihilate the obligation also of contracts? We know it would not.

If the debtor should come within the jurisdiction of any court of another state, the remedy would be immediately applied, and the inherent obligation of the contract enforced. This cannot be ascribed to a renewal of the obligation; for passing the line of a state cannot recreate an obligation which was extinguished. It must be the original obligation derived from the agreement of the parties, and which exists unimpaired though the remedy was withdrawn.

But, we are told that the power of the state over the remedy may be used to the destruction of all beneficial results from the right; and hence it is inferred that the construction which maintains the inviolability of the obligation, must be extended to the power of regulating the remedy. The difficulty which this view of the subject presents does not proceed from the identity or connection of right and remedy, but from the existence of distinct governments acting on kindred subjects. The constitution contemplates restraint as to the obligation of contracts, not as to the application of remedy. If this restraint affects a power which the constitution did not mean to touch, it can only be when that power is used as an instrument of hostility to invade the inviolability of contract, which is placed beyond its reach. A state may use many of its acknowledged powers in such manner as to come in conflict with the provisions of the constitution. Thus the power over its domestic police, the power to regulate commerce purely internal, may be so exercised as to interfere with the regulations of commerce with foreign nations, or between the states. In such cases, the power which is supreme must control that which is not supreme, when they come in conflict. But this principle does not involve any self-contradiction, or deny the existence of the several powers in the respective governments. So, if a state shall not merely modify or withhold a particular remedy, but shall apply it in such manner as to extinguish the obligation without performance, it would be an abuse of power which could scarcely be misunderstood, but which would not prove that remedy could not be regulated without regulating obligation.

The counsel for the plaintiff in error put a case of more difficulty, and urge it as a conclusive argument against the existence of a distinct line dividing obligation from remedy. It is this: The law affords remedy by giving execution against the person, or the property, or both. The same power which can withdraw the remedy against the person can withdraw that against the property, or that against both, and thus effectually defeat the obligation. The constitution, we are told, deals not with form, but with substance; and cannot be presumed, if it designed to protect the obligation of contracts from state legislation, to have left it thus obviously exposed to destruction. The answer is, that if the law goes further, and annuls the obligation without affording the remedy which satisfies it, if its action on the remedy be such as palpably to impair the obligation of the contract, the very case arises which we suppose to be within the constitution. If it leaves the obligation untouched, but withholds the remedy, or affords one which is merely nominal, it is like all other cases of misgovernment, and leaves the debtor still liable to his creditor, should he be found, or should his property be found, where the laws afford a remedy. If that high sense of duty which men selected from the government of their fellow-citizens must be supposed to feel, furnishes no security against a course of legislation which must end in self-destruction; if the solemn oath taken by every member, to support the constitution of the United States, furnishes no security against intentional attempts to violate its spirit while evading its letter, the question how far the constitution interposes a shield for the protec-

tion of an injured individual, who demands from a court of justice that remedy which every government ought to afford, will depend on the law itself which shall be brought under consideration. The anticipation of such a case would be unnecessarily disrespectful, and an opinion on it would be, at least, premature. But, however the question might be decided, should it be even determined that such a law would be a successful invasion of the constitution, it does not follow that an act which operates directly on the contract after it is made is not within the restriction imposed on the states by that instrument. The validity of a law acting directly on the obligation is not proved by showing that the constitution has provided no means for compelling the states to enforce it.

We perceive, then, no reason for the opinion that the prohibition "to pass any law impairing the obligation of contracts" is incompatible with the fair exercise of that discretion, which the state legislatures possess in common with all governments, to regulate the remedies afforded by their own courts. We think that obligation and remedy are distinguishable from each other. That the first is created by the act of the parties, the last is afforded by government. The words of the restriction we have been considering countenance, we think, this idea. No state shall "pass any law impairing the obligation of contracts." These words seem to us to import that the obligation is intrinsic; that it is created by the contract itself; not that it is dependent on the laws made to enforce it. When we advert to the course of reading generally pursued by American statesmen in early life, we must suppose that the framers of our constitution were intimately acquainted with the writings of those wise and learned men whose treatises on the laws of nature and nations have guided public opinion on the subjects of obligation and contract. If we turn to those treatises, we find them to concur in the declaration that contracts possess an original intrinsic obligation, derived from the acts of free agents, and not given by government. We must suppose that the framers of our constitution took the same view of the subject, and the language they have used confirms this opinion.

§ 1994. *Recapitulation.*

The propositions we have endeavored to maintain, of the truth of which we are ourselves convinced, are these: That the words of the clause in the constitution which we are considering, taken in their natural and obvious sense, admit of a prospective as well as of a retrospective operation. That an act of the legislature does not enter into the contract, and become one of the conditions stipulated by the parties; nor does it act externally on the agreement, unless it have the full force of law. That contracts derive their obligation from the act of the parties, not from the grant of government; and that the right of government to regulate the manner in which they shall be formed, or to prohibit such as may be against the policy of the state, is entirely consistent with their inviolability after they have been formed. That the obligation of a contract is not identified with the means which government may furnish to enforce it; and that a prohibition to pass any law impairing it does not imply a prohibition to vary the remedy, nor does a power to vary the remedy imply a power to impair the obligation derived from the act of the parties.

We cannot look back to the history of the times when the august spectacle was exhibited of the assemblage of a whole people by their representatives in convention, in order to unite thirteen independent sovereignties under one government, so far as might be necessary for the purposes of union, without being

sensible of the great importance which was at that time attached to the tenth section of the first article. The power of changing the relative situation of debtor and creditor, of interfering with contracts, a power which comes home to every man, touches the interest of all, and controls the conduct of every individual in those things which he supposes to be proper for his own exclusive management, had been used to such an excess by the state legislatures as to break in upon the ordinary intercourse of society, and destroy all confidence between man and man. The mischief had become so great, so alarming, as not only to impair commercial intercourse, and threaten the existence of credit, but to sap the morals of the people and destroy the sanctity of private faith. To guard against the continuance of the evil was an object of deep interest with all the truly wise as well as the virtuous of this great community, and was one of the important benefits expected from a reform of the government.

To impose restraints on state legislation, as respected this delicate and interesting subject, was thought necessary by all those patriots who could take an enlightened and comprehensive view of our situation; and the principle obtained an early admission into the various schemes of government which were submitted to the convention. In framing an instrument which was intended to be perpetual, the presumption is strong that every important principle introduced into it is intended to be perpetual also; that a principle expressed in terms to operate in all future time is intended so to operate. But if the construction for which the plaintiff's counsel contend be the true one, the constitution will have imposed a restriction in language, indicating perpetuity, which every state in the Union may elude at pleasure. The obligation of contracts in force, at any given time, is but of short duration; and, if the inhibition be of retrospective laws only, a very short lapse of time will remove every subject on which the act is forbidden to operate, and make this provision of the constitution so far useless. Instead of introducing a great principle, prohibiting all laws of this obnoxious character, the constitution will only suspend their operation for a moment, or except from it pre-existing cases. The object would scarcely seem to be of sufficient importance to have found a place in that instrument.

This construction would change the character of the provision, and convert an inhibition to pass laws impairing the obligation of contracts into an inhibition to pass retrospective laws. Had this been the intention of the convention, is it not reasonable to believe that it would have been so expressed? Had the intention been to confine the restriction to laws which were retrospective in their operation, language could have been found, and would have been used, to convey this idea. The very word would have occurred to the framers of the instrument, and we should have probably found it in the clause. Instead of the general prohibition to pass any "law impairing the obligation of contracts," the prohibition would have been to the passage of any retrospective law. Or, if the intention had been not to embrace all retrospective laws, but those only which related to contracts, still, the word would have been introduced, and the state legislatures would have been forbidden "to pass any retrospective law impairing the obligation of contracts," or "to pass any law impairing the obligation of contracts previously made." Words which directly and plainly express the cardinal intent always present themselves to those who are preparing an important instrument, and will always be used by them. Undoubtedly there is an imperfection in human language, which often exposes the same sentence to different constructions. But it is rare, indeed, for a person of

clear and distinct perceptions, intending to convey one principal idea, so to express himself as to leave any doubt respecting that idea. It may be uncertain whether his words comprehend other things not immediately in his mind; but it can seldom be uncertain whether he intends the particular thing to which his mind is specially directed. If the mind of the convention, in framing this prohibition, had been directed, not generally to the operation of laws upon the obligation of contracts, but particularly to their retrospective operation, it is scarcely conceivable that some word would not have been used indicating this idea. In instruments prepared on great consideration, general terms, comprehending a whole subject, are seldom employed to designate a particular, we might say a minute, portion of that subject. The general language of the clause is such as might be suggested by a general intent to prohibit state legislation on the subject to which that language is applied, the obligation of contracts; not such as would be suggested by a particular intent to prohibit retrospective legislation.

It is also worthy of consideration that those laws which had effected all that mischief the constitution intended to prevent were prospective as well as retrospective in their operation. They embraced future contracts as well as those previously formed. There is the less reason for imputing to the convention an intention, not manifested by their language, to confine a restriction intended to guard against the recurrence of those mischiefs to retrospective legislation. For these reasons we are of opinion that, on this point, the district court of Louisiana has decided rightly.

OPINION ON FURTHER ARGUMENT—EFFECT OF A DISCHARGE ON CONTRACTS MADE WITH CITIZENS OF OTHER STATES.

Opinion by MR. JUSTICE JOHNSON.

I am instructed by the majority of the court finally to dispose of this cause. The present majority is not the same which determined the general question on the constitutionality of state insolvent laws, with reference to the violation of the obligation of contracts. I now stand united with the minority on the former question, and, therefore, feel it due to myself and the community to maintain my consistency.

The question now to be considered is whether a discharge of a debtor under a state insolvent law would be valid against a creditor or citizen of another state who has never voluntarily subjected himself to the state laws otherwise than by the origin of his contract. As between its own citizens, whatever be the origin of the contract, there is now no question to be made on the effect of such a discharge; nor is it to be questioned that a discharge not valid under the constitution in the courts of the United States is equally invalid in the state courts. The question to be considered goes to the invalidity of the discharge altogether, and, therefore, steers clear of that provision in the constitution which purports to give validity in every state to the records, judicial proceedings, and so forth, of each state. The question now to be considered was anticipated in the case of *Sturges v. Crowninshield*, 4 Wheat., 122 (§§ 1937-39, *supra*), when the court, in the close of the opinion delivered, declared that it means to confine its views to the case then under consideration, and not to commit itself as to those in which the interests and rights of a citizen of another state are implicated.

§ 1995. *Object of the provision for federal courts in the states.*

The question is one partly international, partly constitutional. My opinion

on the subject is briefly this: that the provision in the constitution which gives the power to the general government to establish tribunals of its own in every state, in order that the citizens of other states or sovereignties might therein prosecute their rights under the jurisdiction of the United States, had for its object an harmonious distribution of justice throughout the Union; to confine the states, in the exercise of their judicial sovereignty, to cases between their own citizens; to prevent, in fact, the exercise of that very power over the rights of citizens of other states which the origin of the contract might be supposed to give to each state; and thus to obviate that *conflictus legum* which has employed the pens of Huberus and various others, and which any one who studies the subject will plainly perceive it is infinitely more easy to prevent than to adjust. These conflicts of power and right necessarily arise only after contracts are entered into. Contracts, then, become the appropriate subjects of judicial cognizance; and if the just claims which they give rise to are violated by arbitrary laws, or if the course of distributive justice be turned aside or obstructed by legislative interference, it becomes a subject of jealousy, irritation and national complaint or retaliation.

It is not unimportant to observe that the constitution was adopted at the very period when the courts of Great Britain were engaged in adjusting the conflicts of right which arose upon their own bankrupt law, among the subjects of that crown in the several dominions of Scotland, Ireland and the West Indies. The first case we have on the effect of foreign discharges, that of *Ballantine v. Golding*, 1 Cooke's Bank. Law, 487, occurred in 1783, and the law could hardly be held settled before the case of *Hunter v. Potts*, 4 Term R., 182, which was decided in 1791. Any one who will take the trouble to investigate the subject will, I think, be satisfied that, although the British courts profess to decide upon a principle of universal law, when adjudicating upon the effect of a foreign discharge, neither the passage in Vattel, to which they constantly refer, nor the practice and doctrines of other nations, will sustain them in the principle to the extent in which they assert it. It was all-important to a great commercial nation, the creditors of all the rest of the world, to maintain the doctrine, as one of universal obligation, that the assignment of the bankrupt's effects, under a law of the country of the contract, should carry the interest in his debts, wherever his debtor may reside; and that no foreign discharge of his debtor should operate against debts contracted with the bankrupt in his own country. But I think it perfectly clear that, in the United States, a different doctrine has been established; and since the power to discharge the bankrupt is asserted on the same principle with the power to assign his debts, that the departure from it in the one instance carries with it a negation of the principle altogether.

It is vain to deny that it is now the established doctrine in England that the discharge of a bankrupt shall be effectual against contracts of the state that give the discharge, whatsoever be the allegiance or country of the creditor. But I think it equally clear that this is a rule peculiar to her jurisprudence, and that reciprocity is the general rule of other countries; that the effect given to such discharge is so much a matter of comity that the states of the European continent, in all cases, reserve the right of deciding whether reciprocity will not operate injuriously upon their own citizens. Huberus, in his third axiom on this subject, puts the effect of such laws upon the ground of courtesy, and recognizes the reservation that I have mentioned; other writers do the same.

§ 1996. *The discharge of a debtor under the English bankrupt law inoperative in this country, the law not operating a legal transfer of property here.*

I will now examine the American decisions on this subject; and, first, in direct hostility with the received doctrines of the British courts, it has been solemnly adjudged in this court, and, I believe, in every state court of the Union, that, notwithstanding the laws of bankruptcy in England, a creditor of the bankrupt may levy an attachment on a debt due the bankrupt in this country and appropriate the proceeds to his own debt.

In the case of *Harrison v. Sterry*, 5 Cranch, 298, 302, a case decided in this court, in 1809, upon full argument and great deliberation, and in which all the English cases were quoted, it is expressly adjudged "that, in the case of a contract made with foreigners in a foreign country, the bankrupt laws of the foreign country are incapable of operating a legal transfer of property in the United States," and judgment was given in favor of the attaching creditors, against the claim of the foreign assignees. In that case, also, another important doctrine is established in hostility with the British doctrine. For the United States had interposed a claim against the English assignees, in order to obtain satisfaction from the proceeds of the bankrupt's effects in this country, for a debt contracted in Great Britain. And this court decreed accordingly, expressly restricting the power of the country of the contract to its concoction and exposition. The language of the court is: "The law of the place where a contract is made is, generally speaking, the law of the contract; that is, it is the law by which the contract is expounded. But the right of priority forms no part of the contract itself. It is extrinsic, and is rather a personal privilege, dependent on the laws of the place where the property lies, and where the court sits which decides the cause." And, accordingly, the law of the United States was sustained, which gave the debts due the bankrupt here to satisfy a debt contracted in England, to the prejudice of the law of England, which gave the same debt to the assignees of the bankrupt.

§ 1997. *The rights of creditors in this country cannot be prejudiced by a discharge of the debtor in another country.*

It cannot be necessary to go further than this case to establish that, so far as relates to the foreign creditor, this country does not recognize the English doctrine that the bankrupt law of the country of the contract is paramount in disposing of the rights of the bankrupt. The United States pass a law which asserts the right to appropriate a debt due a foreign bankrupt, to satisfy a debt due itself, and incurred by that bankrupt in his own country. The assignees of that bankrupt question this right, and claim the debt as legally vested in them by the law of the country of the contract, and maintain that the debt due the United States, being contracted in Great Britain, was subject to the laws of Great Britain, and, therefore, entitled only to share in common with other creditors in the proceeds of the bankrupt's effects; that the debt so appropriated by the law of the United States to its exclusive benefit was, as to all the bankrupt's contracts, or certainly as to all English contracts, vested in the assignees, on international principles, principles which gave effect to the English bankrupt laws, so vesting that debt, paramount to the laws of other countries.

In giving effect to the law of the United States, this court overrules that doctrine; and, in the act of passing that law, this government asserts both the power over the subject, and the right to exercise that power without a violation of national comity; or has at least taken its stand against that comity,

and asserted a right to protect its own interests, which in principle is equally applicable to the interests of its own citizens. It has had, in fact, regard to the *lex loci rei sitæ*, as existing in the person and funds of the debtor of the bankrupt, and the rights of self-preservation, and duty of protection to its own citizens, and the actual allegiance of the creditor and debtor, not the meta-physical allegiance of the contract, on which the foreign power is asserted.

§ 1998. *Cases examined.*

It would be in vain to assign the decision of this court in *Harrison v. Sterry*, 5 Cranch, 289, or the passing of the law of the United States, to the general preference which the government may assert in the payment of its own debt, since that preference can only exist to the prejudice of its own citizens, whereas, the precedence there claimed and conceded operated to the prejudice of British creditors. The case of *Baker v. Wheaton*, adjudged in the courts of Massachusetts in the time of Chief Justice Parsons, 5 Mass., 509, is a very strong case upon this subject. That also was argued with great care, and all the British cases reviewed; the court took time to deliberate, and the same doctrine was maintained, in the same year and the same month with *Harrison v. Sterry*, and certainly without any communication between the two courts.

The case was this: One Wheaton gave a promissory note to one Chandler, both being at that time citizens and inhabitants of Rhode Island. Wheaton was discharged under the bankrupt laws of Rhode Island, both still continuing citizens and inhabitants of the same state, and the note remaining the property of Chandler. Subsequent to the discharge, Chandler indorses the note to Baker, and Wheaton is arrested in Massachusetts. He pleads the discharge in bar, and the court in deciding expresses itself thus: "When, therefore, the defendant was discharged from that contract, *lege loci*, the promisee was bound by that discharge, as he was a party to the laws of that state, and assenting to their operation. But if, when the contract was made, the promisee had not been a citizen of Rhode Island, he would not have been bound by the laws of it or any other state, and, holding this note at the time of the discharge, he might afterwards maintain an action upon it in the courts of this state." And again (page 311): "If the note had been transferred to the plaintiff, a citizen of this state, whilst it remained due and undischarged by the insolvent laws of Rhode Island, those laws could not affect his rights in the courts of law in this state, because he is not bound by them." This, it will be observed, regards a contract acknowledged to be of Rhode Island origin.

There is another case reported in the decisions of the same state, 10 Mass., 337, which carries this doctrine still further, and, I apprehend, to a length which cannot be maintained. This was the case of *Watson v. Bourne*, in which Watson, a citizen of Massachusetts, had sued Bourne in a state court, and obtained judgment. Bourne was discharged under the insolvent laws of that state, and being afterwards found in Massachusetts was arrested on an action of debt upon the judgment. He pleads the discharge; plaintiff replies, that he, plaintiff, was a citizen of Massachusetts, and, therefore, not precluded by the discharge. The origin of the debt does not appear from the report, and the argument turned wholly on the question whether, by entering judgment in the court of the state, he had not subjected his rights to the state laws *pro tanto*. The court overruled the plea, and recognized the doctrine in *Baker v. Wheaton*, 5 Mass., 509, by declaring "that a discharge of that nature can only operate where the law is made by an authority common to the creditor and debtor in all respects, where both are citizens or subjects." I have little doubt that the

court was wrong in denying the effect of the discharge as against judgments rendered in the state courts, when the party goes voluntarily and unnecessarily into those courts; but the decision shows, in other respects, how decidedly the British doctrine is repelled in the courts of that state.

The British doctrine is also unequivocally repelled in a very learned opinion delivered by Mr. Justice Nott, in the court of the last resort in South Carolina, and in which the whole court, consisting of the common law judges of the state, concurred. This was in the case of the Assignees of Topham *v.* Chapman, in which the rights of the attaching creditor were maintained against those of the assignees of the bankrupt (1 Constitutional Reports, 283); and that the same rule was recognized at an early day in the court of Pennsylvania, appears from the leading case of Phillips *v.* Hunter, 2 H. Black., 402, in which a British creditor, who had recovered of a debtor of the bankrupt in Pennsylvania, was compelled by the British courts to refund to the assignees in England, as for money had and received to their use.

§ 1999. *The bankrupt or insolvent laws of states of this Union operate only on the contracts and property of persons subject to those laws by reason of residence and citizenship.*

I think it, then, fully established that in the United States a creditor of the foreign bankrupt may attach the debt due the foreign bankrupt, and apply the money to the satisfaction of his peculiar debt, to the prejudice of the rights of the assignees or other creditors. I do not here speak of assignees, or rights created, under the bankrupt's own deed; those stand on a different ground, and do not affect this question. I confine myself to assignments, or transfers, resting on the operation of the laws of the country, independent of the bankrupt's deed; to the rights and liabilities of debtor, creditor, bankrupt and assignees, as created by law. What is the actual bearing of this right to attach, so generally recognized by our decisions? It imports a general abandonment of the British principles; for, according to their laws, the assignee alone has the power to release the debtor. But the right to attach necessarily implies the right to release the debtor, and that right is here asserted under the laws of a state which is not the state of the contract. So, also, the creditor of the bankrupt is, by the laws of his country, entitled to no more than a ratable participation in the bankrupt's effects. But the right to attach imports a right to exclusive satisfaction, if the effects so attached should prove adequate to make satisfaction. The right to attach also imports the right to sue the bankrupt; and who would impute to the bankrupt law of another country the power to restrain the citizens of these states in the exercise of their right to go into the tribunals of their own country for the recovery of debts, wherever they may have originated? Yet, universally, after the law takes the bankrupt into its own hands, his creditors are prohibited from suing.

Thus much for the law of this case in an international view. I will consider it with reference to the provisions of the constitution. I have said above, that I had no doubt the erection of a distinct tribunal for the resort of citizens of other states was introduced *ex industria*, into the constitution, to prevent, among other evils, the assertion of a power over the rights of the citizens of other states, upon the metaphysical ideas of the British courts on the subject of jurisdiction over contracts. And there was good reason for it; for, upon that principle it is, that a power is asserted over the rights of creditors which involves a mere mockery of justice. Thus, in the case of Burrows *v.* Jemino, (reported in 2 Strange, 733, and better reported in Moseley, 1, and some other

books), the creditor residing in England, was cited, probably, by a placard on a door-post in Leghorn, to appear there to answer to his debtor; and his debt passed upon by the court, perhaps, without his having ever heard of the institution of legal process to destroy it.

The Scotch, if I remember correctly, attach the summons on the flag-staff, or in the market place, at the shore of Leith; and the civil law process by proclamation, or *vis et modis*, is not much better, as the means of subjecting the rights of foreign creditors to their tribunals. All this mockery of justice, and the jealousies, recriminations, and perhaps retaliations which might grow out of it are avoided, if the power of the states over contracts, after they become the subject exclusively of judicial cognizance, is limited to the controversies of their own citizens. And it does appear to me almost incontrovertible, that the states cannot proceed one step further without exercising a power incompatible with the acknowledged powers of other states, or of the United States, and with the rights of the citizens of other states.

Every bankrupt or insolvent system in the world must partake of the character of a judicial investigation. Parties whose rights are to be affected are entitled to a hearing. Hence every system, in common with the particular system now before us, professes to summon the creditors before some tribunal, to show cause against granting a discharge to the bankrupt. But on what principle can a citizen of another state be forced into the courts of a state for this investigation? The judgment to be passed is to prostrate his rights; and on the subject of these rights the constitution exempts him from the jurisdiction of the state tribunals, without regard to the place where the contract may originate. In the only tribunal to which he owes allegiance, the state insolvent or bankrupt laws cannot be carried into effect; they have a law of their own on the subject (2 Stats. at Large, 4); and a certificate of discharge under any other law would not be acknowledged as valid even in the courts of the state in which the court of the United States that grants it is held. Where is the reciprocity? Where the reason upon which the state courts can thus exercise a power over the suitors of that court, when that court possesses no such power over the suitors of the state courts?

In fact, the constitution takes away the only ground upon which this eminent dominion over particular contracts can be claimed, which is that of sovereignty. For the constitutional suitors in the courts of the United States are not only exempted from the necessity of resorting to the state tribunals, but actually cannot be forced into them. If, then, the law of the English courts had ever been practically adopted in this country in the state tribunals, the constitution has produced such a radical modification of state power over even their own contracts, in the hands of individuals not subject to their jurisdiction, as to furnish ground for excepting the rights of such individuals from the power which the states unquestionably possess over their own contracts and their own citizens. Follow out the contrary doctrine in its consequences and see the absurdity it will produce.

The constitution has constituted courts professedly independent of state power in their judicial course; and yet the judgments of those courts are to be vacated, and their prisoners set at large, under the power of the state courts, or of the state laws, without the possibility of protecting themselves from its exercise. I cannot acquiesce in an incompatibility so obvious. No one has ever imagined that a prisoner in confinement, under process from the courts of the United States, could avail himself of the insolvent laws of the state in which

the court sits. And the reason is that those laws are municipal and peculiar, and appertaining exclusively to the exercise of state power in that sphere in which it is sovereign, that is, between its own citizens, between suitors subjected to state power exclusively in their controversies between themselves.

§ 2000. *The discharge of a debtor under the law of one state does not release him from a debt held by a citizen of another state.*

In the courts of the United States no higher power is asserted than that of discharging the individual in confinement under its own process. This affects not to interfere with the rights of creditors in the state courts against the same individual. Perfect reciprocity would seem to indicate that no greater power should be exercised under state authority over the rights of suitors who belong to the United States jurisdiction. Even although the principle asserted in the British courts of supreme and exclusive power over their own contracts had obtained in the courts of the United States, I must think that power has undergone a radical modification by the judicial powers granted to the United States. I, therefore, consider the discharge, under a state law, as incompetent to discharge a debt due a citizen of another state; and it follows that the plea of a discharge here set up is insufficient to bar the rights of the plaintiff.

§ 2001. *Only the statute of limitations of the forum can be set up in bar of the action.*

It becomes necessary, therefore, to consider the other errors assigned in behalf of the defendant; and, first, as to the plea of the act of limitations. The statute pleaded here is not the act of Louisiana, but that of New York; and the question is not raised by the facts or averments whether he could avail himself of that law if the full time had run out before his departure from New York, as was supposed in argument. The plea is obviously founded on the idea that the statute of the state of the contract was generally pleadable in any other state, a doctrine that will not bear argument.

§ 2002. *The judgment being made up according to local practice was valid.*

The remaining error assigned has regard to the sum for which the judgment is entered, it being for a greater amount than the nominal amount of the bills of exchange on which the suit was brought, and which are found by the verdict. There has been a defect of explanation on this subject; but from the best information afforded us, we consider the amount for which judgment is entered as made up of principal, interest and damages, and the latter as being legally incident to the finding of the bills of exchange, and their non-payment, and assessed by the court under a local practice consonant with that by which the amount of written contracts is determined, by reference to the prothonotary in many other of our courts. We, therefore, see no error in it. The judgment below will, therefore, be affirmed.

§ 2003. *Conclusion.*

And the purport of this adjudication, as I understand it, is that, as between citizens of the same state, a discharge of a bankrupt by the laws of that state is valid as it affects posterior contracts; that as against creditors, citizens of other states, it is invalid as to all contracts. The propositions which I have endeavored to maintain in the opinion which I have delivered are these:

1. That the power given to the United States to pass bankrupt laws is not exclusive. 2. That the fair and ordinary exercise of that power by the states does not necessarily involve a violation of the obligation of contracts, *multo fortiori* of posterior contracts. 3. But when, in the exercise of that power, the states pass beyond their own limits, and the rights of their own citizens,

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and act upon the rights of citizens of other states, there arises a conflict of sovereign power, and a collision with the judicial powers granted to the United States, which renders the exercise of such a power incompatible with the rights of other states and with the constitution of the United States.

CHIEF JUSTICE MARSHALL and JUSTICES DUVALL and STORY concur. JUSTICES WASHINGTON, THOMPSON and TRIMBLE dissent.

§ 2004. In general.—The grant of power to congress to pass uniform laws on the subject of bankruptcies is not inconsistent with power in the states to pass such laws, there being no uniform law on the subject passed by congress in force. *Adams v. Storey*, 1 Paine, 79. See §§ 1715, 1731.

§ 2005. State insolvent laws were never intended to be embraced within that provision of the constitution of the United States which forbids the states to pass any law impairing the obligation of contracts. Such a law may therefore discharge debts contracted prior to its passage. *Ibid.* See § 1985.

§ 2006. State legislatures may pass insolvent laws, provided there be no act of congress establishing a uniform system of bankruptcy conflicting with their provisions, and provided that the law itself be so framed that it does not impair the obligation of contracts. But such laws cannot discharge the contracts of citizens of other states unless they voluntarily make themselves parties to the insolvency proceedings. *Gilman v. Lockwood*, 4 Wall., 409.

§ 2007. It is held there can be no constitutional objection to the insolvent act of Louisiana of March 29, 1826, providing that the property of an insolvent petitioner mentioned in his schedule shall be fully vested in the creditors from and after the cession and acceptance; and directing the syndic to take possession of it and sell it for the benefit of the creditors. *Bank of Tennessee v. Horn*, 17 How., 157.

§ 2008. The abolition of imprisonment for debt is not of itself such a change in the remedy as impairs the obligation of existing contracts. *Penniman's Case*,* 13 Otto, 714; *Beers v. Houghton*, 9 Pet., 329; *Glenn v. Humphreys*, 4 Wash., 424.

§ 2009. A statute declaring that "no person shall hereafter be imprisoned, or be continued in prison, . . . upon an execution issued upon a judgment against a corporation of which such person is or was a stockholder," enacted after the recovery of a judgment against a corporation, by virtue of which a stockholder is imprisoned, is not a law which impairs the obligation of the contract, and the stockholder is entitled to be released under the act. *Penniman's Case*,* 13 Otto, 714.

§ 2010. Release of debtor from prison.—H. gave a bond in a civil suit against him, conditioned to remain a true prisoner, within the limits of the prison, without committing any escape, etc., until lawfully discharged. He presented a petition to the legislature, praying for the benefit of the insolvent act, and by a resolution of the legislature all proceedings against him were stayed, and he was released from prison on his giving bond to the sheriff to return to jail if his petition was not granted. The prayer of the defendant was finally granted, and he took the benefit of the insolvent law, and was fully discharged from all his debts, etc. *Held*, that the state legislature had the power to pass the resolution releasing the party from prison; that the states, so far as relates to their own process, have a right to abolish imprisonment for debt altogether, and that such law might extend to present as well as to future imprisonment. *Mason v. Haile*,* 12 Wheat., 370.

§ 2011. Contracts made in other states.—A discharge under the insolvent laws of a state cannot be pleaded in bar of a suit on a contract made in another state with a citizen of such state. Thus, where notes were dated at Baltimore, but were delivered in New York in payment for goods purchased, it was held that the contract was governed by the laws of New York, and that a discharge under the insolvent laws of Maryland could not be set up in bar of a suit on the notes. (This case follows *Sturges v. Crowninshield* and *Ogden v. Saunders*, without adding anything by way of argument or illustration. The opinion of the court was delivered by GRIER, J., and concurring opinions were delivered by TANEY, C. J., and JUSTICES M'LEAN, DANIEL and WOODBURY.) *Cook v. Moffat*,* 5 How., 295. See § 1936.

§ 2012. The opinion of Johnson, J., in *Ogden v. Saunders*, 12 Wheat., 213, sustained and held to be the settled law of the court. The judges who were in the minority of the court upon the general question of the constitutionality of state insolvent laws concurred in the opinion of Mr. Justice Johnson. *Boyle v. Zacharie*,* 6 Pet., 348.

§ 2013. Whatever principles are established in that opinion are, therefore, the settled law of the court. *Ibid.*

§ 2014. In an action in the United States circuit court in New York, upon a note executed and made payable in Massachusetts, brought by a citizen of the latter state, a discharge under

an insolvent law of New York, passed subsequent to the execution of the note, was held to be a good bar. *Adams v. Storey*, 1 Paine, 79.

§ 2015. A state law cannot discharge or suspend the obligation of a contract, though made and to be performed within the state, when it is a contract with a citizen of another state. Therefore the act of the legislature of Maine of 1855, enacting that no action shall be maintained against any bank after the appointment of receivers thereof, and declaring the remedy of creditors to be before the supreme court of the state, cannot defeat the right of a citizen of another state to sue upon the bills of the bank in the United States circuit court, although the bills are made payable in Maine. *Demeritt v. Exchange Bank*, * 20 Law Rep., 606.

§ 2016. States may pass insolvent laws provided there is no bankruptcy law of congress conflicting therewith, and they do not impair the obligation of contracts. But when in the exercise of that power the states pass beyond their own limits and the rights of their own citizens, and act upon the rights of citizens of other states, there arises a conflict of sovereign power and a collision with the judicial powers granted to the United States, which renders the exercise of such power incompatible with the rights of other states, and with the constitution of the United States. Insolvent laws of one state cannot therefore discharge the contracts of citizens of other states, because they have no extraterritorial operation. *Baldwin v. Hale*, 1 Wall., 223; *Baldwin v. Bank of Newbury*, 1 Wall., 284; *Hale v. Baldwin*, 1 Cliff., 511.

§ 2017. Contracts made before passage of law.—The plaintiff sued in Pennsylvania on a contract made within the state, and the defendant pleaded a discharge under an insolvent act of Pennsylvania passed after the contract declared on was made. The parties, at the time of the contract, and ever since, resided in that state. *Held*, that the insolvent act could not constitutionally discharge a debt contracted before its passage. *Farmers' Bank v. Smith*, * 6 Wheat., 131. See § 1835.

§ 2018. A law of a state which declares that a debtor, by delivering up his estate for the benefit of his creditors, shall be forever discharged from the payment of his debts, whether the creditor do any act or not in aid of the law, impairs the obligation of contracts, so far as it applies to debts contracted before its passage. *Golden v. Prince*, * 8 Wash., 813.

4. Laws Affecting Corporations.

[See CORPORATIONS, X. Consult, also, the sub-title *Exemption from Taxation*, *infra*.]

SUMMARY — *Retrospective laws*, § 2019. — *Exclusive ferry privileges; abandonment*, § 2020. — *Toll-bridge; erection of competing bridge*, §§ 2021, 2023, 2025. — *Grant of right to maintain a ferry*, § 2022. — *Contract may be made by reference to a prior act*, § 2024. — *Corporations not public, when*, §§ 2026, 2028. — *Effect of the Revolution on contracts*, § 2027. — *Public corporations subject to control*, § 2028. — *Charter of Dartmouth College a contract*, § 2029. — *Reserved power to alter or amend charters*, §§ 2030, 2032-2037, 2049, 2051, 2057. — *Charters are executed contracts*, §§ 2031, 2035. — *Regulating charges for use of property*, §§ 2038-2045. — *Location of railroads in cities*, § 2016. — *Regulation of civil institutions*, § 2047. — *Revocation of charter of lottery company*, § 2048. — *Prohibitory liquor laws*, § 2050. — *Owners of dam required to maintain fishways*, § 2052. — *Prohibition against assignment of notes by a bank*, § 2053. — *Right of eminent domain*, § 2054. — *Personal liability of stockholders*, §§ 2055, 2056.

§ 2019. A state law may be retrospective in its character, and may divest vested rights, and yet not violate the constitution of the United States, unless it also impairs the obligation of contracts. *Charles River Bridge v. Warren Bridge*, §§ 2058-82. See §§ 20, 633, 1684.

§ 2020. Exclusive privileges to maintain a ferry are lost if the ferry be abandoned and a bridge be erected in its place. *Ibid*. See §§ 1090, 1221.

§ 2021. A company was incorporated for the erection of a toll-bridge, but the charter contained no provision that no other bridge should be authorized which would interfere with the business of the company. *Held*, that an act authorizing the erection of a free bridge so near the first bridge as to deprive the first company of its tolls did not impair the obligation of a contract. *Ibid*. See § 2210.

§ 2022. A grant to municipal corporation of a right to maintain a ferry is not a contract, and may be revoked by the legislature; and especially where the grant is to continue during the pleasure of the legislature. *East Hartford v. Hartford Bridge Co.*, §§ 2083-96.

§ 2023. A grant to a turnpike company at the time when railroads were unknown, of the monopoly of maintaining bridges over a river within certain limits, does not imply a contract not to pass a law authorizing a railroad to erect a bridge over such river within such limits, constructed only with a view to permit the crossing of its cars over the river, and provided

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with no accommodations for foot or wagon travel. *Bridge Proprietors v. Hoboken Co.*, §§ 2087-92. See § 2210.

§ 2024. In granting a charter a state may make a contract by reference to a prior act, and a third contract may be made by reference to the second act. *The Binghamton Bridge*, §§ 2093-98.

§ 2025. Where a state grants a charter for the erection of a bridge, and provides that no other bridge shall be built within a certain distance, this is a contract within the constitutional inhibition; and the provision that it shall not be lawful to build a bridge within the limits means that the legislature will not authorize such a bridge. *Ibid.* See § 2210.

§ 2026. The fact that a corporation is chartered for charitable or educational purposes does not make it a public corporation, subject to the control of the legislature; nor does the fact that the object of the charter, as therein expressed, is "to encourage the laudable and charitable design" of educating the Indians, "and, also, that the best means of education be established" in the "province of New Hampshire, for the benefit of said province," change the rule. *Trustees of Dartmouth College v. Woodward*, §§ 2099-2117.

§ 2027. The rights of parties remained unchanged by the Revolution; and a charter granted by the king of England to a corporation established in the province of New Hampshire remained a contract binding upon the state after its independence was acknowledged; and not being altered prior to the adoption of the constitution, it came within the purview of the clause prohibiting states from impairing the obligation of contracts. *Ibid.*

§ 2028. If an act of incorporation be a grant of political power, if it create a civil institution to be employed in the administration of the government, or if the funds of the corporation be public property, or the state be alone interested in its transactions, then the state may, at its will, deprive it of its power; but if it be merely a private eleemosynary institution, endowed with a capacity to take property for objects unconnected with the government, with funds bestowed by individuals on the faith of the charter, the disposition and management of which were prescribed by them, it is a contract in its strongest sense, which no legislature can affect by amendatory legislation. *Ibid.*

§ 2029. The charter granted by the English government to the trustees of Dartmouth College, to found an educational institution for the benefit of New Hampshire, the Indians, and education in general, was a contract the obligation of which the legislature of New Hampshire could not impair; and its act transferring the management of the college from the board of trustees named in the charter to one designated by the act, of an increased number, and appointed as provided by the act, of which the governor and other state officers were to be members, and making other changes, was an unwarrantable interference with the rights of the college and its trustees, and void. *Ibid.*

§ 2030. Contracts made by a corporation with private individuals do not interfere with the reserved power of the state to alter or modify the charter. *Pennsylvania College Cases*, §§ 2118-26. See §§ 2198, 2220, 2222, 2224, 2239, 2240, 2245.

§ 2031. Charters of corporations are executed contracts, and cannot be altered or repealed against the consent of the corporation. *Ibid.* See § 2197.

§ 2032. But charters may be altered or modified where the power to do so is reserved; and a provision that a charter shall not be altered except by an act of the legislature is an implied reservation of the power. *Ibid.* See § 2198.

§ 2033. Under the reserved power to alter a charter, the legislature may pass an act merging the grantee and another corporation into one corporation. *Ibid.*

§ 2034. And by such merger and the grant to the new corporation of "all the capacities, powers, privileges, immunities and franchises possessed and enjoyed by the original institutions," the reserved power of amendment in the original charters was not lost. *Ibid.*

§ 2035. Charters of private corporations are executed contracts, and unless there is a reserved power for such purpose they cannot be altered or modified against the consent or without the default of the corporation, judicially ascertained and declared. *Miller v. The State*, §§ 2127-32. See § 2197.

§ 2036. But when the power is reserved, either in the charter or by a general law, it may be exercised without conflicting with the provision protecting contracts. *Ibid.*

§ 2037. Such general reserved power will justify the legislature in giving a municipal corporation such an increased representation in the board of control as to permit it to control the corporate affairs. *Ibid.*

§ 2038. Where property has been clothed with a public interest, the legislature may fix a limit to that which shall in law be reasonable for its use. *Peik v. Chicago & N. W. R'y Co.*, §§ 2133-37. See §§ 1847, 1848, 2208.

§ 2039. Until congress acts in the matter, it is within the power of the state legislature to regulate charges on a railroad running into another state, so far as the charges are of a domestic concern. *Ibid.*

§ 2040. By its charter a railroad company was authorized to charge such sums for transportation as it should deem reasonable. The constitution provided that all acts for the creation of corporations might be altered or repealed at any time after their passage. *Held*, that the legislature had the power to fix a maximum rate of charges for fare and freight upon the transportation of persons and property within the state, or taken up outside the state and brought within it, or taken up inside the state and carried without. *Ibid*.

§ 2041. And the legislature retained this power where certain companies in the state consolidated with a company of another state, pursuant to an act which provided that the consolidated company should remain subject to the laws of the state. *Ibid*.

§ 2042. The mere fact that a legislature does not avail itself of its power to regulate the rates of transportation by a corporation, for more than twenty years after incorporating it, does not affect its powers. *Chicago, Burlington & Quincy R. Co. v. Iowa*, §§ 2138-42.

§ 2043. Where a railroad company had the power to establish by-laws and make rules and regulations, etc., subject at all times to such rules and regulations as the legislature might enact and provide, a law of the state dividing the railroads into classes, and fixing maximum rates of charges, does not impair the obligation of the contract. *Ibid*.

§ 2044. Neither does it affect the case that before the power was exercised the company had pledged its income as security for the payment of debts incurred, and had leased its road to a tenant that relied upon the earnings for the means of paying the agreed rent. *Ibid*.

§ 2045. Where the right of a railroad company to establish a schedule of freight and fares within certain limits is subject to legislative control, and the road is consolidated with another road, forming a new company, the new company succeeding to its franchises, it remains subject to the same revisory power. *Tilley v. Savannah, etc., R. Co.*, §§ 2143-57.

§ 2046. Where a railroad was authorized to build its road from some point in a city to be approved by the city council, and the city council afterwards approved a point, but specially reserved all its powers, except such as were necessary to the construction of said road and connecting it with the depot of the company, the city had the power to forbid the said railroad to run any locomotives or trains on the street whereon its road was built. *Railroad Co. v. Richmond*, §§ 2158-60.

§ 2047. The inhibition against laws impairing the obligation of contracts does not interfere with the regulation of the civil institutions of a state. The contracts protected are those that relate to property rights, not governmental. *Stone v. Mississippi*, §§ 2161-64.

§ 2048. A charter to a lottery company may be revoked without impairing the obligation of a contract. Such charter is not a contract, but a mere license. *Ibid*. See § 2215.

§ 2049. Where the charter of a corporation adopts the provisions of an act which reserves the power to repeal, modify, etc., the repeal of this act by an act which reserves the same power does not impair the obligation of a contract. *Beer Co. v. Massachusetts*, §§ 2165-69. See § 2198.

§ 2050. And where the company was chartered for the purpose of manufacturing and selling liquors, the adoption of a prohibitory liquor law does not impair the obligation of a contract. Such an act is authorized under the police power of the state. *Ibid*.

§ 2051. The reservation to the legislature of authority to make any alteration or amendment of a charter authorizes it to make any change which will not defeat or substantially impair the object of the grant or the rights which have vested under it. *Holyoke Co. v. Lyman*, §§ 2170-76. See § 2198.

§ 2052. And where a company is authorized to erect a dam, but is required to pay damages to the owners of fishing rights above the dam, and is not exempted from the duty of maintaining fishways, a law which requires the original or any subsequent owners to maintain fishways does not impair the obligation of the contract. *Ibid*.

§ 2053. By its charter a bank was authorized to receive, retain and dispose of goods, chattels and effects. Under this power it received a note and disposed of it. Before the transfer of the note an act was passed making it unlawful for the bank to transfer any note, and providing that a suit on any note transferred by the bank should abate. *Held*, that this act impaired the obligation of the contract of the state with the bank, as well as that of the maker of the note with the bank. *Planters' Bank v. Sharp*, §§ 2177-87.

§ 2054. In the exercise of the right of eminent domain a state may resume or extinguish a corporate franchise without impairing the obligation of a contract. Thus a toll-bridge, belonging to a corporation, may be taken and laid out as a part of a public highway. *West River Bridge Co. v. Dix*, §§ 2188-90.

§ 2055. A clause in the charter of a corporation, making stockholders personally liable for the debts of the company, cannot be repealed as against debts contracted before the repeal without impairing the obligation of a contract. *Hawthorne v. Calef*, §§ 2191-93. See § 2212.

§ 2056. The articles of association of a corporation, made pursuant to the provisions of the general banking law, provided that the stockholders should not be personally liable for the

debts of the company. One section of the general banking act provided that "the legislature may at any time alter or repeal this act." *Held*, that a constitutional provision, and an act passed to enforce it, by which stockholders were made liable for debts contracted after a certain date in the future, did not impair the obligation of a contract. *Sherman v. Smith*, §§ 2194-96.

§ 2057. A reservation in an act of the power to alter or repeal it is a reservation of a power to alter or repeal all or any one of its terms and conditions. *Ibid.* See §§ 2198, 2220, 2222, 2224, 2239, 2240, 2245.

[NOTES.— See §§ 2197-2217.]

CHARLES RIVER BRIDGE *v.* WARREN BRIDGE.

(11 Peters, 420-650. 1837.)

ERROR to the Supreme Judicial Court of Massachusetts.

Opinion by TANEY, C. J.

STATEMENT OF FACTS.—The questions involved in this case are of the gravest character, and the court have given to them the most anxious and deliberate consideration. The value of the right claimed by the plaintiffs is large in amount; and many persons may no doubt be seriously affected in their pecuniary interests by any decision which the court may pronounce; and the questions which have been raised as to the power of the several states, in relation to the corporations they have chartered, are pregnant with important consequences; not only to the individuals who are concerned in the corporate franchises, but to the communities in which they exist. The court are fully sensible that it is their duty, in exercising the high powers conferred on them by the constitution of the United States, to deal with these great and extensive interests with the utmost caution; guarding, as far as they have the power to do so, the rights of property, and at the same time carefully abstaining from any encroachment on the rights reserved to the states.

It appears from the record that in the year 1650 the legislature of Massachusetts granted to the president of Harvard College the liberty and power to dispose of the ferry from Charlestown to Boston, by lease or otherwise, in the behalf and for the behoof of the college; and that, under that grant, the college continued to hold and keep the ferry by its lessees or agents, and to receive the profits of it until 1785. In the last-mentioned year, a petition was presented to the legislature, by Thomas Russell and others, stating the inconvenience of the transportation by ferries over Charles river, and the public advantages that would result from a bridge; and praying to be incorporated for the purpose of erecting a bridge in the place where the ferry between Boston and Charlestown was then kept. Pursuant to this petition, the legislature, on the 9th of March, 1785, passed an act incorporating a company, by the name of "The Proprietors of the Charles River Bridge," for the purposes mentioned in the petition. Under this charter the company were empowered to erect a bridge, in "the place where the ferry was then kept;" certain tolls were granted, and the charter was limited to forty years from the first opening of the bridge for passengers; and from the time the toll commenced, until the expiration of this term, the company were to pay £200, annually, to Harvard College, and at the expiration of the forty years the bridge was to be the property of the commonwealth; "saving (as the law expresses it) to the said college or university a reasonable annual compensation for the annual income of the ferry which they might have received had not the said bridge been erected."

The bridge was accordingly built, and was opened for passengers on the 17th

of June, 1786. In 1792 the charter was extended to seventy years from the opening of the bridge, and at the expiration of that time it was to belong to the commonwealth. The corporation have regularly paid to the college the annual sum of £200, and have performed all of the duties imposed on them by the terms of their charter. In 1828 the legislature of Massachusetts incorporated a company by the name of "The Proprietors of the Warren Bridge," for the purpose of erecting another bridge over Charles river. This bridge is only sixteen rods, at its commencement on the Charlestown side, from the commencement of the bridge of the plaintiffs; and they are about fifty rods apart at their termination on the Boston side. The travelers who pass over either bridge proceed from Charlestown square, which receives the travel of many great public roads leading from the country; and the passengers and travelers who go to and from Boston used to pass over the Charles River Bridge, from and through this square, before the erection of the Warren Bridge.

The Warren Bridge, by the terms of its charter, was to be surrendered to the state as soon as the expenses of the proprietors in building and supporting it should be reimbursed; but this period was not, in any event, to exceed six years from the time the company commenced receiving toll.

When the original bill in this case was filed, the Warren Bridge had not been built; and the bill was filed after the passage of the law, in order to obtain an injunction to prevent its erection, and for general relief. The bill, among other things, charged, as a ground for relief, that the act for the erection of the Warren Bridge impaired the obligation of the contract between the commonwealth and the proprietors of the Charles River Bridge, and was therefore repugnant to the constitution of the United States. Afterwards a supplemental bill was filed, stating that the bridge had then been so far completed that it had been opened for travel, and that divers persons had passed over, and thus avoided the payment of the toll which would otherwise have been received by the plaintiffs. The answer to the supplemental bill admitted that the bridge had been so far completed that foot passengers could pass, but denied that any persons but the workmen and the superintendents had passed over with their consent. In this state of the pleadings the cause came on for hearing in the supreme judicial court for the county of Suffolk, in the commonwealth of Massachusetts, at November term, 1829, and the court decided that the act incorporating the Warren Bridge did not impair the obligation of the contract with the proprietors of the Charles River Bridge, and dismissed the complainants' bill; and the case is brought here by writ of error from that decision. It is, however, proper to state that it is understood that the state court was equally divided upon the question, and that the decree dismissing the bill upon the ground above stated was pronounced by a majority of the court for the purpose of enabling the complainants to bring the question for decision before this court.

In the argument here it was admitted that since the filing of the supplemental bill a sufficient amount of toll had been received by the proprietors of the Warren Bridge to reimburse all their expenses, and that the bridge is now the property of the state, and has been made a free bridge; and that the value of the franchise granted to the proprietors of the Charles River Bridge has, by this means, been entirely destroyed. If the complainants deemed these facts material, they ought to have been brought before the state court by a supplemental bill, and this court, in pronouncing its judgment, cannot regularly notice them. But in the view which the court take of this subject, these addi-

tional circumstances would not in any degree influence their decision. And as they are conceded to be true, and the case has been argued on that ground, and the controversy has been for a long time depending, and all parties desire a final end of it; and as it is of importance to them that the principles on which this court decide should not be misunderstood, the case will be treated in the opinion now delivered as if these admitted facts were regularly before us. A good deal of evidence has been offered to show the nature and extent of the ferry right granted to the college, and also to show the rights claimed by the proprietors of the bridge at different times, by virtue of their charter, and the opinions entertained by committees of the legislature and others upon that subject. But as these circumstances do not affect the judgment of this court, it is unnecessary to recapitulate them.

The plaintiffs in error insist mainly upon two grounds: 1. That by virtue of the grant of 1650 Harvard College was entitled, in perpetuity, to the right of keeping a ferry between Charlestown and Boston; that this right was exclusive, and that the legislature had not the power to establish another ferry on the same line of travel, because it would infringe the rights of the college; and that these rights, upon the erection of the bridge in the place of the ferry, under the charter of 1785, were transferred to, and became vested, in "the proprietors of the Charles River Bridge;" and that under and by virtue of this transfer of the ferry right the rights of the bridge company were as exclusive in that line of travel as the rights of the ferry. 2. That independently of the ferry right, the acts of the legislature of Massachusetts of 1785 and 1792, by their true construction, necessarily implied that the legislature would not authorize another bridge, and especially a free one, by the side of this and placed in the same line of travel, whereby the franchise granted to the "Proprietors of the Charles River Bridge" should be rendered of no value; and the plaintiffs in error contend that the grant of the ferry to the college, and of the charter to the proprietors of the bridge, are both contracts on the part of the state, and that the law authorizing the erection of the Warren Bridge, in 1828, impairs the obligation of one or both of these contracts.

§ 2058. *A state law may be retrospective and divest vested rights, and yet be constitutional, unless it impairs the obligations of contracts.*

It is very clear that in the form in which this case comes before us, being a writ of error to a state court, the plaintiffs, in claiming under either of these rights, must place themselves on the ground of contract, and cannot support themselves upon the principle that the law divests vested rights. It is well settled by the decisions of this court that a state law may be retrospective in its character, and may divest vested rights, and yet not violate the constitution of the United States, unless it also impairs the obligation of a contract. In 2 Pet., 413, *Satterlee v. Matthewson*, this court, in speaking of the state law then before them, and interpreting the article in the constitution of the United States which forbids the states to pass laws impairing the obligation of contracts, uses the following language: "It (the state law) is said to be retrospective; be it so. But retrospective laws which do not impair the obligation of contracts, or partake of the character of *ex post facto* laws, are not condemned or forbidden by any part of that instrument" (the constitution of the United States). And in another passage in the same case the court say: "The objection, however, most pressed upon the court, and relied upon by the counsel for the plaintiff in error, was that the effect of this act was to divest rights which were vested by law in *Satterlee*. There is certainly no part of the constitution

of the United States which applies to a state law of this description; nor are we aware of any decision of this or of any circuit court which has condemned such a law upon this ground, provided its effect be not to impair the obligation of a contract." The same principles were reaffirmed in this court in the late case of *Watson v. Mercer*, decided in 1834, 8 Pet., 110 (§§ 1849-51, *supra*): "as to the first point (say the court), it is clear that this court has no right to pronounce an act of the state legislature void, as contrary to the constitution of the United States, from the mere fact that it divests antecedent vested rights of property. The constitution of the United States does not prohibit the states from passing retrospective laws generally, but only *ex post facto* laws."

§ 2059. *Exclusive privileges granted to parties to establish a ferry are destroyed if they abandon the ferry and erect a bridge in its place.*

After these solemn decisions of this court it is apparent that the plaintiffs in error cannot sustain themselves here either upon the ferry right or the charter to the bridge, upon the ground that vested rights of property have been divested by the legislature. And whether they claim under the ferry right or the charter to the bridge, they must show that the title which they claim was acquired by contract, and that the terms of that contract have been violated by the charter to the Warren Bridge. In other words, they must show that the state had entered into a contract with them, or those under whom they claim, not to establish a free bridge at the place where the Warren Bridge is erected. Such, and such only, are the principles upon which the plaintiffs in error can claim relief in this case. The nature and extent of the ferry right granted to Harvard College, in 1650, must depend upon the laws of Massachusetts, and the character and extent of this right has been elaborately discussed at the bar. But in the view which the court take of the case before them, it is not necessary to express any opinion on these questions. For assuming that the grant to Harvard College and the charter to the bridge company were both contracts, and that the ferry right was as extensive and exclusive as the plaintiffs contend for, still they cannot enlarge the privileges granted to the bridge, unless it can be shown that the rights of Harvard College in this ferry have, by assignment, or in some other way, been transferred to the proprietors of the Charles River Bridge, and still remain in existence, vested in them, to the same extent with that in which they were held and enjoyed by the college before the bridge was built.

It has been strongly pressed upon the court, by the plaintiffs in error, that these rights are still existing, and are now held by the proprietors of the bridge. If this franchise still exists, there must be somebody possessed of authority to use it, and to keep the ferry. Who could now lawfully set up a ferry where the old one was kept? The bridge was built in the same place, and its abutments occupied the landings of the ferry. The transportation of passengers in boats, from landing to landing, was no longer possible; and the ferry was as effectually destroyed as if a convulsion of nature had made there a passage of dry land. The ferry then, of necessity, ceased to exist as soon as the bridge was erected; and when the ferry itself was destroyed, how can rights which were incident to it be supposed to survive? The exclusive privileges, if they had such, must follow the fate of the ferry, and can have no legal existence without it; and if the ferry right had been assigned by the college in due and legal form, to the proprietors of the bridge, they themselves extinguished that right when they erected the bridge in its place. It is not supposed by any one that the bridge company have a right to keep a ferry. No such right is claimed

for them, nor can be claimed for them, under their charter to erect a bridge; and it is difficult to imagine how ferry rights can be held by a corporation, or an individual, who have no right to keep a ferry. It is clear that the incident must follow the fate of the principal, and the privilege connected with property cannot survive the destruction of the property; and if the ferry right in Harvard College was exclusive, and had been assigned to the proprietors of the bridge, the privilege of exclusion could not remain in the hands of their assignees, if those assignees destroyed the ferry.

§ 2060. *The assignment of the ferry right of the bridge proprietors is not proved.*

But upon what ground can the plaintiffs in error contend that the ferry rights of the college have been transferred to the proprietors of the bridge? If they have been thus transferred, it must be by some mode of transfer known to the law, and the evidence relied on to prove it can be pointed out in the record. How was it transferred? It is not suggested that there ever was, in point of fact, a deed of conveyance executed by the college to the bridge company. Is there any evidence in the record from which such a conveyance may, upon legal principle, be presumed? The testimony before the court, so far from laying the foundation for such a presumption, repels it in the most positive terms. The petition to the legislature, in 1785, on which the charter was granted, does not suggest an assignment, nor any agreement or consent on the part of the college; and the petitioners do not appear to have regarded the wishes of that institution as by any means necessary to insure their success. They place their application entirely on considerations of public interest and public convenience, and the superior advantages of a communication across Charles river by a bridge, instead of a ferry. The legislature, in granting the charter, show by the language of the law that they acted on the principles assumed by the petitioners. The preamble recites that the bridge "will be of great public utility;" and that is the only reason they assign for passing the law which incorporates this company. The validity of the charter is not made to depend on the consent of the college, nor of any assignment or surrender on their part; and the legislature deal with the subject as if it were one exclusively within their own power, and as if the ferry right were not to be transferred to the bridge company, but to be extinguished; and they appear to have acted on the principle that the state, by virtue of its sovereign powers and eminent domain, had a right to take away the franchise of the ferry, because, in their judgment, the public interest and convenience would be better promoted by a bridge in the same place; and upon that principle they proceed to make a pecuniary compensation to the college for the franchise thus taken away; and as there is an express reservation of a continuing pecuniary compensation to the college when the bridge shall become the property of the state, and no provision whatever for the restoration of the ferry right, it is evident that no such right was intended to be reserved or continued. The ferry, with all its privileges, was intended to be forever at an end, and a compensation in money was given in lieu of it. The college acquiesced in this arrangement, and there is proof, in the record, that it was all done with their consent. Can a deed of assignment to the bridge company which would keep alive the ferry rights in their hands be presumed under such circumstances? Do not the petition, the law of incorporation, and the consent of the college to the pecuniary provision made for it in perpetuity, all repel the notion of an assignment of its rights to the bridge company, and prove that every party to this proceeding intended that its fran-

chises, whatever they were, should be resumed by the state, and be no longer held by any individual or corporation? With such evidence before us, there can be no ground for presuming a conveyance to the plaintiffs. There was no reason for such a conveyance. There was every reason against it, and the arrangements proposed by the charter to the bridge could not have been carried into full effect unless the rights of the ferry were entirely extinguished.

It is, however, said that the payment of the £200 a year to the college, as provided for in the law, gives to the proprietors of the bridge an equitable claim to be treated as the assignees of their interest, and by substitution, upon chancery principles, to be clothed with all their rights. The answer to this argument is obvious. This annual sum was intended to be paid out of the proceeds of the tolls which the company were authorized to collect. The amount of the tolls, it must be presumed, was graduated with a view to this incumbrance, as well as to every other expenditure to which the company might be subjected under the provisions of their charter. The tolls were to be collected from the public, and it was intended that the expense of the annuity to Harvard College should be borne by the public, and it is manifest that it was so borne from the amount which it is admitted they received until the Warren Bridge was erected. Their agreement, therefore, to pay that sum can give them no equitable right to be regarded as the assignees of the college, and certainly can furnish no foundation for presuming a conveyance; and as the proprietors of the bridge are neither the legal nor equitable assignees of the college, it is not easy to perceive how the ferry franchise can be invoked in aid of their claims, if it were even still a subsisting privilege and had not been resumed by the state for the purpose of building a bridge in its place.

Neither can the extent of the pre-existing ferry right, whatever it may have been, have any influence upon the construction of the written charter for the bridge. It does not, by any means, follow, that because the legislative power in Massachusetts, in 1650, may have granted to a justly favored seminary of learning the exclusive right of ferry between Boston and Charlestown, they would, in 1785, give the same extensive privilege to another corporation, who were about to erect a bridge in the same place. The fact that such a right was granted to the college cannot, by any sound rule of construction, be used to extend the privileges of the bridge company beyond what the words of the charter naturally and legally import. Increased population, longer experienced in legislation, the different character of the corporations which owned the ferry from that which owned the bridge, might well have induced a change in the policy of the state in this respect, and as the franchise of the ferry, and that of the bridge, are different in their nature, and were each established by separate grants, which have no words to connect the privileges of the one with the privileges of the other, there is no rule of legal interpretation which would authorize the court to associate these grants together, and to infer that any privilege was intended to be given to the bridge company, merely because it had been conferred on the ferry. The charter to the bridge is a written instrument which must speak for itself, and be interpreted by its own terms.

§ 2061. *In charters of incorporation, any ambiguity is construed against the corporation.*

This brings us to the act of the legislature of Massachusetts, of 1785, by which the plaintiffs were incorporated by the name of "The Proprietors of the Charles River Bridge," and it is here and in the law of 1792, prolonging their

charter, that we must look for the extent and nature of the franchise conferred upon the plaintiffs.

Much has been said in the argument of the principles of construction by which this law is to be expounded, and what undertakings, on the part of the state, may be implied. The court think there can be no serious difficulty on that head. It is the grant of certain franchises by the public to a private corporation, and in a matter where the public interest is concerned. The rule of construction in such cases is well settled, both in England, and by the decisions of our own tribunals. In 2 Barn. & Ad., 793, in the case of *Stourbridge Canal v. Wheeley*, the court say: "The canal having been made under an act of parliament, the rights of the plaintiffs are derived entirely from that act. This, like many other cases, is a bargain between a company of adventurers and the public, the terms of which are expressed in the statute, and the rule of construction in all such cases is now fully established to be this: that any ambiguity in the terms of the contract must operate against the adventurers, and in favor of the public, and the plaintiffs can claim nothing that is not clearly given them by the act." And the doctrine thus laid down is abundantly sustained by the authorities referred to in this decision. The case itself was as strong a one as could well be imagined for giving to the canal company, by implication, a right to the tolls they demanded. Their canal had been used by the defendants, to a very considerable extent, in transporting large quantities of coal. The rights of all persons to navigate the canal were expressly secured by the act of parliament, so that the company could not prevent them from using it, and the toll demanded was admitted to be reasonable. Yet, as they only used one of the levels of the canal, and did not pass through the locks; and the statute, in giving the right to exact toll, had given it for articles which passed "through any one or more of the locks," and had said nothing as to toll for navigating one of the levels, the court held that the right to demand toll, in the latter case, could not be implied, and that the company were not entitled to recover it. This was a fair case for an equitable construction of the act of incorporation, and for an implied grant, if such a rule of construction could ever be permitted in a law of that description. For the canal had been made at the expense of the company; the defendants had availed themselves of the fruits of their labors, and used the canal freely and extensively for their own profit. Still, the right to exact toll could not be implied, because such a privilege was not found in the charter.

Borrowing, as we have done, our system of jurisprudence from the English law, and having adopted in every other case, civil and criminal, its rules for the construction of statutes, is there anything in our local situation, or in the nature of our political institutions, which should lead us to depart from the principle where corporations are concerned? Are we to apply to acts of incorporation a rule of construction differing from that of the English law, and, by implication, make the terms of a charter in one of the states more unfavorable to the public than upon an act of parliament, framed in the same words, would be sanctioned in an English court? Can any good reason be assigned for excepting this particular class of cases from the operation of the general principle, and for introducing a new and adverse rule of construction in favor of corporations, while we adopt and adhere to the rules of construction known to the English common law, in every other case, without exception? We think not; and it would present a singular spectacle, if, while the courts in England are restraining within the strictest limits the spirit of monopoly, and exclusive privileges

in nature of monopolies, and confining corporations to the privileges plainly given to them in their charter, the courts of this country should be found enlarging these privileges by implication, and construing a statute more unfavorably to the public and to the rights of the community than would be done in a like case in an English court of justice.

But we are not now left to determine for the first time the rules by which public grants are to be construed in this country. The subject has already been considered in this court, and the rule of construction, above stated, fully established. In the case of the *United States v. Arredondo*, 6 Pet., 738, the leading cases upon this subject are collected together by the learned judge who delivered the opinion of the court, and the principle recognized, that, in grants by the public, nothing passes by implication.

The rule is still more clearly and plainly stated in the case of *Jackson v. Lamphire*, in 3 Pet., 289 (§§ 1845-48, *supra*). That was a grant of land by the state; and in speaking of this doctrine of implied covenants in grants by the state, the court use the following language, which is strikingly applicable to the case at bar: "The only contract made by the state is the grant to John Cornelius, his heirs and assigns, of the land in question. The patent contains no covenant to do or not to do any further act in relation to the land; and we do not feel ourselves at liberty, in this case, to create one by implication. The state has not, by this act, impaired the force of the grant; it does not profess or attempt to take the land from the assigns of Cornelius and give it to one not claiming under him; neither does the award produce that effect; the grant remains in full force; the property conveyed is held by his grantee, and the state asserts no claim to it." The same rule of construction is also stated in the case of *Beatty v. Knowler*, 4 Pet., 166, decided in this court in 1830. In delivering their opinion in that case the court say: "That a corporation is strictly limited to the exercise of those powers which are specifically conferred on it will not be denied. The exercise of the corporate franchise, being restrictive of individual rights, cannot be extended beyond the letter and spirit of the act of incorporation."

But the case most analogous to this, and in which the question came more directly before the court, is the case of *Providence Bank v. Billings*, 4 Pet., 514 (§§ 2321-24, *infra*), and which was decided in 1830. In that case it appeared that the legislature of Rhode Island had chartered the bank in the usual form of such acts of incorporation. The charter contained no stipulation on the part of the state that it would not impose a tax on the bank, nor any reservation of the right to do so. It was silent on this point. Afterwards, a law was passed imposing a tax on all banks in the state; and the right to impose this tax was resisted by the Providence Bank, upon the ground that, if the state could impose a tax, it might tax so heavily as to render the franchise of no value, and destroy the institution; that the charter was a contract, and that a power which may in effect destroy the charter is inconsistent with it, and is impliedly renounced by granting it. But the court said that the taxing power was of vital importance, and essential to the existence of government; and that the relinquishment of such a power is never to be assumed. And in delivering the opinion of the court, the late chief justice states the principle in the following clear and emphatic language. Speaking of the taxing power, he says, "as the whole community is interested in retaining it undiminished, that community has a right to insist that its abandonment ought not to be presumed in a case in which the deliberate purpose of the state to abandon it does not ap-

pear." The case now before the court is, in principle, precisely the same. It is a charter from a state. The act of incorporation is silent in relation to the contested power. The argument in favor of the proprietors of the Charles River Bridge is the same, almost in words, with that used by the Providence Bank; that is, that the power claimed by the state, if it exists, may be so used as to destroy the value of the franchise they have granted to the corporation. The argument must receive the same answer; and the fact that the power has been already exercised so as to destroy the value of the franchise cannot in any degree affect the principle. The existence of the power does not, and cannot, depend upon the circumstance of its having been exercised or not.

It may, perhaps, be said, that in the case of the Providence Bank this court were speaking of the taxing power, which is of vital importance to the very existence of every government. But the object and end of all government is to promote the happiness and prosperity of the community by which it is established; and it can never be assumed that the government intended to diminish its power of accomplishing the end for which it was created. And in a country like ours, free, active and enterprising, continually advancing in numbers and wealth, new channels of communication are daily found necessary, both for travel and trade, and are essential to the comfort, convenience and prosperity of the people. A state ought never to be presumed to surrender this power, because, like the taxing power, the whole community have an interest in preserving it undiminished. And when a corporation alleges that a state has surrendered for seventy years its power of improvement and public accommodation, in a great and important line of travel, along which a vast number of its citizens must daily pass, the community have a right to insist, in the language of this court above quoted, "that its abandonment ought not to be presumed in a case in which the deliberate purpose of the state to abandon it does not appear." The continued existence of a government would be of no great value, if, by implications and presumptions, it was disarmed of the powers necessary to accomplish the ends of its creation, and the functions it was designed to perform transferred to the hands of privileged corporations. The rule of construction announced by the court was not confined to the taxing power, nor is it so limited in the opinion delivered. On the contrary, it was distinctly placed on the ground that the interests of the community were concerned in preserving, undiminished, the power then in question; and whenever any power of the state is said to be surrendered or diminished, whether it be the taxing power or any other affecting the public interest, the same principle applies, and the rule of construction must be the same. No one will question that the interests of the great body of the people of the state would, in this instance, be affected by the surrender of this great line of travel to a single corporation, with the right to exact toll and exclude competition for seventy years. While the rights of private property are sacredly guarded, we must not forget that the community also have rights, and that the happiness and well-being of every citizen depends on their faithful preservation.

§ 2062. *Where there is nothing to the contrary in a bridge charter a competing bridge may be authorized.*

Adopting the rule of construction above stated as the settled one, we proceed to apply it to the charter of 1785, to the proprietors of the Charles River Bridge. This act of incorporation is in the usual form, and the privileges such as are commonly given to corporations of that kind. It confers on them the ordinary faculties of a corporation, for the purpose of building the bridge; and

establishes certain rates of toll, which the company are authorized to take. This is the whole grant. There is no exclusive privilege given to them over the waters of Charles river, above or below their bridge. No right to erect another bridge themselves, nor to prevent other persons from erecting one. No engagement from the state that another shall not be erected; and no undertaking not to sanction competition, nor to make improvements that may diminish the amount of its income. Upon all these subjects the charter is silent; and nothing is said in it about a line of travel, so much insisted on in the argument, in which they are to have exclusive privileges. No words are used from which an intention to grant any of these rights can be inferred. If the plaintiff is entitled to them, it must be implied, simply, from the nature of the grant, and cannot be inferred from the words by which the grant is made.

The relative position of the Warren Bridge has already been described. It does not interrupt the passage over the Charles River Bridge, nor make the way to it or from it less convenient. None of the faculties or franchises granted to that corporation have been revoked by the legislature, and its right to take the tolls granted by the charter remains unaltered. In short, all the franchises and rights of property enumerated in the charter, and there mentioned to have been granted to it, remain unimpaired. But its income is destroyed by the Warren Bridge; which, being free, draws off the passengers and property which would have gone over it, and renders their franchise of no value. This is the gist of the complaint. For it is not pretended that the erection of the Warren Bridge would have done them any injury, or in any degree affected their right of property, if it had not diminished the amount of their tolls. In order, then, to entitle themselves to relief, it is necessary to show that the legislature contracted not to do the act of which they complain, and that they impaired, or, in other words, violated that contract by the erection of the Warren Bridge.

The inquiry then is, does the charter contain such a contract on the part of the state? Is there any such stipulation to be found in that instrument? It must be admitted on all hands that there is none,—no words that even relate to another bridge, or to the diminution of their tolls, or to the line of travel. If a contract on that subject can be gathered from the charter, it must be by implication, and cannot be found in the words used. Can such an agreement be implied? The rule of construction before stated is an answer to the question. In charters of this description, no rights are taken from the public, or given to the corporation, beyond those which the words of the charter, by their natural and proper construction, purport to convey. There are no words which import such a contract as the plaintiffs in error contend for and none can be implied; and the same answer must be given to them that was given by this court to the Providence Bank. 4 Pet., 514 (§§ 2321–24, *infra*). The whole community are interested in this inquiry, and they have a right to require that the power of promoting their comfort and convenience, and of advancing the public prosperity, by providing safe, convenient and cheap ways for the transportation of produce, and the purposes of travel, shall not be construed to have been surrendered or diminished by the state, unless it shall appear by plain words that it was intended to be done.

But the case before the court is even still stronger against any such implied contract as the plaintiffs in error contend for. The Charles River Bridge was completed in 1786. The time limited for the duration of the corporation, by their original charter, expired in 1826. When, therefore, the law passed au-

thorizing the erection of the Warren Bridge, the proprietors of Charles River Bridge held their corporate existence under the law of 1792, which extended their charter for thirty years; and the rights, privileges and franchises of the company must depend upon the construction of the last-mentioned law, taken in connection with the act of 1785. The act of 1792, which extends the charter of this bridge, incorporates another company to build a bridge over Charles river; furnishing another communication with Boston, and distant only between one and two miles from the old bridge.

The first six sections of this act incorporate the proprietors of the West Boston Bridge, and define the privileges, and describe the duties, of that corporation. In the seventh section there is the following recital: "And whereas the erection of Charles River Bridge was a work of hazard and public utility, and another bridge in the place of West Boston Bridge may diminish the emoluments of Charles River Bridge, therefore, for the encouragement of enterprise," they proceed to extend the charter of the Charles River Bridge, and to continue it for the term of seventy years from the day the bridge was completed, subject to the conditions prescribed in the original act, and to be entitled to the same tolls. It appears, then, that by the same act that extended this charter, the legislature established another bridge, which they knew would lessen its profits; and this, too, before the expiration of the first charter, and only seven years after it was granted; thereby showing that the state did not suppose that, by the terms it had used in the first law, it had deprived itself of the power of making such public improvements as might impair the profits of the Charles River Bridge; and from the language used in the clauses of the law by which the charter is extended, it would seem that the legislature were especially careful to exclude any inference that the extension was made upon the ground of compromise with the bridge company, or as a compensation for rights impaired.

On the contrary, words are cautiously employed to exclude that conclusion; and the extension is declared to be granted as a reward for the hazard they had run, and "for the encouragement of enterprise." The extension was given because the company had undertaken and executed a work of doubtful success, and the improvements which the legislature then contemplated might diminish the emoluments they had expected to receive from it. It results from this statement, that the legislature, in the very law extending the charter, asserts its rights to authorize improvements over Charles river which would take off a portion of the travel from this bridge and diminish its profits; and the bridge company accept the renewal thus given, and thus carefully connected with this assertion of the right on the part of the state. Can they, when holding their corporate existence under this law, and deriving their franchises altogether from it, add to the privileges expressed in their charter an implied agreement which is in direct conflict with a portion of the law from which they derive their corporate existence? Can the legislature be presumed to have taken upon themselves an implied obligation, contrary to its own acts and declarations contained in the same law? It would be difficult to find a case justifying such an implication, even between individuals; still less will it be found where sovereign rights are concerned, and where the interests of a whole community would be deeply affected by such an implication. It would, indeed, be a strong exertion of judicial power, acting upon its own views of what justice required and the parties ought to have done, to raise, by a sort of judicial coercion, an implied contract, and infer from it the nature of the very instru-

ment in which the legislature appear to have taken pains to use words which disavow and repudiate any intention, on the part of the state, to make such a contract.

Indeed, the practice and usage of almost every state in the Union, old enough to have commenced the work of internal improvement, is opposed to the doctrine contended for on the part of the plaintiffs in error. Turnpike roads have been made in succession on the same line of travel; the later ones interfering materially with the profits of the first. These corporations have, in some instances, been utterly ruined by the introduction of newer and better modes of transportation and traveling. In some cases, railroads have rendered the turnpike roads on the same line of travel so entirely useless that the franchise of the turnpike corporation is not worth preserving. Yet in none of these cases have the corporation supposed that their privileges were invaded, or any contract violated on the part of the state. Amid the multitude of cases which have occurred, and have been daily occurring for the last forty or fifty years, this is the first instance in which such an implied contract has been contended for, and this court called upon to infer it from an ordinary act of incorporation, containing nothing more than the usual stipulations and provisions to be found in every such law. The absence of any such controversy, when there must have been so many occasions to give rise to it, proves that neither states, nor individuals, nor corporations, ever imagined that such a contract could be implied from such charters. It shows that the men who voted for these laws never imagined that they were forming such a contract; and if we maintain that they have made it, we must create it by a legal fiction, in opposition to the truth of the fact and the obvious intention of the party. We cannot deal thus with the rights reserved to the states, and, by legal intendments and mere technical reasoning, take away from them any portion of that power over their own internal police and improvement which is so necessary to their well-being and prosperity.

And what would be the fruits of this doctrine of implied contracts on the part of the states, and of property in a line of travel by a corporation, if it should now be sanctioned by this court? To what results would it lead us? If it is to be found in the charter to this bridge, the same process of reasoning must discover it in the various acts which have been passed within the last forty years for turnpike companies. And what is to be the extent of the privileges of exclusion on the different sides of the road? The counsel who have so ably argued this case have not attempted to define it by any certain boundaries. How far must the new improvement be distant from the old one? How near may you approach without invading its rights in the privileged line? If this court should establish the principles now contended for, what is to become of the numerous railroads established on the same line of travel with turnpike companies, and which have rendered the franchises of the turnpike corporations of no value? Let it once be understood that such charters carry with them these implied contracts, and give this unknown and undefined property in a line of traveling, and you will soon find the old turnpike corporations awakening from their sleep, and calling upon this court to put down the improvements which have taken their place. The millions of property which have been invested in railroads and canals, upon lines of travel which have been before occupied by turnpike corporations, will be put in jeopardy. We shall be thrown back to the improvements of the last century, and obliged to stand still until the claims of the old turnpike corporations shall be satisfied,

and they shall consent to permit these states to avail themselves of the lights of modern science, and to partake of the benefit of those improvements which are now adding to the wealth and prosperity, and the convenience and comfort, of every other part of the civilized world. Nor is this all. This court will find itself compelled to fix, by some arbitrary rule, the width of this new kind of property in a line of travel; for, if such a right of property exists, we have no lights to guide us in marking out its extent, unless, indeed, we resort to the old feudal grants, and to the exclusive rights of ferries, by prescription, between towns; and are prepared to decide that when a turnpike road from one town to another had been made, no railroad or canal, between these two points, could afterwards be established. This court are not prepared to sanction principles which must lead to such results.

Many other questions of the deepest importance have been raised and elaborately discussed in the argument. It is not necessary, for the decision of this case, to express our opinion upon them; and the court deem it proper to avoid volunteering an opinion on any question involving the construction of the constitution, where the case itself does not bring the question directly before them, and make it their duty to decide upon it. Some questions, also, of a purely technical character, have been made and argued, as to the form of proceeding and the right to relief. But enough appears on the record to bring out the great question in contest; and it is the interest of all parties concerned that the real controversy should be settled without further delay; and as the opinion of the court is pronounced on the main question in dispute here, and disposes of the whole case, it is altogether unnecessary to enter upon the examination of the forms of proceeding in which the parties have brought it before the court.

The judgment of the supreme judicial court of the commonwealth of Massachusetts, dismissing the plaintiffs' bill, must, therefore, be affirmed, with costs.

MR. JUSTICE M'LEAN was of the opinion that the merits were on the side of the claimants, but that the bill ought to be dismissed for want of jurisdiction.

Dissenting opinion by MR. JUSTICE STORY.

This cause was argued at a former term of this court, and having been then held under advisement by the court for a year, was, upon a difference of opinion among the judges, ordered to be again argued; and has accordingly been argued at the present term.

The arguments at the former term were conducted with great learning, research and ability, and have been renewed with equal learning, research and ability at the present term. But the grounds have been, in some respects, varied, and new grounds have been assumed, which require a distinct consideration. I have examined the case with the most anxious care and deliberation, and with all the lights which the researches of the years, intervening between the first and last argument, have enabled me to obtain; and I am free to confess that the opinion which I originally formed, after the first argument, is that which now has my most firm and unhesitating conviction. The argument at the present term, so far from shaking my confidence in it, has at every step served to confirm it. In now delivering the results of that opinion, I shall be compelled to notice the principal arguments urged the other way; and as the topics discussed and the objections raised have assumed various forms, some of which require distinct and others the same answers, it will be unavoidable

that some repetitions should occur in the progress of my own reasoning. My great respect for the counsel who have pressed them, and the importance of the cause, will, I trust, be thought a sufficient apology for the course which I have, with great reluctance, thought it necessary to pursue.

Some of the questions involved in the case are of local law. And here, according to the known principles of this court, we are bound to act upon that local law, however different from or opposite to the jurisprudence of other states it either is, or may be supposed to be. Other questions seem to belong exclusively to the jurisdiction of the state tribunals, as they turn upon a conflict, real or supposed, between the state constitution and the state laws. The only question over which this court possesses jurisdiction in this case (it being an appeal from a state court and not from the circuit court) is, as has been stated at the bar, whether the obligation of any contract, within the true intent and meaning of the constitution of the United States, has been violated, as set forth in the bill. All the other points argued are before us only as they are preliminaries and incidents to this.

§ 2063. *Appellate jurisdiction of the supreme court.*

A question has, however, been made as to the jurisdiction of this court to entertain the present writ of error. It has been argued that this bridge has now become a free bridge, and is the property of the state of Massachusetts; that the state cannot be made a party defendant to any suit to try its title to the bridge; and that there is no difference between a suit against the state directly, and against the state indirectly, through its servants and agents. And in further illustration of this argument, it is said that no tolls can be claimed in this case under the notion of an implied trust; for the state court has no jurisdiction in equity over implied trusts, but only over express trusts; and, if this court has no jurisdiction over the principal subject-matter of the suit, the title to the bridge, it can have none over the tolls, which are but incidents.

§ 2064. *The constitutional inhibition of suits against states applies only where a state is a party to the record.*

My answer to this objection will be brief. In the first place, this is a writ of error from a state court, under the twenty-fifth section of the judiciary act of 1789, ch. 20 (1 Stats. at Large, 85); and in such a case, if there is drawn in question the construction of any clause of the constitution of the United States, and the decision of the state court is against the right or title set up under it, this court has a right to entertain the suit, and decide the question, whoever may be the parties to the original suit, whether private persons or the state itself. This was decided in the case of *Cohens v. Virginia*, 6 Wheat., 264. In the next place, the state of Massachusetts is not a party on the record in this suit, and therefore the constitutional prohibition of commencing any suit against a state does not apply; for that clause of the constitution is strictly confined to the parties on the record. So it was held in *Osborn v. Bank of United States*, 9 Wheat., 738 (§§ 2363-87, *infra*); and in the *Commonwealth Bank of Kentucky v. Wister*, 2 Pet., 319, 323. In the next place, it is no objection to the jurisdiction, even of the circuit courts of the United States, that the defendant is a servant or agent of the state, and the act complained of is done under its authority, if it be tortious and unconstitutional. So it was held in the cases last cited. In the next place, this court, as an appellate court, has nothing to do with ascertaining the nature or extent of the jurisdiction of the state court over any persons or parties or subject-matters given by the state laws, or as to the mode of exercising the same, except so far as respects

the very question arising under the twenty-fifth section of the act of 1789, c. 20.

There are but few facts in this case which admit of any controversy. The legislature of Massachusetts, by an act passed on the 9th of March, 1785, incorporated certain persons by the name of the Proprietors of the Charles River Bridge, for the purpose of building a bridge over Charles river, between Boston and Charlestown, and granted to them the exclusive toll thereof for forty years from the time of the first opening of the bridge for passengers. The bridge was built and opened for passengers in June, 1786. In March, 1792, another corporation was created by the legislature for the purpose of building a bridge over Charles river, from the westerly part of Boston to Cambridge; and on that occasion the legislature, taking into consideration the probable diminution of the profits of the Charles River Bridge, extended the grant of the proprietors of the latter bridge to seventy years from the first opening of it for passengers. The proprietors have, under these grants, ever since continued to possess and enjoy the emoluments arising from the tolls taken for travel over the bridge; and it has proved a very profitable concern.

In March, 1828, the legislature created a corporation, called the Proprietors of the Warren Bridge, for the purpose of erecting another bridge across Charles river, between Boston and Charlestown. The *termini* of the last bridge (which has been since erected, and was, at the commencement of this suit, in the full receipt of toll, and is now a free bridge) are so very near to that of Charles River Bridge that, for all practical purposes, they may be taken to be identical. The same travel is accommodated by each bridge, and necessarily approaches to a point, before it reaches either, which is nearly equidistant from each. In short, it is impossible, in a practical view, and so was admitted at the argument, to distinguish this case from one where the bridges are contiguous from the beginning to the end.

The present bill is filed by the proprietors of Charles River Bridge against the proprietors of Warren Bridge, for an injunction and other relief founded upon the allegation that the erection of the Warren Bridge, under the circumstances, is a violation of their chartered rights, and so is void by the constitution of Massachusetts and by the constitution of the United States. The judges of the supreme judicial court of Massachusetts were, as is well known, equally divided in opinion upon the main points in the cause; and, therefore, a *pro forma* decree was entered, with a view to bring before this court the great and grave question whether the legislature of Massachusetts, in the grant of the charter of the Warren Bridge, has violated the obligation of the constitution of the United States. If the legislature has done so, by mistake or inadvertence, I am quite sure that it will be the last to insist upon maintaining its own act. It has that stake in the Union, and in the maintenance of the constitutional rights of its own citizens, which will, I trust, ever be found paramount to all local interests, feelings and prejudices, to the pride of power and to the pride of opinion.

In order to come to any just conclusion in regard to the only question which this court, sitting as an appellate court, has a right to entertain upon a writ of error to a state court, it will be necessary to ascertain what are the rights conferred on the proprietors of Charles River Bridge by the act of incorporation. The act is certainly not drawn with any commendable accuracy. But it is difficult, upon any principles of common reasoning, to mistake its real purport and object. It is entitled, "An act for incorporating certain persons, for the

purpose of building a bridge over Charles river between Boston and Charlestown, and supporting the same during the term of forty years." Yet it nowhere, in terms, in any of the enacting clauses, confers any authority upon the corporation, thus created, to build any such bridge; nor does it state in what particular place the bridge shall commence or terminate on either side of the river, except by inference and implication from the preamble. I mention this at the threshold of the present inquiry, as an irresistible proof that the court must, in the construction of this very act of incorporation, resort to the common principles of interpretation, and imply and presume things which the legislature has not expressly declared. If the court were not at liberty so to do, there would be an end of the cause.

The act begins by reciting that "the erecting of a bridge over Charles river, in a place where the ferry between Boston and Charlestown is now kept, will be of great public utility, and Thomas Russell and others having petitioned, etc., for the act of incorporation to empower them to build said bridge, and many other persons, under the expectation of such an act, have subscribed to a fund for executing and completing the aforesaid purpose." It then proceeds to enact that the proprietors of the fund or stock shall be a corporation under the name of the Proprietors of Charles River Bridge; and it gives them the usual powers of corporations, such as the power to sue and be sued, etc. In the next section it provides for the organization of the corporation, for choosing officers; for establishing rules and regulations for the corporation; and for effecting, completing and executing the purpose aforesaid. In the next section, "for the purpose of reimbursing the said proprietors the money expended in building and supporting the said bridge," it provides that a toll be, and thereby is, granted and established, for the sole benefit of the proprietors, for forty years from the opening of the bridge for travel, according to certain specified rates. In the next section it provides that the bridge shall be well built, at least forty feet wide, of sound and suitable materials, with a convenient draw or passageway for ships and vessels, etc.; and "that the same shall be kept in good, safe and passable repair for the term aforesaid, and, at the end of the said term, the said bridge shall be left in like repair." Certain other provisions are also made, as to lighting the bridge, erecting a toll-board, lifting the draw for all ships and vessels, without toll or pay, etc., etc. The next section declares that, after the tolls shall commence, the proprietors "shall annually pay to Harvard College, or University, the sum of £200 during the said term of forty years; and, at the end of the said term, the said bridge shall revert to, and be the property of, the commonwealth, saving to the said college or university a reasonable and annual compensation for the annual income of the ferry, which they might have received had not such bridge been erected." The next and last section of the act declares the act void unless the bridge should be built within three years from the passing of the act.

Such is the substance of the charter of incorporation which the court is called upon to construe. But before we can properly enter upon the consideration of this subject, a preliminary inquiry is presented as to the proper rules of interpretation applicable to the charter. Is the charter to receive a strict or liberal construction? Are any implications to be made, beyond the express terms? And if so, to what extent are they justifiable by the principles of law? No one doubts that the charter is a contract and a grant; and that it is to receive such a construction as belongs to contracts and grants, as contradistinguished from mere laws. But the argument has been pressed here with

unwonted earnestness, and it seems to have had an irresistible influence elsewhere, that this charter is to be construed as a royal grant, and that such grants are always construed with a stern and parsimonious strictness. Indeed, it seems tacitly conceded that, unless such a strict construction is to prevail (and it is insisted on as the positive dictate of common law), there is infinite danger to the defense assumed on behalf of the Warren Bridge proprietors. Under such circumstances, I feel myself constrained to go at large into the doctrine of the common law in respect to royal grants, because I cannot help thinking that, upon this point, very great errors of opinion have crept into the argument. A single insulated position seems to have been taken as a general axiom. In my own view of the case, I should not have attached so much importance to the inquiry. But it is now fit that it should be sifted to the bottom.

§ 2065. *Construction of grants. Grants by the king.*

It is a well-known rule in the construction of private grants, if the meaning of the words be doubtful, to construe them most strongly against the grantor. But it is said that an opposite rule prevails in cases of grants by the king; for where there is any doubt, the construction is made most favorably for the king and against the grantee. The rule is not disputed. But it is a rule of very limited application. To what cases does it apply? To such cases only where there is a real doubt; where the grant admits of two interpretations, one of which is more extensive, and the other more restricted; so that a choice is fairly open, and either may be adopted without any violation of the apparent objects of the grant. If the king's grant admits of two interpretations, one of which will make it utterly void and worthless, and the other will give it a reasonable effect, then the latter is to prevail, for the reason (says the common law) "that it will be more for the benefit of the subject, and the honor of the king, which is to be more regarded than his profit." Com. Dig., Grant, G. 12; 9 Co. R., 131, a; 10 Co. R., 67, b; 6 Co. R., 6. And in every case the rule is made to bend to the real justice and integrity of the case. No strained or extravagant construction is to be made in favor of the king. And if the intention of the grant is obvious, a fair and liberal interpretation of its terms is enforced. The rule itself is also expressly dispensed with in all cases where the grant appears upon its face to flow, not from the solicitation of the subject, but from the special grace, certain knowledge and mere motion of the crown, or as it stands in the old royal patents, *ex speciali gratiâ, certâ scientiâ et ex mero motu regis* (see Arthur Legate's Case, 10 Co. R., 109, 112, b; Sir John Molyn's Case, 6 Co. R., 5; 2 Black. Comm., 347; Com. Dig., Grant, G. 12); and these words are accordingly inserted in most of the modern grants of the crown, in order to exclude any narrow construction of them. So the court admitted the doctrine to be in *Attorney-General v. Lord Eardly*, 8 Price, 69. But what is a most important qualification of the rule, it never did apply to grants made for a valuable consideration by the crown; for, in such grants, the same rule has always prevailed as in cases between subjects. The mere grant of a bounty of the king may properly be restricted to its obvious intent. But the contracts of the king for value are liberally expounded, that the dignity and justice of the government may never be jeopardized by petty evasions and technical subtleties.

I shall not go over all the cases in the books which recognize these principles, although they are abundant. Many of them will be found collected in Bacon's Abridgment, Prerogative, F. 2, pp. 602 to 604; in Comyn's Digest,

Grant, G. 12; and in Chitty on the Prerogatives of the Crown, c. 16, § 3. But I shall dwell on some of the more prominent, and especially on those which have been mainly relied on by the defendants, because, in my humble judgment, they teach a very different doctrine from what has been insisted on. Lord Coke, in his Commentary on the Statute of Quo Warranto, 18 Edw. I., makes this notable remark: "Here is an excellent rule for construction of the king's patents, not only of liberties, but of lands, tenements and other things, which he may lawfully grant, that they have no strict or narrow interpretation for the overthrowing of them, *sed secundum earundum plenitudinem judicentur*; that is, to have a liberal and favorable construction for the making them available in law, *usque ad plenitudinem*, for the honor of the king." Surely, no lawyer would contend for a more beneficent or more broad exposition of any grant whatsoever than this.

So, in respect to implications in cases of royal grants, there is not the slightest difficulty, either upon authority or principle, in giving them a large effect, so as to include things which are capable of being the subject of a distinct grant. A very remarkable instance of this sort arose under the Statute of Prerogative, 17 Edw. II., Stat. 2, c. 15, which declared that when the king granteth to any a manor or land, with the appurtenances, unless he makes express mention in the deed, in writing, of advowsons, etc., belonging to such manor, then the king reserveth to himself such advowsons. Here the statute itself prescribed a strict rule of interpretation. *S. P. in Attorney-General v. Sitwell*, 1 Younge's Rep., 583. Yet in *Whistler's Case*, 10 Co. R., 63, it was held that a royal grant of a manor, with the appurtenances, in as ample a manner as it came to the king's hands, conveyed an advowson, which was appendant to the manor, by implication from the words actually used, and the apparent intent. This was certainly a very strong case of raising an implication from words susceptible of different interpretations, where the statute had furnished a positive rule for a narrow construction, excluding the advowson. So it has been decided that if the king grants a messuage, and all lands *spectantes, aut cum eo dismissas*, lands which have been enjoyed with it for a convenient time, pass. 2 Rolle's Abridg., 186, C. 25, 30; Cro. Car., 169; Chitty on the Prerogatives, c. 16, § 3, p. 393; Com. Dig., Grant, G. 5. In short, wherever the intent from the words is clear, or possesses a reasonable certainty, the same construction prevails in crown grants as in private grants, especially where the grant is presumed to be from the voluntary bounty of the crown, and not from the representation of the subject.

It has been supposed in the argument that there is a distinction between grants of lands held by the king, and grants of franchises which are matters of prerogative, and held by the crown for the benefit of the public, as flowers of prerogative. I know of no such distinction; and Lord Coke, in the passage already cited, expressly excludes it, for he insists that the same liberal rule of interpretation is to be applied to cases of grants of liberties as to cases of grants of lands.

I am aware that Mr. Justice Blackstone, in his Commentaries, 2 Black. Com., 347, has laid down some rules apparently varying from what has been stated. He says: "The manner of granting by the king does not more differ from that by a subject than the construction of his grants when made. 1. A grant made by the king at the suit of the grantee shall be taken most beneficially for the king, and against the party; whereas the grant of a subject is construed most strongly against the grantor, etc. 2. A subject's grant shall be

construed to include many things besides what are expressed, if necessary for the operation of the grant. Therefore, in a private grant of the profits of land for one year, free ingress, egress and regress, to cut and carry away those profits, are also inclusively granted, etc. But the king's grant shall not inure to any other intent than that which is precisely expressed in the grant. As if he grants land to an alien, it operates nothing; for such a grant shall not inure to make him a denizen, that so he may be capable to take by the grant." Now, in relation to the last position, there is nothing strange or unnatural in holding that a crown grant shall not inure to a totally different purpose from that which is expressed, or to a double intent, when all its terms are satisfied by a single intent. It is one thing to grant land to an alien, and quite a different thing to make him a denizen. The one is not an incident to the other, nor does it naturally flow from it. The king may be willing to grant land to an alien when he may not be willing to give him all the privileges of a subject. It is well known that an alien may take land by grant, and may hold it against every person but the king, and it does not go to the latter until office found; so that in the mean time an alienation by the alien will be good. A grant, therefore, to an alien is not utterly void. It takes effect, though it is not indefeasible. And, in this respect, there does not seem any difference between a grant by a private person and by the crown; for the grant of the latter takes effect, though it is liable to be defeated. See Com. Dig., Alien, C. 4; 1 Leon., 47; 4 Leon., 82. The question in such cases is not whether there may not be implications in a crown grant, but whether a totally different effect shall be given to a crown grant from what its terms purport. The same principle was acted upon in *Englefield's Case*, 7 Coke R., 14, a. There the crown had demised certain lands which were forfeited by a tenant for life by attainder, to certain persons for forty years; and the crown being entitled to a condition which would defeat the remainder over after the death of the person attainted, tendered performance of the condition to the remainder-man, who was a stranger to the demise, and he contended that by the demise the condition was suspended. And it was held that the demise should not operate to a double intent, namely, to pass the term, and also, in favor of a stranger, to suspend the condition; for (it was said) "the grant of the crown shall be taken according to the express intention comprehended in the grant, and shall not extend to any other thing by construction or implication which doth not appear by the grant that the intent did extend to," though it might have been different in the case of a subject.

In regard to the other position of Mr. Justice Blackstone, it may be supposed that he means to assert that in a crown grant of the profits of land for a year, free ingress, egress and regress, to take the profits, are not included by implication, as they would be in a subject's grant. If such be his meaning, he is certainly under a mistake. The same construction would be put upon each; for otherwise nothing would pass by the grant. It is a principle of common sense, as well as of law, that, when a thing is granted, whatever is necessary to its enjoyment is granted also. It is not presumed that the king means to make a void grant; and, therefore, if it admits of two constructions, that shall be followed which will secure its validity and operation. In *Comyn's Digest*, Com. Dig., Grant, E., 11 Co. Litt., 56 a, a case is cited from the *Year Book*, 1 Hen. 4, 5 (it should be 6, a), that if there be a grant of land, *cum pertinentiis*, to which common is appendant, the common passes as an incident, even though it be the grant of the king. So, it is said in the same case, if the king grant

to me the foundation of an abbey, the corody passes. So, if the king grant to me a fair, I shall have a court of Piepoudre as incident thereto. And there are other cases in the books to the same effect. See Bac. Abridg., Prerogative, F. 2, p. 602; Comyn's Dig., Grant, G. 12; Lord Chandos' Case, 6 Co. R., 55; Sir Robert Atkyn's Case, 1 Vent., 399, 409; 9 Co. R., 29, 30. Finch, in his treatise on the law, contains nothing beyond the common authorities. Finch's Law, b. 2, c. 2, p. 24, edit. 1163; Cro. Eliz., 591; Per Popham, C. J., 17 Vin. Abridg., Prerogative, O., c. pl. 13; Com. Dig., Franchise, C. 2; Inst., 282.

Lord Coke, after stating the decision of Sir John Molyn's Case, 6 Co. R., 6, adds these words: "Note the gravity of the ancient sages of the law to construe the king's grants beneficially for his honor, and not to make any strict or literal construction in subversion of such grants." This is an admonition, in my humble judgment, very fit to be remembered and acted upon by all judges who are called upon to interpose between the government and the citizen in cases of public grants. Legat's Case, 10 Co. R., 109, contains nothing that in the slightest degree impugns the general doctrine here contended for. It proceeded upon a plain interpretation of the very words of the grant; and no implications were necessary, or proper, to give it its full effect.

The case of the Royal Fishery of the Banne, decided in Ireland, in the privy council in 8th James I., Davies' Rep., 149, has been much relied on to establish the point that the king's grant shall pass nothing by implication. That case, upon its actual circumstances, justifies no such sweeping conclusion. The king was owner of a royal fishery in gross (which is material), on the River Banne, in navigable waters, where the tide ebbed and flowed, about two leagues from the sea; and he granted to Sir R. M'D. the territory of Rout, which is parcel of the county of Antrim, and adjoining to the River Banne, in that part where the said fishery is; the grant containing the following words: "*Omnia castra, messuagia, etc., etc., piscarias, piscationes, aquas, aquarum cursus, etc., ac omnia alia hereditamenta in vel infra dictum territorium de Rout, in comitatu Antrim, exceptis, et ex hac concessione nobis heredibus et successoribus nostris reservatis tribus partibus piscationibus fluminis de Banne.*" The question was, whether the grant passed the royal fishery in the Banne to the grantee. And it was held that it did not; first, because the River Banne, so far as the sea ebbs and flows, is a royal navigable river, and the fishery there a royal fishery; secondly, because no part of this royal fishery could pass by the grant of the land adjoining, and by the general grant of all the fisheries [in or within the territory of Rout]; for this royal fishery is not appurtenant to the land, but is a fishery in gross, and parcel of the inheritance of the crown itself; and general words in the king's grant shall not pass such special royalty, which belongs to the crown by prerogative; thirdly, that by the exception in the grant of three parts of this fishery, the other fourth part of this fishery did not pass by this grant, for the king's grant shall pass nothing by implication; and for this was cited 2 Hen. 7, 13.

Now, there is nothing in this case which is not easily explicable upon the common principles of interpretation. The fishery was a royal fishery in gross, and not appurtenant to the territory of Rout. Ward v. Cresswell, Willes, 265. The terms of the grant were of all fisheries in and within this territory; and this excluded any fishery not within it, or not appurtenant to it. The premises, then, clearly did not, upon any just construction, convey the fishery in question, for it was not within the territory. The only remaining question was whether the exception of three quarters would, by implication, carry the

fourth part which was not excepted; that is, whether terms of exception in a crown grant should be construed to be terms of grant and not of exception. It is certainly no harsh application of the common rules of interpretation to hold that an implication which required such a change in the natural meaning of the words ought not to be allowed to the prejudice of the crown. *Non constat*, that the king might not have supposed, at the time of the grant, that he was owner of three parts only of the fishery, and not of the fourth part. This case of the fishery of the Banne was cited and commented on by Mr. Justice Bayley, in delivering the opinion of the court in the case of the Duke of Somerset v. Fogwell, 5 Barn. & Cress., 875 and 885, and the same view was taken of the grounds of the decision which has been here stated; the learned judge adding, that it was further agreed in that case, that the grant of the king passes nothing by implication, by which he must be understood to mean nothing which its terms do not, fairly and reasonably construed, embrace as a portion of or incident to the subject-matter of the grant.

As to the case cited from 2 Hen. VII., 13 (which was the sole authority relied on), it turned upon a very different principle. There the king, by letters-patent, granted to a man that he might give twenty marks annual rent to a certain chaplain to pray for souls, etc.; and the question was, whether the grant was not void for uncertainty, as no chaplain was named. And the principal stress of the argument seems to have been, whether this license should be construed to create, or enable the grantee to create, a corporation capable of taking the rent. In the argument, it was asserted that the king's grants should not be construed, by implication, to create a corporation, or to inure to a double intent. In point of fact, however, I find (*Chronica Juridicialia*, p. 141) that neither of the persons whose opinions are stated in the case was a judge at the time of the argument, nor does it appear what the decision was; so that the whole report is but the argument of counsel. The same case is fully reported by Lord Coke, in the case of Sutton's Hospital, 10 Co. Rep., 27, 28, who says that he had seen the original record, and who gives the opinions of the judges at large, by which it appears that the grant was held valid. And so says Lord Coke: "Note, reader, this grant of the king inures to these intents, namely, to make an incorporation; to make a succession; and to grant a rent." So that here we have a case, not only of a royal grant being construed liberally, but divers implications being made not at all founded in the express terms of the grant. The reason of which was (as Lord Coke says), because the king's charter, made for the erection of pious and charitable works, shall be always taken in the most favorable and beneficial sense. This case was recognized by the judges as sound law in the case of Sutton's Hospital. And it was clearly admitted by the judges, that, in a charter of incorporation by the crown, all the incidents to a corporation were tacitly annexed, although not named; as the right to sue and be sued; to purchase, hold, and alien lands; to make by-laws, etc. And if power is expressly given to purchase, but no clause to alien, the latter follows by implication, as an incident. Comyn's Dig., Franchise, F. 6, F. 10, F. 15. It is very difficult to affirm, in the teeth of such authorities, that in the king's grants nothing is to be taken by implication, as is gravely asserted in the case in Davies' Reports, 149. The case cited to support it is directly against it. In truth, it is obvious that the learned judges mistook the mere arguments of counsel for the solemn opinions of the court. And the case, as decided, is a direct authority the other way.

The case of *Blankley v. Winstanley*, 3 Term R., 279, has also been relied on

for the same purpose. But it has nothing to do with the point. The court there held, that by the saving in the very body of the charter, the concurrent jurisdiction of the county magistrates was preserved. There was nothing said by the court in respect to the implications in crown grants. The whole argument turned upon the meaning of the express clauses. Much reliance has also been placed upon the language of Lord Stowell in *The Elsebe*, 5 Rob., 173. The main question in that case was whether the crown had a right to release captured property before adjudication, without the consent of the captors. That question depended upon the effect of the king's orders in council, his proclamation and the parliamentary prize act, for, independently of these acts, it was clear that all captured property, *jure belli*, belonged to the crown, and was subject to its sole disposal. Lord Stowell, whose eminent qualifications as a judge entitle him to great reverence, on that occasion said: "A general presumption arising from these considerations is, that government does not mean to divest itself of this universal attribute of sovereignty conferred for such purposes (to be used for peace as well as war), unless it is so clearly and unequivocally expressed. In conjunction with this universal presumption must be taken, also, the wise policy of our own peculiar law, which interprets the grants of the crown in this respect by other rules than those which are applicable in the construction of the grants of individuals. Against an individual it is presumed that he meant to convey a benefit with the utmost liberality that his words will bear. It is indifferent to the public in which person an interest remains, whether in the grantor or the taker. With regard to the grant of the sovereign, it is far otherwise. It is not held by the sovereign himself as private property, and no alienation shall be presumed, except what is clearly and indisputably expressed." Now, the right of the captors in that case was given by the words of the king's order in council only. It was a right to seize and bring in for adjudication. The right to seize then was given, and the duty to bring in for adjudication was imposed. If nothing more had existed, it would be clear that the crown would have the general property in the captures. Then, again, the prize act and prize proclamation gave to the captors a right in the property after adjudication, as lawful prize, and not before. This very limitation naturally implied that until adjudication they had no right in the property. And this is the ground upon which Lord Stowell placed his judgment, as the clear result of a reasonable interpretation of these acts, declining to rely on any reasoning from considerations of public policy. And it is to be considered that Lord Stowell was not speaking of an ordinary grant of land, or of franchises, in the common course of mere municipal regulations; but of sovereign attributes and prerogatives, involving the great rights and duties of war and peace, where, upon every motive of public policy, and every ground of rational interpretation, there might be great hesitation in extending the terms of a grant beyond their fair interpretation.

But what, I repeat, is most material to be stated, is, that all this doctrine in relation to the king's prerogative of having a construction in his own favor is exclusively confined to cases of mere donation, flowing from the bounty of the crown. Whenever the grant is upon a valuable consideration, the rule of construction ceases; and the grant is expounded exactly as it would be in the case of a private grant, favorably to the grantee. Why is this rule adopted? Plainly, because the grant is a contract, and is to be interpreted according to its fair meaning. It would be to the dishonor of the government that it should pocket a fair consideration, and then quibble as to the obscurities and

implications of its own contract. Such was the doctrine of my Lord Coke, and of the venerable sages of the law in other times, when a resistance to prerogative was equivalent to a removal from office. Even in the worst ages of arbitrary power, and irresistible prerogative, they did not hesitate to declare that contracts founded in a valuable consideration ought to be construed liberally for the subject for the honor of the crown. 2 Co. Inst., 496. See, also, Com. Dig., Franchise, C. F. 6. If we are to have the grants of the legislature construed by the rules applicable to royal grants, it is but common justice to follow them throughout for the honor of this republic. The justice of the commonwealth will not (I trust) be deemed less extensive than that of the crown.

I think that I have demonstrated, upon authority, that it is by no means true that implications may not, and ought not, to be admitted in regard to crown grants. And I would conclude what I have to say on this head by a remark made by the late Mr. Chief Justice Parsons, a lawyer equally remarkable for his extraordinary genius and his professional learning. "In England, prerogative is the cause of one against the whole. Here, it is the cause of all against one. In the first case the feelings and vices, as well as the virtues, are enlisted against it; in the last in favor of it. And, therefore, here, it is of more importance that the judicial courts should take care that the claim of prerogative should be more strictly watched." *Martin v. Commonwealth*, 1 Mass., 356.

If, then, the present were the case of a royal grant, I should most strenuously contend, both upon principle and authority, that it was to receive a liberal and not a strict construction. I should so contend upon the plain intent of the charter, from its nature and objects, and from its burdens and duties. It is confessedly a case of contract and not of bounty; a case of contract for a valuable consideration; for objects of public utility; to encourage enterprise; to advance the public convenience; and to secure a just remuneration for large outlays of private capital. What is there in such a grant of the crown which should demand from any court of justice a narrow and strict interpretation of its terms? Where is the authority which contains such a doctrine, or justifies such a conclusion? Let it not be assumed, and then reasoned from, as an undisputed concession. If the common law carries in its bosom such a principle, it can be shown by some authorities, which ought to bind the judgment, even if they do not convince the understanding. In all my researches I have not been able to find any whose reach does not fall far, very far, short of establishing any such doctrine. Prerogative has never been wanting in pushing forward its own claims for indulgence or exemption. But it has never yet, as far as I know, pushed them to this extravagance.

§ 2066. *In construing a legislative grant the intent of the legislature should be sought.*

I stand upon the old law; upon law established more than three centuries ago, in cases contested with as much ability and learning as any in the annals of our jurisprudence, in resisting any such encroachments upon the rights and liberties of the citizens, secured by public grants. I will not consent to shake their title-deeds by any speculative niceties or novelties. The present, however, is not the case of a royal grant, but of a legislative grant by a public statute. The rules of the common law in relation to royal grants have, therefore, in reality, nothing to do with the case. We are to give this act of incorporation a rational and fair construction, according to the general rules which govern in all cases of the exposition of public statutes. We are to ascertain the legislative intent; and that once ascertained, it is our duty to give it a full and liberal

operation. The books are full of cases to this effect (see Com. Dig., Parliament, R. 10 to R. 28; Bac. Abridg., Statute); if, indeed, so plain a principle of common sense and common justice stood in any need of authority to support it. Lord Chief Justice Eyre, in the case of *Bolton v. Bull*, 2 H. Bla., 463, 500, took notice of the distinction between the construction of a crown grant and a grant by an act of parliament; and held the rules of the common law, introduced for the protection of the crown in respect to its own grants, to be inapplicable to a grant by an act of parliament. "It is to be observed," said his lordship, "that there is nothing technical in the composition of an act of parliament. In the exposition of statutes, the intent of parliament is the guide. It is expressly laid down in our books (I do not here speak of penal statutes) that every statute ought to be expounded, not according to the letter, but the intent." Again, he said, "This case was compared to the case of the king being deceived in his grants. But I am not satisfied that the king, proceeding by and with the advice of parliament, is in that situation, in respect to which he is under the special protection of the law; and that he could on that ground be considered as deceived in his grant. No case was cited to prove that position."

Now, it is to be remembered that his lordship was speaking upon the construction of an act of parliament of a private nature; an act of parliament in the nature of a monopoly; an act of parliament granting an exclusive patent for an invention to the celebrated Mr. Watt. And let it be added, that his opinion as to the validity of that grant, notwithstanding all the obscurities of the act, was ultimately sustained in the king's bench by a definitive judgment in its favor. See *Hornblower v. Boulton*, 8 Term R., 95. A doctrine equally just and liberal has been repeatedly recognized by the supreme court of Massachusetts. In the case of *Richards v. Daggett*, 4 Mass., 534, 537, Mr. Chief Justice Parsons, in delivering the opinion of the court, said: "It is always to be presumed that the legislature intend the most beneficial construction of their acts, when the design of them is not apparent." See, also, *Inhabitants of Somerset v. Inhabitants of Dighton*, 12 Mass., 383; *Whitney v. Whitney*, 14 Mass., 88; 8 Mass., 523; *Holbrook v. Holbrook*, 1 Pick., 248; *Stanwood v. Peirce*, 7 Mass., 458. Even in relation to mere private statutes, made for the accommodation of particular citizens, and which may affect the rights and privileges of others, courts of law will give them a large construction if it arise from necessary implication. *Coolidge v. Williams*, 4 Mass., 145.

§ 2067. *Grants by the state for the erection of bridges, etc., are to be construed as contracts, and not mere laws.*

As to the manner of construing parliamentary grants for private enterprise, there are some recent decisions, which, in my judgment, establish two very important principles applicable directly to the present case; which, if not confirmatory of the views which I have endeavored to maintain, are at least not repugnant to them. The first is, that all grants for purposes of this sort are to be construed as contracts between the government and the grantees, and not as mere laws; the second is, that they are to receive a reasonable construction; and that if either upon their express terms, or by just inference from the terms, the intent of the contract can be made out, it is to be recognized and enforced accordingly. But if the language be ambiguous, or if the inference be not clearly made out, then the contract is to be taken most strongly against the grantor, and most favorably for the public. The first case is *Leeds & Liverpool Canal v. Hustler*, 1 Barn. & Cress., 424, where the question was upon the

terms of the charter granting a toll. The toll was payable on empty boats passing a lock of the canal. The court said: "No toll was expressly imposed upon empty boats, etc., and we are called upon to say that such a toll was imposed by inference. Those who seek to impose a burden upon the public should take care that their claim rests upon plain and unambiguous language. Here the claim is by no means clear." The next case was the *Kingston-upon-Hull Dock Company v. La Marche*, 8 Barn. & Cress., 42, where the question was as to a right to wharfage of goods shipped off from their quays. Lord Tenterden, in delivering the judgment of the court in the negative, said: "This was clearly a bargain made between a company of adventurers and the public; and, as in many similar cases, the terms of the bargain are contained in the act, and the plaintiffs can claim nothing which is not clearly given." The next case is *Stourbridge Canal v. Wheeley*, 2 Barn. & Ad., 792, in which the question was as to a right to certain tolls. Lord Tenterden, in delivering the opinion of the court, said: "This, like many other cases, is a bargain between a company of adventurers and the public, the terms of which are expressed in the statute. And the rule of construction in all such cases is now fully established to be this: That any ambiguity in the terms of the contract must operate against the adventurers and in favor of the public; and the plaintiffs can claim nothing which is not clearly given to them by the act." "Now, it is quite certain that the company have no right expressly given to receive any compensation, except, etc.; and therefore it is incumbent upon them to show that they have a right, clearly given by inference from some other of the clauses." This latter statement shows that it is not indispensable that, in grants of this sort, the contract or the terms of the bargain should be in express language; it is sufficient if they may be clearly proved by implication or inference. I admit that, where the terms of a grant are to impose burdens upon the public or to create a restraint injurious to the public interest, there is sound reason for interpreting the terms, if ambiguous, in favor of the public. But at the same time I insist that there is not the slightest reason for saying, even in such a case, that the grant is not to be construed favorably to the grantee so as to secure him in the enjoyment of what is actually granted.

I have taken up more time in the discussion of this point than perhaps the occasion required, because of its importance, and the zeal and earnestness, and learning, with which the argument for a strict construction has been pressed upon the court as in some sort vital to the merits of this controversy. I feel the more confirmed in my own views upon the subject by the consideration that every judge of the state court, in delivering his opinion, admitted, either directly or by inference, the very principle for which I contend. Mr. Justice Morton, who pressed the doctrine of a strict construction most strongly, at the same time said: "Although no distinct thing or right will pass by implication, yet I do not mean to question that the words used should be understood in their most natural and obvious sense; and that whatever is essential to the enjoyment of the thing granted, will be necessarily implied to the grant." 7 Pick., 462. Mr. Justice Wilde said: "In doubtful cases it seems to me a sound and wholesome rule of construction to interpret public grants most favorably to the public interests, and that they are not to be enlarged by doubtful implications." "When, therefore, the legislature makes a grant of a public franchise, it is not to be extended by construction beyond its clear and obvious meaning." "There are some legislative grants, no doubt, that may admit of a different rule of construction; such as grants of lands on a valuable consideration, and

the like." 7 Pick., 469. These two learned judges were adverse to the plaintiffs' claim. But the two other learned judges, who were in favor of it, took a much broader and more liberal view of the rules of interpretation of the charter.

An attempt has, however, been made to put the case of legislative grants upon the same footing as royal grants, as to their construction, upon some supposed analogy between royal grants and legislative grants under our republican forms of government. Such a claim in favor of republican prerogative is new, and no authority has been cited which supports it. Our legislatures neither have nor affect to have any royal prerogatives. There is no provision in the constitution authorizing their grants to be construed differently from the grants of private persons in regard to the like subject-matter. The policy of the common law, which gave the crown so many exclusive privileges and extraordinary claims, different from those of the subject, was founded in a good measure, if not altogether, upon the divine right of kings, or at least upon a sense of their exalted dignity and pre-eminence over all subjects, and upon the notion that they are entitled to peculiar favor for the protection of their kingly rights and office. Parliamentary grants never enjoyed any such privileges. They were always construed according to common sense and common reason, upon their language and their intent. What reason is there that our legislative acts should not receive a similar interpretation? Is it not at least as important in our free governments that a citizen should have as much security for his rights and estate derived from the grants of the legislature as he would have in England? What solid ground is there to say that the words of a grant in the mouth of a citizen shall mean one thing, and in the mouth of the legislature shall mean another thing? That, in regard to the grant of a citizen, every word shall, in case of any question of interpretation or implication, be construed against him, and, in regard to the grant of the government, every word shall be construed in its favor? That language shall be construed, not according to its natural import and implications from its own proper sense and the objects of the instrument, but shall change its meaning, as it is spoken by the whole people, or by one of them? There may be very solid grounds to say that neither grants nor charters ought to be extended beyond the fair reach of their words; and that no implications ought to be made which are not clearly deducible from the language and the nature and objects of the grant.

In the case of a legislative grant, there is no ground to impute surprise, imposition or mistake to the same extent as in a mere private grant of the crown. The words are the words of the legislature, upon solemn deliberation, and examination and debate. Their purport is presumed to be well known, and the public interests are watched and guarded by all the varieties of local, personal and professional jealousy, as well as by the untiring zeal of numbers, devoted to the public service.

It should also be constantly kept in mind that, in construing this charter, we are not construing a statute involving political powers and sovereignty, like those involved in the case of *The Elsebe*, 5 Rob. R., 173. We are construing a grant of the legislature, which, though in the form of a statute, is still but a solemn contract. In such a case, the true course is to ascertain the sense of the parties from the terms of the instrument; and that once ascertained, to give it full effect. Lord Coke, indeed, recommends this as the best rule, even in respect to royal grants. "The best exposition," says he, "of the king's charter is, upon the consideration of the whole charter, to expound the charter by

the charter itself; every material part thereof [being] explained according to the true and genuine sense, which is the best method." Case of Sutton's Hospital, 10 Co. R., 24, b.

§ 2068. *The charter of the Charles River Bridge is not a restriction upon the legislative power.*

But with a view to induce the court to withdraw from all the common rules of reasonable and liberal interpretation in favor of grants, we have been told at the argument that this very charter is a restriction upon the legislative power; that it is in derogation of the rights and interests of the state and the people; that it tends to promote monopolies and exclusive privileges; and that it will interpose an insuperable barrier to the progress of improvement. Now, upon every one of these propositions, which are assumed and not proved, I entertain a directly opposite opinion; and, if I did not, I am not prepared to admit the conclusion for which they are adduced. If the legislature has made a grant which involves any or all of these consequences, it is not for courts of justice to overturn the plain sense of the grant because it has been improvidently or injuriously made.

•But I deny the very groundwork of the argument. This charter is not (as I have already said) any restriction upon the legislative power; unless it be true that, because the legislature cannot grant again what it has already granted, the legislative power is restricted. If so, then every grant of the public land is a restriction upon that power; a doctrine that has never yet been established, nor (as far as I know) ever contended for.

§ 2069. *Every grant of a franchise is, so far as that grant extends, necessarily exclusive, and cannot be resumed or interfered with.*

Every grant of a franchise is, so far as that grant extends, necessarily exclusive, and cannot be resumed or interfered with. All the learned judges in the state court admitted that the franchise of Charles River Bridge, whatever it be, could not be resumed or interfered with. The legislature could not recall its grant, or destroy it. It is a contract whose obligation cannot be constitutionally impaired. In this respect, it does not differ from a grant of lands. In each case, the particular land, or the particular franchise, is withdrawn from the legislative operation. The identical land, or the identical franchise, cannot be regranted or avoided by a new grant. But the legislative power remains unrestricted. The subject-matter only (I repeat it) has passed from the hands of the government. If the legislature should order a government debt to be paid by a sale of the public stock, and it is so paid, the legislative power over the funds of the government remains unrestricted, although it has ceased over the particular stock which has been thus sold. For the present, I pass over all further consideration of this topic, as it will necessarily come again under review in examining an objection of a more broad and comprehensive nature.

§ 2070. *The charter of the Charles River Bridge is not in derogation of the rights and interests of the people or state.*

Then, again, how is it established that this is a grant in derogation of the rights and interests of the people? No individual citizen has any right to build a bridge over navigable waters; and, consequently, he is deprived of no right, when a grant is made to any other persons for that purpose. Whether it promotes or injures the particular interest of an individual citizen constitutes no ground for judicial or legislative interference, beyond what his own rights justify. When, then, it is said that such a grant is in derogation of the rights and interests of the people, we must understand that reference is had to the

rights and interests common to the whole people, as such (such as the right of navigation), or belonging to them as a political body; or, in other words, the rights and interests of the state. Now, I cannot understand how any grant of a franchise is a derogation from the rights of the people of the state, any more than a grant of public land. The right, in each case, is gone to the extent of the thing granted, and so far may be said to derogate from, that is to say, to lessen, the rights of the people, or of the state. But that is not the sense in which the argument is pressed; for, by derogation is here meant an injurious or mischievous detraction from the sovereign rights of the state. On the other hand, there can be no derogation from the rights of the people, as such, except it applies to rights common there before, which the building of a bridge over navigable waters certainly is not. If it had been said that the grant of this bridge was in derogation of the common right of navigating the Charles river, by reason of its obstructing, *pro tanto*, a free and open passage, the ground would have been intelligible. So, if it had been an exclusive grant of the navigation of that stream. But if, at the same time, equivalent public rights of a different nature, but of greater public accommodation and use, had been obtained, it could hardly have been said, in a correct sense, that there was any derogation from the rights of the people, or the rights of the state. It would be a mere exchange of one public right for another.

Then again, as to the grant being against the interests of the people. I know not how that is established, and certainly it is not to be assumed. It will hardly be contended that every grant of the government is injurious to the interests of the people, or that every grant of a franchise must necessarily be so. The erection of a bridge may be of the highest utility to the people. It may essentially promote the public convenience, and aid the public interests, and protect the public property. And if no persons can be found willing to undertake such a work, unless they receive in return the exclusive privilege of erecting it, and taking toll, surely, it cannot be said, as of course, that such a grant, under such circumstances, is *per se* against the interests of the people. Whether the grant of a franchise is, or is not, on the whole, promotive of the public interests, is a question of fact and judgment, upon which different minds may entertain different opinions. It is not to be judicially assumed to be injurious, and then the grant to be reasoned down. It is a matter exclusively confided to the sober consideration of the legislature, which is invested with full discretion, and possesses ample means to decide it. For myself, meaning to speak with all due deference for others, I know of no power or authority confided to the judicial department to rejudge the decisions of the legislature upon such a subject. It has an exclusive right to make the grant, and to decide whether it be, or be not, for the public interests. It is to be presumed, if the grant is made, that it is made from a high sense of public duty, to promote the public welfare, and to establish the public prosperity. In this very case, the legislature has, upon the very face of the act, made a solemn declaration as to the motive for passing it; that "the erecting of a bridge over Charles river, etc., will be a great public utility."

What court of justice is invested with authority to gainsay this declaration? To strike it out of the act, and reason upon the other words, as if it were not there? To pronounce that a grant is against the interests of the people, which the legislature has declared to be of great utility to the people? It seems to me to be our duty to interpret laws, and not to wander into speculations upon their policy. And where, I may ask, is the proof that Charles River Bridge

has been against the interests of the people? The record contains no such proof; and it is, therefore, a just presumption that it does not exist.

§ 2071. — *nor is it a grant of a monopoly; a monopoly being defined as an exclusive right granted to a few of something which was before of common right.*

Again, it is argued that the present grant is a grant of a monopoly, and of exclusive privileges, and therefore to be construed by the most narrow mode of interpretation. The sixth article of the bill of rights of Massachusetts has been supposed to support the objection: "No man nor corporation, or association of men, have any other title to obtain advantages or particular and exclusive privileges distinct from those of the community, than what arises from the consideration of services rendered to the public; and this title being in nature neither hereditary nor transmissible to children, or descendants, or relations by blood, the idea of a man born a magistrate, lawgiver, or judge, is absurd and unnatural." Now, it is plain that, taking this whole clause together, it is not an inhibition of all legislative grants of exclusive privileges, but a promulgation of the reasons why there should be no hereditary magistrates, legislators or judges. But it admits, by necessary implication, the right to grant exclusive privileges for public services, without ascertaining of what nature those services may be. It might be sufficient to say that all the learned judges in the state court admitted that the grant of an exclusive right to take toll at a ferry, or a bridge, or a turnpike, is not a monopoly which is deemed odious in law; nor one of the particular and exclusive privileges, distinct from those of the community, which are reprobated in the bill of rights. All that was asserted by the judges, opposed to a liberal interpretation of this grant, was that it tended to promote monopolies. See the case, 7 Pick., 416, 432, 437.

Again, the old colonial act of 1641, against monopolies, has been relied on to fortify the same argument. That statute is merely in affirmance of the principles of the English statute against monopolies of 21 James I., c. 3; and if it were now in force (which it is not), it would require the same construction. There is great virtue in particular phrases; and when it is once suggested that a grant is of the nature or tendency of a monopoly, the mind almost instantaneously prepares itself to reject every construction which does not pare it down to the narrowest limits. It is an honest prejudice, which grew up in former times from the gross abuses of the royal prerogatives, to which in America there are no analogous authorities.

§ 2072. — *monopolies defined.*

But what is a monopoly, as understood in law? It is an exclusive right granted to a few, of something which was before of common right. Thus a privilege granted by the king for the sole buying, selling, making, working or using a thing, whereby the subject, in general, is restrained from that liberty of manufacturing or trading which before he had, is a monopoly. 4 Black. Comm., 159; Bac. Abridg., Prerogative, F. 4.

My Lord Coke, in his Pleas of the Crown, 3 Inst., 181, has given this very definition of a monopoly; and that definition was approved by Holt and Treby (afterwards chief justices of king's bench), *arguendo*, as counsel, in the great case of the East India Co. v. Sandys, 10 How. St. Tr., 386. His words are, that a monopoly is "an institution by the king, by his grant, commission or otherwise, to any persons or corporations, of or for the sole buying, selling, making, working or using of everything, whereby any persons or corporations

are sought to be restrained of any freedom or liberty they had before, or hindered in their lawful trade." So that it is not the case of a monopoly if the subjects had not the common right or liberty before to do the act, or possess and enjoy the privilege or franchise granted as a common right. 10 How. St. Tr., 425. And it deserves an especial remark, that this doctrine was an admitted concession, pervading the entire arguments of the counsel who opposed, as well as of those who maintained, the grant of the exclusive trade in the case of the East India Co. v. Sandys, 10 How. St. Tr., 386, a case which constitutes, in a great measure, the basis of this branch of the law.

No sound lawyer will, I presume, assert that the grant of a right to erect a bridge over a navigable stream is a grant of a common right. Before such grant, had all the citizens of the state a right to erect bridges over navigable streams? Certainly they had not, and, therefore, the grant was no restriction of any common right. It was neither a monopoly, nor, in a legal sense, had it any tendency to a monopoly. It took from no citizen what he possessed before, and had no tendency to take it from him. It took, indeed, from the legislature the power of granting the same identical privilege or franchise to any other persons. But this made it no more a monopoly than the grant of the public stock or funds of a state for a valuable consideration. Even in cases of monopolies, strictly so called, if the nature of the grant be such that it is for the public good, as in cases of patents for inventions, the rule has always been to give them a favorable construction in support of the patent, as Lord Chief Justice Eyre said, *ut res magis valeat quam pereat*. *Boulton v. Bull*, 2 H. Bl., 463, 500.

§ 2073. — *nor does a liberal construction of said charter, as conferring an exclusive right, interpose a barrier to the improvement of the country.*

But it has been argued, and the argument has been pressed in every form which ingenuity could suggest, that if grants of this nature are to be construed liberally, as conferring any exclusive rights on the grantees, it will interpose an effectual barrier against all general improvements of the country. For myself, I profess not to feel the cogency of this argument, either in its general application to the grant of franchises or in its special application to the present grant. This is a subject upon which different minds may well arrive at different conclusions, both as to policy and principle. Men may, and will, complexionally differ upon topics of this sort, according to their natural and acquired habits of speculation and opinion. For my own part I can conceive of no surer plan to arrest all public improvements founded on private capital and enterprise, than to make the outlay of that capital uncertain and questionable, both as to security and as to productiveness. No man will hazard his capital in any enterprise in which if there be a loss it must be borne exclusively by himself, and if there be success, he has not the slightest security of enjoying the rewards of that success for a single moment. If the government means to invite its citizens to enlarge the public comforts and conveniences, to establish bridges, or turnpikes, or canals, or railroads, there must be some pledge that the property will be safe; that the enjoyment will be co-extensive with the grant, and that success will not be the signal of a general combination to overthrow its rights and to take away its profits. The very agitation of a question of this sort is sufficient to alarm every stockholder in every public enterprise of this sort throughout the whole country. Already, in my native state, the legislature has found it necessary expressly to concede the exclusive privilege here contended against, in order to insure the accomplishment of a railroad for

the benefit of the public. And yet we are told that all such exclusive grants are to the detriment of the public.

But if there were any foundation for the argument itself in a general view, it would totally fail in its application to the present case. Here the grant, however exclusive, is but for a short and limited period, more than two-thirds of which have already elapsed; and when it is gone, the whole property and franchise are to revert to the state. The legislature exercised a wholesome foresight on the subject, and within a reasonable period it will have an unrestricted authority to do whatever it may choose, in the appropriation of the bridge and its tolls. There is not, then, under any fair aspect of the case, the slightest reason to presume that public improvements either can, or will, be injuriously retarded by a liberal construction of the present grant.

I have thus endeavored to answer, and I think I have successfully answered, all the arguments (which indeed run into each other) adduced to justify a strict construction of the present charter. I go further, and maintain not only that it is not a case for strict construction, but that the charter upon its very face, by its terms and for its professed objects, demands from the court, upon undeniable principles of law, a favorable construction for the grantees. In the first place, the legislature has declared that the erecting of the bridge will be of great public utility, and this exposition of its own motives for the grant requires the court to give a liberal interpretation, in order to promote, and not to destroy, an enterprise of great public utility. In the next place, the grant is a contract for a valuable consideration, and a full and adequate consideration. The proprietors are to lay out a large sum of money (and in those times it was a very large outlay of capital) in erecting a bridge; they are to keep it in repair during the whole period of forty years; they are to surrender it in good repair at the end of that period to the state, as its own property; they are to pay, during the whole period, an annuity of £200 to Harvard College; and they are to incur other heavy expenses and burdens for the public accommodation. In return for all these charges, they are entitled to no more than the receipt of the tolls during the forty years, for their reimbursement of capital, interest and expenses. With all this they are to take upon themselves the chances of success; and if the enterprise fails, the loss is exclusively their own. Nor let any man imagine that there was not, at the time when this charter was granted, much solid ground for doubting success. In order to entertain a just view of this subject, we must go back to that period of general bankruptcy, and distress, and difficulty. The constitution of the United States was not only not then in existence but it was not then even dreamed of. The union of the states was crumbling into ruins under the old confederation. Agriculture, manufactures and commerce were at their lowest ebb. There was infinite danger to all the states from local interests and jealousies, and from the apparent impossibility of a much longer adherence to that shadow of a government, the continental congress. And even four years afterwards, when every evil had been greatly aggravated, and civil war was added to other calamities, the constitution of the United States was all but shipwrecked in passing through the state conventions. It was adopted by very slender majorities. These are historical facts which required no coloring to give them effect, and admitted of no concealment to seduce men into schemes of future aggrandizement. I would even now put it to the common sense of every man, whether, if the constitution of the United States had not been adopted, the charter would have been worth a forty years' purchase of the tolls.

This is not all. It is well known, historically, that this was the very first bridge ever constructed in New England, over navigable tide waters so near the sea. The rigors of our climate, the dangers from sudden thaws and freezing, and the obstructions from ice in a rapid current, were deemed by many persons to be insuperable obstacles to the success of such a project. It was believed that the bridge would scarcely stand a single severe winter. And I myself am old enough to know that in regard to other arms of the sea, at much later periods, the same doubts have had a strong and depressing influence upon public enterprises. If Charles River Bridge had been carried away during the first or second season after its erection, it is far from being certain that up to this moment another bridge, upon such an arm of the sea, would ever have been erected in Massachusetts. I state these things, which are of public notoriety, to repel the notion that the legislature was surprised into an incautious grant, or that the reward was more than adequate to the perils. There was a full and adequate consideration, in a pecuniary sense, for the charter. But, in a more general sense, the erection of the bridge, as a matter of accommodation, has been incalculably beneficial to the public. Unless, therefore, we are wholly to disregard the declarations of the legislature, and the objects of the charter, and the historical facts of the times, and indulge in mere private speculations of profit and loss by our present lights and experience, it seems to me that the court is bound to come to the interpretation of this charter with a persuasion that it was granted in furtherance, and not in derogation, of the public good.

But I do not insist upon any extraordinary liberality in interpreting this charter. All I contend for is that it shall receive a fair and reasonable interpretation, so as to carry into effect the legislative intention and secure to the grantees a just security for their privileges. I might, indeed, well have spared myself any investigation of the principles upon which royal and legislative grants are ordinarily to be construed, for this court has itself furnished an unequivocal rule for interpreting all public contracts. The present grant is confessedly a contract; and in *Huidekoper v. Douglass*, 3 Cranch, 1; S. C., 1 Pet. Cond. Rep., 446, this court said: "This is a contract, and although a state is a party, it ought to be construed according to those well-established principles which regulate contracts generally;" that is, precisely as in cases between mere private persons, taking into consideration the nature and objects of the grant. A like rule was adopted by this court in the case of a contract by the United States. *United States v. Gurney*, 4 Cranch, 333; S. C., 2 Pet. Cond. Rep., 132. And the good sense and justice of the rule seem equally irresistible.

§ 2074. *The title of an act, though not a part of the enacting clause, may be resorted to in construing the act, if it aids in removing ambiguities.*

Let us now enter upon the consideration of the terms of the charter. In my judgment, nothing can be more plain than that it is a grant of a right to erect a bridge between Boston and Charlestown in the place where the ferry between those towns was kept. It has been said that the charter itself does not describe the bridge as between Charlestown and Boston, but grants an authority to erect "a bridge over Charles river in the place where the old ferry was then kept;" and that these towns are not named, except for the purpose of describing the then ferry. Now this seems to me, with all due deference, to be a distinction without a difference. The bridge is to be erected in the place where the old ferry then was. But where was it to begin, and where was it to terminate?

Boston and Charlestown are the only possible *termini*, for the ferry ways were there; and it was to be built between Boston and Charlestown, because the ferry was between them. Surely, according to the true sense of the preamble, where alone the descriptive words occur (for it is a great mistake to suppose that the enacting clause anywhere refers, except by implication, to the location of the bridge), it is wholly immaterial whether we read the clause "whereas the erecting of a bridge over Charles river in the place where the ferry between Boston and Charlestown is now kept;" or "whereas the erection of a bridge over Charles river between Charlestown and Boston where the ferry is now kept." In each case the bridge is to be between Boston and Charlestown, and the *termini* are the ferry ways. The title of the act puts this beyond all controversy; for it is "An act for incorporating certain persons for the purpose of building a bridge over Charles river between Boston and Charlestown," etc. But then we are told that no rule in construing statutes is better settled than that the title of an act does not constitute any part of the act. If by this no more be meant than that the title of an act constitutes no part of its enacting clauses, the accuracy of the position will not be disputed. But if it is meant to say that the title of the act does not belong to it for any purpose of explanation or construction, and that in no sense is it any part of the act, I, for one, must deny that there is any such settled principle of law. On the contrary, I understand that the title of an act (though it is not ordinarily resorted to) may be legitimately resorted to for the purpose of ascertaining the legislative intention, just as much as any other part of the act. In point of fact it is usually resorted to whenever it may assist us in removing any ambiguities in the enacting clauses. Thus, in the great case of Sutton's Hospital, 10 Coke, 23, 24, b, the title of an act of parliament was thought not unworthy to be examined in construing the design of the act. In *Boulton v. Bull*, 2 H. BL, 463, 500, the effect of the title of an act was largely insisted upon in the argument, as furnishing a key to the intent of the enacting clauses. And Lord Chief Justice Eyre admitted the propriety of the argument, and met it by saying that in that case he would, if necessary, expound the word "engine," in the body of the bill, in opposition to the title to it, to mean a "method" in order to support the patent. In the case of the *United States v. Fisher*, 2 Cranch, 358; S. C., 1 Pet. Cond. Rep., 421, the supreme court of the United States expressly recognized the doctrine, and gave it a practical application. In that case the chief justice, in delivering the opinion of the court, after adverting to the argument at the bar respecting the degree of influence which the title of an act ought to have in construing the enacting clauses, said: "Where the mind labors to discover the design of the legislature, it seizes everything from which aid can be derived; and in such a case the title claims a degree of notice, and will have its due share of consideration."

§ 2075. *The charter of the Charles River Bridge grants the franchise of erecting a bridge over Charles river between Charlestown and Boston, and of taking tolls.*

According to my views of the terms of the charter, the grant, then, is of the franchise of erecting a bridge over Charles river between Charlestown and Boston, and of taking tolls or pontage from passengers. It is therefore limited to those towns, and does not exclude the legislature from any right to grant a bridge over the same river between any other towns and Boston, as for example between Chelsea and Boston, or Cambridge and Boston, or Roxbury and Boston.

§ 2076. — *and such grant carries with it by implication an exclusive franchise to a reasonable distance on the river, so that the ordinary travel on the bridge shall not be diverted to a new bridge to the injury or ruin of the franchise.*

But although, in my judgment, this is the true construction of the limits of the charter, *ex vi terminorum*, my opinion does not, in any important degree, rest upon it. Taking this to be a grant of a right to build a bridge over Charles river in the place where the old ferry between Charlestown and Boston was then kept (as is contended for by the defendants), still it has, as all such grants must have, a fixed locality; and the same question meets us, is the grant confined to the mere right to erect a bridge on the proper spot, and to take toll of the passengers who may pass over it, without any exclusive franchise on either side of the local limits of the bridge? Or does it, by implication, include an exclusive franchise on each side, to an extent which shall shut out any injurious competition? In other words, does the grant still leave the legislature at liberty to erect other bridges on either side, free or with tolls, even in juxtaposition with the timbers and planks of this bridge? Or is there an implied obligation, on the part of the legislature, to abstain from all acts of this sort which shall impair or destroy the value of the grant? The defendants contend that the exclusive right of the plaintiffs extends no further than the planks and timbers of the bridge, and that the legislature is at full liberty to grant any new bridge, however near; and although it may take away a large portion, or even the whole, of the travel which would otherwise pass over the bridge of the plaintiffs. And to this extent the defendants must contend; for their bridge is, to all intents and purposes, in a legal and practical sense, contiguous to that of the plaintiffs.

The argument of the defendants is, that the plaintiffs are to take nothing by implication. Either (say they) the exclusive grant extends only to the local limits of the bridge, or it extends the whole length of the river, or at least up to Old Cambridge bridge. The latter construction would be absurd and monstrous, and therefore the former must be the true one. Now, I utterly deny the alternatives involved in the dilemma. The right to build a bridge over a river, and to take toll, may well include an exclusive franchise beyond the local limits of the bridge, and yet not extend through the whole course of the river, or even to any considerable distance on the river. There is no difficulty, in common sense or in law, in maintaining such a doctrine. But then, it is asked, what limits can be assigned to such a franchise? The answer is obvious; the grant carries with it an exclusive franchise to a reasonable distance on the river, so that the ordinary travel to the bridge shall not be diverted by any new bridge to the injury or ruin of the franchise. A new bridge which would be a nuisance to the old bridge would be within the reach of its exclusive right. The question would not be so much as to the fact of distance, as it would be as to the fact of nuisance. There is nothing new in such expositions of incorporeal rights, and nothing new in thus administering, upon this foundation, remedies in regard thereto. The doctrine is coeval with the common law itself. Suppose an action is brought for shutting up the ancient lights belonging to a messuage, or for diverting a water-course, or for flowing back a stream, or for erecting a nuisance near a dwelling-house; the question in such cases is not a question of mere distance, of mere feet and inches, but of injury; permanent, real and substantial injury, to be decided upon all the circumstances of the case. But of this I shall speak again hereafter.

Let us see what is the result of the narrow construction contended for by

the defendants. If that result be such as is inconsistent with all reasonable presumptions growing out of the case, if it be repugnant to the principles of equal justice, if it will defeat the whole objects of the grant, it will not, I trust, be insisted on that this court is bound to adopt it. I have before had occasion to take notice that the original charter is a limited one for forty years; that the whole compensation of the proprietors for all their outlay of capital, their annuity to Harvard College, and their other annual burdens and charges, is to arise out of the tolls allowed them during that period. No other fund is provided for their indemnity, and they are to take it subject to all the perils of failure, and the chances of an inadequate remuneration. The moment the charter was accepted, the proprietors were bound to all the obligations of this contract on their part. Whether the bargain should turn out to be good or bad, productive or unproductive of profit, did not vary their duties. The franchise was not a mere *jus privatum*. From the moment of its acceptance, and the erection of the bridge, it became charged with a *jus publicum*. The government had a right to insist that the bridge should be kept in perfect repair for public travel by the proprietors; that the bridge should be lighted; that the draw should be raised without expense for the purposes of navigation. And if the proprietors had refused or neglected to do their duty in any of these respects, they would have been liable to a public prosecution. It could be no apology or defense that the bridge was unprofitable, that the tolls were inadequate, that the repairs were expensive, or that the whole concern was a ruinous enterprise. The proprietors took the charter *cum onere*, and must abide by their choice. It is no answer to all this to say that the proprietors might surrender their charter and thus escape from the burden. They could have no right to make such a surrender. It would depend upon the good pleasure of the government whether it would accept of such a surrender or not; and, until such an acceptance, the burdens would be obligatory to the last hour of the charter. And when that hour shall have arrived, the bridge itself, in good repair, is to be delivered to the state.

Now, I put it to the common sense of every man, whether if, at the moment of granting the charter, the legislature had said to the proprietors, you shall build the bridge, you shall bear the burdens, you shall be bound by the charges, and your sole reimbursement shall be from the tolls of forty years, and yet we will not even guaranty you any certainty of receiving any tolls. On the contrary, we reserve to ourselves the full power and authority to erect other bridges, toll or free bridges, according to our own free will and pleasure, contiguous to yours, and having the same *termini* with yours; and if you are successful, we may thus supplant you, divide, destroy your profits, and annihilate your tolls without annihilating your burdens; if, I say, such had been the language of the legislature, is there a man living, of ordinary discretion or prudence, who would have accepted such a charter upon such terms? I fearlessly answer, no. There would have been such a gross inadequacy of consideration, and such a total insecurity of all the rights of property, under such circumstances, that the project would have dropped stillborn. And I put the question further, whether any legislature, meaning to promote a project of permanent public utility (such as this confessedly was), would ever have dreamed of such a qualification of its own grant, when it sought to enlist private capital and private patronage to insure the accomplishment of it?

Yet this is the very form and pressure of the present case. It is not an imaginary and extravagant case. Warren Bridge has been erected under such

a supposed reserved authority, in the immediate neighborhood of Charles River Bridge, and with the same *termini* to accommodate the same line of travel. For a half dozen years it was to be a toll-bridge for the benefit of the proprietors, to reimburse them for their expenditures. At the end of that period the bridge is to become the property of the state, and free of toll, unless the legislature should hereafter impose one. In point of fact, it has since become, and now is, under the sanction of the act of incorporation and other subsequent acts, a free bridge without the payment of any tolls for all persons. So that, in truth, here now is a free bridge, owned by and erected under the authority of the commonwealth, which necessarily takes away all the tolls from Charles River Bridge, while its prolonged charter has twenty years to run. And yet the act of the legislature establishing Warren Bridge is said to be no violation of the franchise granted to the Charles River Bridge. The legislature may annihilate, nay, has annihilated, by its own acts, all chance of receiving tolls, by withdrawing the whole travel; though it is admitted that it cannot take away the barren right to gather tolls, if any should occur, when there is no travel to bring a dollar. According to the same course of argument, the legislature would have a perfect right to block up every avenue to the bridge, and to obstruct every highway which should lead to it, without any violation of the chartered rights of Charles River Bridge, and at the same time it might require every burden to be punctiliously discharged by the proprietors during the prolonged period of seventy years. I confess that the very statement of such propositions is so startling to my mind, and so irreconcilable with all my notions of good faith, and of any fair interpretation of the legislative intentions, that I should always doubt the soundness of any reasoning which should conduct me to such results.

But it is said that there is no prohibitory covenant in the charter, and no implications are to be made of any such prohibition. The proprietors are to stand upon the letter of their contract, and the maxim applies, *de non apparentibus et non existentibus, eadem est lex*. And yet it is conceded that the legislature cannot revoke or resume this grant. Why not, I pray to know? There is no negative covenant in the charter; there is no express prohibition to be found there. The reason is plain. The prohibition arises by a natural, if not by necessary, implication. It would be against the first principles of justice to presume that the legislature reserved a right to destroy its own grant. That was the doctrine of *Fletcher v. Peck*, 6 Cranch, 87, in this court, and in other cases turning upon the same great principle of political and constitutional duty and right. Can the legislature have power to do that indirectly which it cannot do directly? If it cannot take away or resume the franchise itself, can it take away its whole substance and value? If the law will create an implication that the legislature shall not resume its own grant, is it not equally as natural and as necessary an implication that the legislature shall not do any act directly to prejudice its own grant or to destroy its value? If there were no authority in favor of so reasonable a doctrine, I would say, in the language of the late lamented Mr. Chief Justice Parker, in this very case: "I ground it on the principles of our government and constitution, and on the immutable principles of justice, which ought to bind governments as well as people."

But it is most important to remember, that, in the construction of all legislative grants, the common law must be taken into consideration; for the legislature must be presumed to have in view the general principles of construction which are recognized by the common law. Now, no principle is better estab-

lished than the principle that, when a thing is given or granted, the law giveth, impliedly, whatever is necessary for the taking and enjoying the same. This is laid down in Co. Litt., 56, a; and is, indeed, the dictate of common sense applicable to all grants. Is not the unobstructed possession of the tolls indispensable to the full enjoyment of the corporate rights granted to the proprietors of Charles River Bridge? If the tolls were withdrawn, directly or indirectly, by the authority of the legislature, would not the franchise be utterly worthless? A burden, and not a benefit? Would not the reservation of authority in the legislature to create a rival bridge impair, if it did not absolutely destroy, the exclusive right of the proprietors of Charles River Bridge? I conceive it utterly impossible to give any other than an affirmative answer to each of these questions. How, then, are we to escape from the conclusion that that which would impair or destroy the grant is prohibited, by implication of law, from the nature of the grant? "We are satisfied," said Mr. Chief Justice Parsons, in delivering the opinion of the court in *Wales v. Stetson*, 2 Mass., 143, 146, "that the rights legally vested in any corporation cannot be controlled or destroyed by any subsequent statute, unless a power for that purpose be reserved to the legislature in the act of incorporation." Where is any such reservation to be found in the charter of Charles River Bridge?

My brother Washington (than whom few judges ever possessed a sounder judgment or clearer learning), in his able opinion in the case of *Dartmouth College v. Woodward*, 4 Wheat., 658, took this same view of the true sense of the passage in Blackstone's Commentaries, and uses the following strong language in the subject of a charter of the government: "Certain obligations are created (by it), both on the grantor and the grantees. On the part of the former it amounts to an extinguishment of the king's prerogative to bestow the same identical franchise on another corporate body, because it would prejudice his former grant. It implies, therefore, a contract not to reassert the right to grant the franchise to another, or to impair it." I know not how language more apposite could be applied to the present case. None of us then doubted its entire correctness, when he uttered it; and I am not able to perceive how the legal inference can now be escaped. The case of *Chesapeake & Ohio Canal Co. v. Baltimore & Ohio R. Co.*, 4 Gill & J., 1, 4, 6, 143, 146, 149, fully sustains the same doctrine, and most elaborately expounds its nature, and operation, and extent.

But we are not left to mere general reasoning on this subject. There are cases of grants of the crown, in which a like construction has prevailed, which are as conclusive upon this subject, in point of authority, as any can be. How stands the law in relation to grants by the crown of fairs, markets and ferries? I speak of grants, for all claims of this sort resolve themselves into grants; a prescription being merely evidence of, and presupposing, an ancient grant, which can be no longer traced, except by the constant use and possession of the franchise. If the king grants a fair, or a market, or a ferry, has the franchise no existence beyond the local limits where it is erected? Does the grant import no more than a right to set up such fair, or market, or ferry, leaving in the crown full power and authority to make other grants of the same nature, in juxtaposition with those local limits? No case, I will venture to say, has ever maintained such a doctrine; and the common law repudiates it (as will be presently shown) in the most express terms.

The authorities are abundant to establish that the king cannot make any second grant which shall prejudice the profits of the former grant. And why

not? Because the grant imposes public burdens on the grantee, and subjects him to public charges, and the profits constitute his only means of remuneration; and the crown shall not be at liberty directly to impair, much less to destroy, the whole value and objects of its grant. In confirmation of this reasoning, it has been repeatedly laid down in the books that, when the king grants a fair, or market, or ferry, it is usual to insert in all such grants a clause or proviso that it shall not be to the prejudice of any other existing franchise of the same nature; as a fair, or market, or ferry. But if such a clause or proviso is not inserted, the grant is always construed with the like restriction; for such a clause will be implied by law. And, therefore, if such new grant is without such a clause, if it occasion any damage either to the king or to a subject in any other thing, it will be revocable. So my Lord Coke laid it down in 2 Inst., 406. The judges laid down the same law in the house of lords in the case of *The King v. Butler*, 3 Lev., 220, 222, which was the case of a grant of a new market to the supposed prejudice of an old market. Their language on that occasion deserves to be cited. It was, "that the king has an undoubted right to repeal a patent wherein he is deceived, or his subjects prejudiced, and that by *scire facias*." And afterwards, referring to cases where a writ of *ad quod damnum* had been issued, they added: "There the king takes notice that it is not *ad damnum*; and yet, if it be *ad damnum*, the patent is void; for all such patents the condition is implied, namely, that it be not *ad damnum* of the neighboring merchants." And they added further: "This is positively alleged (in the *scire facias*), that *concessio predicta est ad damnum et depauperationem*, etc.; which is a sufficient cause to revoke the patent, if there were nothing more." The same doctrine is laid down in Mr. Sargeant Williams' learned note (2) to the case of *Yard v. Ford*, 2 Saund., 174. Now, if in the grant of any such franchise of a fair, or market, or ferry, there is no implied obligation or condition that the king will not make any subsequent grant to the prejudice of such prior grant, or impairing its rights, it is inconceivable why such a proviso should be implied. But if (as the law certainly is) the king can make no subsequent grant to the prejudice of his former grant, then the reason of such implication is clear; for the king will not be presumed to intend to violate his duty, but rather to be deceived in his second grant, if to the prejudice of the first.

It is upon this ground, and this ground only, that we can explain the established doctrine in relation to ferries. When the crown grants a ferry from A to B, without using any words which import it to be an exclusive ferry, why is it (as will be presently shown) that, by the common law, the grant is construed to be exclusive of all other ferries between the same places or *termini*; at least, if such ferries are so near that they are injurious to the first ferry, and tend to a direct diminution of its receipts? Plainly, it must be because, from the nature of such a franchise, it can have no permanent value, unless it is exclusive; and the circumstance that, during the existence of the grant, the grantee has public burdens imposed upon him, raises the implication that nothing shall be done to the prejudice of it, while it is a subsisting franchise. The words of the grant do, indeed, import *per se* merely to confer a right of ferry between A and B. But the common law steps in, and *ut res magis valeat quam pereat*, expands the terms into an exclusive right, from the very nature, and objects and motives, of the grant.

I say this is the theory of the common law on this subject. Let us now see if it is not fully borne out by the authorities in relation to ferries; a franchise

which approaches so near to that of a bridge that human ingenuity has not yet been able to state any assignable difference between them, except that one includes the right of pontage, and the other of passage or ferriage (see Webb's Case, 8 Co. R., 46, b); that is, each includes public duties and burdens, and an indemnity for these duties and burdens, by a right to receive tolls. A grant of a ferry must always be by local limits; it must have some *termini*, and must be between some fixed points, vills or places. But is the franchise of a ferry limited to the mere ferry ways? Unless I am greatly mistaken, there is an unbroken series of authorities establishing the contrary doctrine; a doctrine firmly fixed in the common law, and brought to America by our ancestors as a part of their inheritance. The case of a ferry is put as a case of clear law by Paston, J., as long ago as in 22 Hen. VI., 14, b. "If," says he, "I have a market or a fair on a particular day, and another sets up a market or a fair on the same day in a ville which is near to my market, so that my market or my fair is impaired, I shall have against him an assize of nuisance, or an action on the case." And the same law is: "If I have an ancient ferry in a ville, and another sets up another ferry upon the same river near to my ferry, so that the profits of my ferry are impaired, I shall have an action on the case against him." And Newton (who, it seems, was of counsel for the defendant in that case) admitted the law to be so; and gave as a reason, "for you are bound to support the ferry, and to serve and repair it for the ease of the common people, and otherwise you shall be grievously amerced; and it is inquirable before the sheriff at his tourn, and also before the justices in Eyre." As to the case of a market or fair, Newton said that, in the king's grant of a market or fair, there is always a proviso that it should not be to the nuisance of another market or fair. To which Paston, J., replied: "Suppose the king grants to me a market without any proviso; if one sets up after that time another market, which is a nuisance to that, I shall have against him an assize of nuisance."

The doctrine here laid down seems indisputable law; and it was cited and approved by Lord Abinger in *Hussy v. Field*, 2 Crompt. M. & R., 432, to which reference will presently be made. In Bacon's Abridgment, Prerogative, F. 1, it is laid down "that if the king creates or grants a fair or market to a person, and afterwards grants another to another person, to the prejudice of the first, the second grant is void." See 16 Viner's Abridg., Nuisance, G., pl. 2. The same law is laid down in 3 Black. Comm., 218, 219. "If (says he) I am entitled to hold a fair or market, and another person sets up a fair or market so near mine that it does me a prejudice, it is a nuisance to the freehold which I have in my market or fair." He adds, "if a ferry is erected on a river, so near another ancient ferry as to draw away the custom, it is a nuisance to the old one; for where there is a ferry by prescription, the owner is bound always to keep it in repair and readiness for the ease of the king's subjects, otherwise he may be grievously amerced. It would be, therefore, extremely hard, if a new ferry were suffered to share the profits, which does not also share the burden." The same doctrine is to be found in Comyn's Digest (Action upon the Case for a Nuisance, A.), and in many other authorities. See *Yard v. Ford*, 2 Saund., 175, and note (2); *Fitz. N. Brev.*, 184; *Hale de Port. Maris*, c. 5; *Harg. Law Tracts*, p. 59; *Com. Dig.*, Piscary, B.; *Id.*, Market, C. 2, C. 3; 2 Black. Comm., 27.

The doctrine is in England just as true now, and just as strictly enforced, as it was three centuries ago. In *Blissett v. Hart*, Willes, 508, the plaintiff recovered damages for a violation of his right to an ancient ferry, against the

defendant, who had set up a neighboring ferry to his nuisance. The court said: "A ferry is *publici juris*. It is a franchise that no one can erect without a license from the crown; and when one is erected, another cannot be erected without an *ad quod damnum*. If a second is erected without a license, the crown has a remedy by a *quo warranto*; and the former grantee has a remedy by action." The case of *Tripp v. Frank*, 4 Term R., 666, proceeds upon the admission of the same doctrine, as does *Prince v. Lewis*, 5 Barn. & Cress., 363; *Peter v. Kendall*, 6 Barn. & Cress., 703; *Mosley v. Chadwick*, 7 Barn. & Cress., 47, note a; and *Mosley v. Walker*, 7 Barn. & Cress., 40.

There is a very recent case (already alluded to), which was decided by the court of exchequer upon the fullest consideration, and in which the leading authorities upon this point were discussed with great acuteness and ability. I mean the case of *Huzzy v. Field*, in 1835; 13 Law Journ., 239; S. C., 2 Crompt., M. & R., 432. Lord Abinger, in delivering the opinion of the court on that occasion, used the following language: "So far the authorities appear to be clear, that if a new ferry be put up without the king's license, to the prejudice of an old one, an action will lie; and there is no case which has the appearance of being to the contrary, except that of *Tripp v. Frank*, hereafter mentioned. These old authorities proceeded upon the ground, first, that the grant of the franchise is good in law, being for a sufficient consideration to the subject, who, as he received a benefit, may have, by the grant of the crown, a corresponding obligation imposed upon him, in return for the benefit received; and secondly, that if another, without legal authority, interrupts the grantee in the exercise of his franchise, by withdrawing the profits of passengers, which he would otherwise have had, and which he has in a manner purchased from the public at the price of his corresponding liability, the disturber is subject to an action for the injury. And the case is, in this respect, analogous to the grant of a fair or market, which is also a privilege of the nature of a monopoly. A public ferry, then, is a public highway of a special description; and its *termini* must be in places where the public have rights, as towns, or vills, or highways leading to towns or vills. The right of the grantee is in one case an exclusive right of carrying from town to town; in the other, of carrying from one point to the other all who are going to use the highway to the nearest town or ville to which the highway leads on the other side. Any new ferry, therefore, which has the effect of taking away such passengers must be injurious. For instance, if any one should construct a new landing-place at a short distance of one *terminus* of the ferry, and make a proclamation of carrying passengers over from the other *terminus*, and then landing them at that place from which they pass to the same public highway upon which the ferry is established, before it reaches any town or vill, by which the passengers go immediately to the first and all the vills to which that highway leads, there could not be any doubt but that such an act would be an infringement of the right of ferry, whether the person so acting intended to defraud the grantee of the ferry, or not. If such new ferry be nearer, or the boat used more commodious, or the fare less, it is obvious that all the custom must be inevitably withdrawn from the old ferry. And thus the grantee would be deprived of all the benefit of the franchise, whilst he continued liable to all the burdens imposed upon him."

Language more apposite to the present case could scarcely have been used. And what makes it still stronger is, that the very case before the court was of a new ferry starting on one side from the same town, but not at the same place in the town, to a *terminus* on the other side different from that of the

old ferry-house, and more than a half a mile from it, and thence by a highway communicated with the highway which was connected with the old ferry, at a mile distance from the ferry. Now, if the right of the old ferry did not, by implication, extend on either side beyond its local *termini*, no question could have arisen as to the disturbance. *Trotter v. Harris*, 2 Young & Jerv., 285, proceeded upon similar principles, though it did not call for so exact an exposition of them.

It is observable that in the case of *Huzzy v. Field*, 2 Crompton, M. & R., 432, the defendant did not claim under any license or grant from the crown; and, therefore, it may be supposed in argument that it does not apply to a case where that is a grant of the new ferry from the crown. But in point of law there is no difference between the cases. In each case the new ferry must be treated as a clear disturbance of the rights of the old ferry, or it is not in either case; for if the first grant does not, by implication, carry an exclusive right above and below its local *termini*, then there can be no pretense, in either case, for the grantee of the old ferry to complain of the new ferry, for it does not violate his rights under his grant. If the first grant does, by implication, carry an exclusive right above and below its local *termini*, so far as it may be prejudiced or disturbed by a new ferry, then it is equally clear, upon established principles, that the king cannot, by a new grant, prejudice his former grant; for the law deprives him of any such prerogative. It is true that where the new ferry is got up without a license from the crown, it may be abated as a nuisance, upon a *quo warranto*, or information, by the crown. But this will not confer any right of action on the grantee of the old ferry, unless his own rights have been disturbed.

I have said that this is the result of established principles; and the case of the Islington Market, 3 Cl. & Finn., 513, recently before the judges of England upon certain questions submitted to them by the house of lords, is an authority of the most solemn and conclusive nature upon this identical point of franchise. What gives it still more importance is, that in the last three questions proposed to the judges by the house of lords, the very point as to the power of the king to make a second grant of a market, to the prejudice of his former grant, within the limits of the common law, arose, and was pointedly answered in the negative. On that occasion the judges said that while the first grant of a market remains unrepealed, even the default of the grantee of the franchise, in not providing, according to his duty, proper accommodations for the public, cannot operate, in point of law, as a ground for granting a new charter to another to hold a market within the common law which shall really be injurious to the existing market. The judges, after adverting to the usual course of the issuing of a writ of *ad quod damnum*, in cases where a new market is asked for, added: "We do not say that a writ of *ad quod damnum* is absolutely necessary. But if the crown were to grant a new charter without a writ of *ad quod damnum*, and it should appear that the interests of other persons were prejudiced, the crown would be supposed to be deceived and the grant might be repealed on a *scire facias*." And they cited, with approbation, the doctrine of Lord Coke, in 2 Inst., 406, that "If one held a market either by prescription or by letters-patent, and another obtains a market to the nuisance of the former market, he shall not tarry till he have avoided the letters-patent of the latter market by course of law that he may have an assize of nuisance;" thus establishing the doctrine that there is no difference in point of law whether the first market be by prescription or by grant, or whether the new market be with or

without a patent from the crown. In each case the remedy is the same for the owner of the first market, if the new market is a nuisance to him. The judges also held that the circumstance of the benefit of the public requiring a new market, would not, of itself, warrant the grant of the new market.

Mr. Dane, in his Abridgment (2 Dane's Abridg., c. 67, p. 683), lays down the doctrine in terms equally broad and comprehensive, as applicable to America. After having spoken of a ferry as imposing burdens, *publici juris*, he adds: "In this way a ferry becomes property, an incorporeal hereditament; the owners of which, for the public convenience, being obliged by law to perform certain public services, must, as a reasonable equivalent, be protected in this property." And he cites the case of *Chadwick v. Haverhill Bridge*, as directly in point; that the erection of a neighboring bridge under the authority of the legislature is a nuisance to a ferry. Notwithstanding all the commentary bestowed on that case to escape from its legal pressure, I am of opinion that the report of the referees never could have been accepted by the court, or judgment given thereon, if the declaration had not stated a right which in point of law was capable of supporting such a judgment. The court seems, from Mr. Dane's statement of the case, clearly to have recognized the title of the plaintiff, if he should prove himself the owner of a ferry. Besides, without disparagement to any other man, Mr. Dane himself (the chairman of the referees), from his great learning and ability, is well entitled to speak with the authority of a commentator of the highest character upon such a subject.

It is true that there is the case of *Churchman v. Tunstal*, Hard., 162, where a different doctrine, as to a ferry, was laid down. But that case is repugnant to all former cases, as well as later cases; and Lord Chief Baron Maconald, in *Attorney-General v. Richard*, 2 Anst., 603, informs us that it was afterwards overturned. Lord Abinger, in *Huzzy v. Field*, 13 Law Jour., 239; S. C., 2 Crompt. & Roscoe, 432, goes further, and informs us that after the bill in that case was dismissed (which was a bill by a farmer of a ferry, as it should seem, under the crown, for an injunction to restrain the defendant who had lands on both sides of the Thames, three quarters of a mile off, and who was in the habit of ferrying passengers across, from continuing to do so), another bill was brought after the restoration, in 1663, and a decree made by Lord Hale in favor of the plaintiff that the new ferry should be put down. This last determination is exceeding strong, carrying the implication in regard to the franchise of a ferry, as exclusive of all other ferries injurious to it, to a very enlarged extent; and it was made by one of the greatest judges who ever adorned the English bench.

But it has been suggested that the doctrine as to ferries is confined to ancient ferries by prescription, and does not apply to those where there is a grant, which may be shown. In the former case the exclusive right may be proved by long use, and exclusive use. In the latter, the terms of the grant show whether it is exclusive or not; and if not stated to be exclusive in the grant, it cannot by implication be presumed to be exclusive. Now, there is no authority shown for such a distinction, and it is not sound in itself. If a ferry exists by prescription, nothing more from the nature of the thing can be established by long possession than that the ferry originated in some grant, and that it has local limits, from the ferry ways on one side to those on the other side. The mere absence of any other near ferry proves nothing except that there is no competition; for until there is some interference by the erection of another ferry, there can be nothing exclusive above or below the ferry ways established by the mere use of the

ferry. If such an interference should occur, then the question might arise; and the long use could establish no more than the rightful possession of the franchise. The question whether the franchise is exclusive or not must depend upon the nature of such a franchise at the common law, and the implications belonging to it. In short, it is in the authorities taken to be exclusive, unless a contrary presumption arises from the facts, as it did in *Holcroft v. Heel*, 1 Bos. & Pull., 400. But Lord Coke (in 2 Inst., 406) lays down the law as equally applicable to all cases of prescription and of grant. "If," says he, "one hath a market either by prescription or by letters-patent of the king, and another obtains a market to the nuisance of the former market, he shall not tarry till he have avoided the letters-patent of the latter market, by course of law, but he may have an assize of nuisance." The same rule must, for the same reason, apply to fairs and ferries. The case of *Prince v. Lewis*, 5 Barn. & Cress., 363, was the case of a grant of a market, and not of a market by prescription; yet no one suggested any distinction on this account. *Holcroft v. Heel*, 1 Bos. & Pull., 400, was the case of a grant of a market by letters-patent.

In *Ogden v. Gibbons*, 4 Johns. Ch., 150, Mr. Chancellor Kent recognizes, in the most ample manner, the general principles of the common law. Speaking of the grant in that case of an exclusive right to navigate with steamboats from New York to Elizabethtown Point, etc., he declared that the true intent was to include not merely that point, but the whole shore or navigable part of Elizabethtown. "Any narrower construction," said he, "in favor of the grantor would render the deed a fraud upon the grantee. It would be like granting an exclusive right of ferriage between two given points, and then setting up a rival ferry within a few rods of those very points, and within the same course of the line of travel. The common law contained principles applicable to this very case, dictated by a sounder judgment and a more enlightened morality. If one had a ferry by prescription, and another erected a ferry so near to it as to draw away its custom, it was a nuisance; for which the injured party had his remedy by action, etc. The same rule applies, in its spirit and substance, to all exclusive grants and monopolies. The grant must be so construed as to give it due effect by excluding all contiguous and injurious competition." Language more apposite to the present case could not well be imagined. Here there is an exclusive grant of a bridge from Charlestown to Boston, on the old ferry ways; must it not also be so construed as to exclude all contiguous and injurious competition? Such an opinion, from such an enlightened judge, is not to be overthrown by general suggestions against making any implications in legislative grants.

The case of the *Newburgh Turnpike Co. v. Miller*, 5 Johns. Ch., 101, decided by the same learned judge, is still more directly in point, and, as far as his authority can go, conclusively establishes the doctrine, not only that the franchise of a ferry is not confined to the ferry ways, but that the franchise of a bridge is not confined to the *termini* and local limits of the bridge. In that case, the plaintiffs had erected a toll-bridge over the River Wallkill, in connection with a turnpike, under an act of the legislature; and the defendants afterwards erected another road and bridge near to the former, and thereby diverted the toll from the plaintiffs' bridge. The suit was a bill in chancery, for a perpetual injunction of this nuisance of the plaintiffs' bridge, and it was accordingly, at the hearing, granted by the court. Mr. Chancellor Kent, on that occasion, said: "Considering the proximity of the new bridge, and the facility that every traveler has by means of that bridge, and the road connected with it, to shun

the plaintiffs' gate, which he would otherwise be obliged to pass, I cannot doubt for a moment that the new bridge is a direct and immediate disturbance of the plaintiffs' enjoyment of their privileges," etc. "The new road, by its *termini*, created a competition most injurious to the statute franchise; and becomes what is deemed in law, in respect to such franchise, a nuisance." And, after adverting to his own language, already quoted in *Ogden v. Gibbons*, 4 Johns. Ch., 150, 160, he added: "The same doctrine applies to any exclusive privilege created by statute. All such privileges come within the equity and reason of the principle. No rival road, bridge or ferry, or other establishment of a similar kind, and for like purposes, can be tolerated so near to the other as materially to affect or take away its custom. It operates as a fraud upon the grant, and goes to defeat it. The consideration by which individuals are invited to expend money upon great and expensive and hazardous public works, as roads and bridges, and to become bound to keep them in constant and good repair, is the grant of an exclusive toll. This right, thus purchased for a valuable consideration, cannot be taken away by direct or indirect means devised for the purpose, both of which are equally unlawful." Now, when the learned chancellor here speaks of an exclusive privilege, or franchise, he does not allude to any terms in the statute grant expressly giving such a privilege beyond the local limits; for the statute contained no words to such an effect. The grant, indeed, was by necessary implication exclusive as to the local limits, for the legislature could not grant any other bridge in the same place with the same *termini*. It was to such a grant of a franchise, exclusive in this sense, and in no other, that his language applies. And he affirms the doctrine in the most positive terms that such a grant carries with it a necessary right to exclude all injurious competition, as an indispensable incident. And his judgment turned altogether upon this doctrine.

It is true that in this case the defendants did not erect the new bridge under any legislative act. But that is not material in regard to the point now under consideration. The point we are now considering is, whether the grant of a franchise to erect a bridge or a ferry is confined to the local limits or *termini*, to the points and planks of the bridge, or to the ferry ways of the ferry. The learned chancellor rejects such a doctrine with the most pointed severity of phrase. "It operates," says he, "as a fraud upon the grant, and goes to defeat it." The grant necessarily includes "a right to an exclusive toll." "No rival road, bridge or ferry can be tolerated so near to the former as to affect or take away its custom." Now, if such be the true construction of the grant of such a franchise, it is just as true a construction in relation to the government as in relation to private persons. It would be absurd to say that the same grant means one thing as to the public, and an entirely opposite thing in relation to individuals. If the right to an exclusive franchise or toll exists, it exists from the nature and objects of the grant, and applies equally in all directions. It would be repugnant to all notions of common sense, as well as of justice, to say that the legislature had a right to commit a fraud upon its own grant. The whole reasoning of the learned chancellor repudiates such a notion.

But in what manner is the doctrine to be maintained, that the franchise of a ferry is confined to the ferry ways, and the franchise of a bridge to the planks? It is said that in *Saville's Reports*, 11, it is laid down "that a ferry is in respect to the landing-place, and not of the water; which water may belong to one, and the ferry to another." There can be no doubt of this doctrine. A ferry must have local limits. It must have *termini*, or landing-places; and it

may include only a right of passage over the water. And is not this equally true whether it be a ferry by prescription or by grant? If so, can there be any difference as to the value of the exclusive right in cases of grant or of prescription? Does not each rest on its landing-places? But it is added in Saville: "And in every ferry, the land on both sides of the water ought to be (belong) to the owner of the ferry; for otherwise he cannot land upon the other part." Now, if by this is meant that the owner of the ferry must be the owner of the land, it is not law; for all that is required is, that he should have a right or easement in the landing-places. So it was adjudged in *Peter v. Kendall*, 6 Barn. & Cress., 703; and the *dictum* of Saville was there overruled. If the same principle is to be applied (as I think it must be) to a bridge, then, as there must be a subsisting right in the proprietors of Charles River Bridge to have such landing-places on the old ferry ways, there must be an assignment or grant implied of those ferry ways by Harvard College to the proprietors for that purpose. But of this I shall speak hereafter.

One of the learned judges in the state court (who was against the plaintiffs) admitted that if any person should be forcibly prevented from passing over the plaintiffs' bridge, it would be an injury, for which an action on the case would lie. I entirely assent to this doctrine, which appears to me to be founded in the most sound reasoning. It is supported by the case of the Bailiffs of Tewksbury v. Diston, 6 East, 438, and by the authorities cited by Lord Ellenborough on that occasion; and especially by the doctrine of Mr. Justice Powell, in *Ashby v. White*, 2 Lord Raym., 948; and S. C., 6 Mod., 49. But how can this be, if the franchise of the bridge is confined to the mere local limits or timbers of the bridge? If the right to take toll does not commence or attach in the plaintiffs, except when the passengers arrive on the bridge, how can an action lie for the proprietors for obstructing passengers from coming to the bridge? The remedy of the plaintiffs can only be co-extensive with their rights and franchise. And if an action lies for an obstruction of passengers, because it goes to impair the right of toll, and to prevent its being earned, why does not the diversion of passengers from the bridge by other means, equally give a cause of action, since it goes, equally, nay more, to impair the right of the plaintiffs to toll? If the legislature could not impair or destroy its own grant by blocking up all avenues to the bridge, how can it possess the right to draw away all the tolls by a free bridge, which must necessarily withdraw all passengers? For myself, I cannot perceive any ground upon which a right of action is maintainable for any obstruction of passengers, which does not equally apply to the diversion of passengers. In each case the injury of the franchise is the same, although the means used are or may be different.

The truth is, that the reason why the grant of a franchise, as, for example, of a ferry, or of a bridge, though necessarily local in its limits, is yet deemed to extend beyond those local limits by operation and intendment of law, is founded upon two great fundamental maxims of law applicable to all grants. One is the doctrine already alluded to, and laid down in *Liford's Case*, in 11 Coke, 46, 52, a. *Lex est cuicunque, aliquis, quod concedit, concedere videtur et id, sine quo res ipsa esse non potuit*; or, as it is expressed with pregnant brevity by Mr. Justice Twisden, in *Pomfret v. Ricroft*, 1 Saund., 321, 323: "When the use is granted, everything is granted by which the grantee may have and enjoy the use." See, also, *Lord Darcy v. Askwith*, Hob., 234; 1 Saund., 323; note (6) by Williams; Co. Lit., 56 (a). Another is, that wherever a grant is made for a valuable consideration, which involves public duties and charges,

the grant shall be construed so as to make the indemnity co-extensive with the burden. *Qui sentit onus, sentire debet et commodum.* In the case of a ferry there is a public charge and duty. The owner must keep the ferry in good repair, upon the peril of an indictment. He must keep sufficient accommodations for all travelers at all reasonable times. He must content himself with a reasonable toll. Such is the *jus publicum*. In return the law will exclude all injurious competition, and deem every new ferry a nuisance which subtracts from him the ordinary custom and toll. See Com. Dig., Piscary, B.; id., Ferry. So strong is the duty of the ferry owner to the public, that it was held in *Paine v. Patrick*, 3 Mod., 289, 294, that the ferry owner could not excuse himself from not keeping proper boats, even by showing that he had erected a bridge more convenient for passengers. It would be a fraud upon such a grant of a ferry to divert the travel and yet to impose the burden. The right to take toll would, or might be, useless, unless it should be exclusive within all the bounds of injurious rivalry from another ferry. The franchise is therefore construed to extend beyond the local limits, and to be exclusive within a reasonable distance; for the plain reason that it is indispensable to the fair enjoyment of the franchise and right of toll. The same principle applies, without a shadow of difference that I am able to perceive, to the case of a bridge; for the duties are *publici juris*, and pontage and passage are but different names for exclusive toll for transportation.

In the argument at the present term it has been further contended that at all events in the state of Massachusetts the ancient doctrine of the common law in relation to ferries is not in force, and never has been recognized; that all ferries in Massachusetts are held at the mere will of the legislature, and may be established by them and annihilated by them at pleasure; and of course that the grantees hold them *durante bene placito* of the legislature. And in confirmation of this view of the subject, certain proceedings of the colonial legislature have been relied on, and especially those stated in the record, between the years 1629 to 1650; to the colonial act of 1641 against monopolies (which is in substance like the statute of monopolies of the 21 James I., ch. 3), and to the general colonial and provincial and state statutes regulating ferries, passed in 1641, 1644, 1646, 1647, 1695, 1696, 1710, 1719, 1781 and 1787, some of which contain special provisions respecting Charlestown and Boston ferry.

As to the proceedings of the colonial government, so referred to, in my judgment they establish no such conclusion. But some of them, at least, are directly opposed to it. Thus, for example, in 1638 a ferry was granted to Garret Spencer, at Lynn, for two years. In 1641 it was ordered that they that put two boats between Cape Ann and Annisquam shall have liberty to take sufficient toll, as the court shall think fit, for one-and-twenty years. Could the colonial government have repealed these grants within the terms specified at their pleasure? In 1648 John Glover had power given him to let a ferry over Neponset river between Dorchester and Braintree, to any person or persons for the term of seven years, etc.; or else to take it to himself and his heirs as his inheritance forever; provided it be kept in such a place and at such a price as may be most convenient for the country and pleasant to the general court. Now, if Glover, according to this act, had taken this ferry to him and his heirs as an inheritance, could the colonial legislature have revoked it at its pleasure? Or rather can it be presumed that the colonial legislature intended such a ferry, confessedly an inheritance, to be an estate held only at will? It would be repugnant to all notions of legal interpretation.

In 1637 the general court ordered the ferry between Boston and Charlestown to be let for three years. It was afterwards, in 1640, granted to Harvard College. From that time down to 1785 it was always held and claimed by the college as its inheritance. But the college never supposed that it was not subject to the regulation of the legislature, so far as the public interests were concerned. The acts of 1650, 1654, 1694, 1696, 1710 and 1781 establish this. But they show no more. That many of the ferries in Massachusetts were held, and perhaps were always held, under mere temporary licenses of the legislature, or of certain magistrates to whom they were intrusted, is not denied. But it is as clear that there were other ferries held under more permanent tenures. The colonial act of 1644, authorizing magistrates to pass ferries toll free, except such ferries as are appropriated to any, or rented out, and are out of the countries' hands; and then it is "ordered that their passages be paid by the country." The act of 1694 excepts from its operation "such ferries as are already stated and settled either by the court or town to whom they appertain." The colonial act of 1670, as an inducement to the town of Cambridge or other persons to repair the bridge at Cambridge, or to erect a new one, declared "that this order (granting certain tolls) should continue in force so long a time as the said bridge is maintained serviceable and safe for passage." So that it is plain that the colonial legislature did contemplate both ferries and bridges to be held by permanent tenures, and not to be revocable at pleasure.

But to all the general laws respecting ferries one answer may be given, that their provisions are generally confined to the due regulation of public ferries and matters *publici juris*; and so far as the public have rights which ought to be enforced and protected, and which the legislature had a proper right to enforce and protect by suitable laws. And, in regard to matters not strictly of this nature, the enactments may well apply to all such ferries within the state as were held under the mere temporary license of the state, and were revocable and controllable at pleasure by the legislature, in which predicament a very large number of the ferries in the state were; and also to those ferries (among which Charlestown ferry seems to have been) over which a modified legislative control had been, at their original establishment, reserved. Beyond these results, I am not prepared to admit that these statutes either had, or ever were supposed to have, any legitimate operation. And before I should admit such a conclusion, I should require the evidence of some solemn judgment of a court of justice in Massachusetts to the very point.

But the argument presses the doctrine to an extent which it is impossible can be correct, if any principles respecting vested rights exist, or have any recognition in a free government. What is it? That all ferries in Massachusetts are revocable and extinguishable at pleasure. Suppose, then, the legislature of Massachusetts, for a valuable consideration, should grant a ferry from A to B to a grantee and his heirs, or to a grantee for forty years, or for life; will it be contended that the legislature can take away, revoke, or annihilate, that grant within the period? That it may make such a grant cannot well be denied, for there is no prohibition touching it in the constitution of Massachusetts. That it can take away or resume such a grant has never yet been held by any judicial tribunal in that state. The contrary is as well established as to all sorts of grants, unless an express power be reserved for the purpose, as any principle in its jurisprudence. In the very case now before this court, every judge of the supreme court of the state admitted that the legislature could not resume or revoke its charter to Charles River Bridge.

Why not, if it could revoke its solemn grant of a ferry to a private person, or to a corporation, during the stipulated period of the grant? The legislature might just as well resume its grant of the public land, or the grant of turnpike, or of a railroad, or of any other franchise, within the period stipulated by its charter.

The doctrine, then, is untenable. The moment that you ascertain what the terms and stipulations of a grant of a ferry, or any other franchise, are, that moment they are obligatory. They cannot be gainsaid or resumed. So this court has said in the case of *Fletcher v. Peck*, 6 Cranch, 87 (§§ 1805-12, *supra*); and so are the unequivocal principles of justice, which cannot be overturned without shaking every free government to its very foundations. If, then, the ferry between Charlestown and Boston was vested in perpetuity in the corporation of Harvard College, it could not be taken away, without its consent, by the legislature. It was a ferry, so far withdrawn from the power of any legislation trenching on its rights and franchises. It is assuming the very point in controversy to say that the ferry was held at the mere pleasure of the legislature. An exclusive claim, and possession, and user, and taking of the profits thereof for one hundred and fifty years, by the corporation of Harvard College, without interruption, was as decisive evidence of its exclusive right to the franchise in perpetuity as the title deed of any man to his own estate. The legislature of Massachusetts has never, as far as I know, breathed a doubt on the point. All the judges of the state court admit the exclusive right of Harvard College to the ferry, in the most unequivocal terms. The argument, then, that the English doctrine as to ferries has not been adopted, and is not in force in Massachusetts, is not supported. For myself, I can only say that I have always understood that the English doctrine on this subject constitutes a part of the common law of Massachusetts. But what is most material to be stated, not one of the learned judges in the state court doubted or denied the doctrine, though it was brought directly before them; and they gave, *seriatim*, opinions containing great diversities of judgment on other points. It is also fully established by the case of *Chadwick v. Haverhill Bridge*, already cited.

But it is urged that some local limits must be assigned to such grants, and the court must assign them, for otherwise they would involve the absurdity of being co-extensive with the range of the river; for every other bridge or ferry must involve some diminution of toll; and how much (it is asked) is necessary to constitute an infringement of the right? I have already given an answer, in part, to this suggestion. The rule of law is clear. The application of it must depend upon the particular circumstances of each case. Wherever any other bridge or ferry is so near that it injures the franchise or diminishes the toll in a positive and essential degree, there it is a nuisance, and is actionable. It invades the franchise, and ought to be abated. But whether there be such an injury or not is a matter, not of law, but of fact. Distance is no otherwise important than as it bears on the question of fact. All that is required is, that there should be a sensible, positive injury. In the present case there is no room to doubt upon this point, for the bridges are contiguous; and Warren Bridge, after it was opened, took away three-fourths of the profits of the travel from Charles River Bridge; and when it became free (as it now is), it necessarily took away all the tolls, or all except an unimportant and trivial amount of tolls.

What I have said, however, is to be understood with this qualification, that the franchise of the bridge has no assigned local limits; but it is a simple

grant of the right to erect a bridge across a river from one point to another, without being limited between any particular vills or towns, or by other local limits. In the case now before the court, I have already stated that my judgment is that the franchise is merely to erect a bridge between Charlestown and Boston; and therefore it does not necessarily exclude the legislature from making any other grant for the erecting of a bridge between Boston and any other town. The exclusive right being between those towns, it only precludes another legislative grant between those towns which is injurious to Charles River Bridge. The case of *Tripp v. Frank*, 4 Term R., 666, is a clear authority for this doctrine. It was there decided that the grant of an exclusive ferry between A and B did not exclude a ferry between A and C. But the argument of the plaintiffs' counsel was tacitly admitted by the court, that "ferries in general must have some considerable extent upon which their right may operate; otherwise the exclusive privilege would be of no avail. That extent must be governed by local circumstances." And there is the greatest reason for supporting such rights, because the owners of ferries are bound at their peril to supply them to the public use, and are therefore fairly entitled to the public advantage arising from them.

But it is said, if this is the law, what then is to become of turnpikes and canals? Is the legislature precluded from authorizing new turnpikes or new canals, simply because they cross the path of the old ones, and incidentally diminish their receipt of tolls? The answer is plain. Every turnpike has its local limits and local *termini*; its points of beginning and of end. No one ever imagined that the legislature might grant a new turnpike, with exactly the same location and *termini*. That would be to rescind its first grant. The grant of turnpike between A and B does not preclude the legislature from the grant of a turnpike between A and C, even though it should incidentally intercept some of the travel; for it is not necessarily a nuisance to the former grant. The *termini* being different, the grants are or may be substantially different. But if the legislature should grant a second turnpike, substantially taking away the whole travel from the first turnpike between the same local points, then, I say, it is a violation of the rights of the first turnpike. And the opinion of Mr. Chancellor Kent, and all the old authorities on the subject of ferries, support me in the doctrine.

Some reliance has been placed upon the cases of *Prince v. Lewis*, 5 Barn. & Cress., 363, and *Mosley v. Walker*, 7 Barn. & Cress., 40, as impugning the reasoning. But it appears to me that they rather fortify than shake it. In the former case, the king granted a market to A and his heirs, in a place within certain specified limits, and the grantees used part of the limits for other purposes, and space enough was not ordinarily left for the marketing. It was held that the owner of the market could not maintain an action against a person for selling marketable goods in the neighborhood, without showing that at the time of the sale there was room enough in the market for the seller. This clearly admits the exclusive right of the owner, if there is room enough in the market. The other case affirms the same principle, as indeed it was before affirmed in *Mosley v. Chadwick*, 7 Barn. & Cress., 47, note.

But then again, it is said, that all this rests upon implication, and not upon the words of the charter. I admit that it does; but I again say, that the implication is natural and necessary. It is indispensable to the proper effect of the grant. The franchise cannot subsist without it, at least for any valuable or practical purpose. What objection can there be to implications, if they arise

from the very nature and objects of the grant? If it be indispensable to the full enjoyment of the right to take toll, that it should be exclusive within certain limits, is it not just and reasonable that it should be so construed? If the legislative power to erect a new bridge would annihilate a franchise already granted, is it not, unless expressly reserved, necessarily excluded by intentment of law? Can any reservations be raised by mere implication to defeat the operation of a grant, especially when such a reservation would be co-extensive with the whole right granted, and amount to the reservation of a right to recall the whole grant?

Besides, in this very case, it is admitted on all sides, that, from the defective language and wording of the charter, no power is directly given to the proprietors to erect the bridge; and yet it is agreed that the power passes by necessary implication from the grant, for otherwise it would be utterly void. The argument, therefore, surrenders the point as to the propriety of making implications, and reduces the question to the mere consideration of what is a necessary implication. Now, I would willingly put the whole case upon this point, whether it is not indispensable to the fair and full operation of the grant, that the plaintiffs should be secure in the full enjoyment of their right to tolls, without disturbance or diversion, as that they should have the power to erect the bridge. If the tolls may be all swept away by a contiguous free bridge, erected the next day, can it be said, in any sense, that the object of the franchise is obtained? What does the sound logic of the common law teach us on this point? If a grant, even of the crown, admits of two constructions, one of which will defeat and the other will promote and secure the fair operation of the grant, the latter is to be followed.

§ 2077. *The grant to the Charles River Bridge, construed upon its own terms, upon the plain principles of construction of the common law, is an exclusive grant.*

The truth is, that the whole argument of the defendants turns upon an implied reservation of power in the legislature to defeat and destroy its own grant. The grant, construed upon its own terms, upon the plain principles of construction of the common law, by which alone it ought to be judged, is an exclusive grant. It is the grant of a franchise, *publici juris*, with a right of tolls, and in all such cases the common law asserts the grant to be exclusive, so as to prevent injurious competition. The argument seeks to exclude the common law from touching the grant, by implying an exception in favor of the legislative authority to make any new grant. And let us change the position of the question as often as we may, it comes to this as a necessary result, that the legislature has reserved the power to destroy its own grant and annihilate the right of pontage of the Charles River Bridge. If it stops short of this exercise of its power, it is its own choice and not its duty. Now, I maintain that such a reservation is equivalent to a power to resume the grant, and yet it has never been for a moment contended that the legislature was competent to resume it.

To the answer already given to the objection that, unless such a reservation of power exists, there will be a stop put to the progress of all public improvements, I wish, in this connection, to add that there never can any such consequence follow upon the opposite doctrine. If the public exigencies and interests require that the franchise of Charles River Bridge should be taken away or impaired, it may be lawfully done upon making due compensation to the proprietors. "Whenever," says the constitution of Massachusetts, "the public exigencies require that the property of any individual should be appro-

priated to public uses, he shall receive a reasonable compensation therefor;" and this franchise is property, is fixed, determined property. We have been told, indeed, that where the damage is merely consequential (as, by the erection of a new bridge, it is said that it would be), the constitution does not entitle the party to compensation, and *Thruston v. Hancock*, 12 Mass., 220, and *Callender v. Marsh*, 1 Pick., 418, are cited in support of the doctrine. With all possible respect for the opinions of others, I confess myself to be among those who never could comprehend the law of either of those cases, and I humbly continue to doubt if, upon principle or authority, they are easily maintainable, and I think my doubts fortified by the recent English decisions. But, assuming these cases to be unquestionable, they do not apply to a case like the present, if the erection of such a new bridge is a violation of the plaintiff's franchise. That franchise, so far as it reaches, is private property; and so far as it is injured, it is the taking away of private property. Suppose a man is the owner of a mill, and the legislature authorizes a diversion of the water-course which supplies it, whereby the mill is injured or ruined, are we to be told that this is a consequential injury and not within the scope of the constitution? If not within the scope of the constitution, it is, according to the fundamental principles of a free government, a violation of private rights, which cannot be taken away without compensation. The case of *Gardner v. Village of Newburgh*, 2 Johns. Ch., 162, would be a sufficient authority to sustain this reasoning, if it did not stand upon the eternal principles of justice, recognized by every government which is not a pure despotism.

Not a shadow of authority has been introduced to establish the position of the defendants that the franchise of a toll-bridge is confined to the planks of the bridge; and yet it seems to me that the *onus probandi* is on them, for all the analogies of the common law are against them. They are driven, indeed, to contend that the same principles apply to ferries, which are limited to the ferry ways unless some prescription has given them a more extensive range. But here, unless I am entirely mistaken, they have failed to establish their position. As I understand the authorities they are, unequivocally, the other way. Are we then to desert the wholesome principles of the common law, the bulwark of our public liberties and the protecting shield of our private property, and assume a doctrine which substantially annihilates the security of all franchises affected with public easements?

But it is said that if the doctrine contended for be not true, then every grant to a corporation becomes, *ipso facto*, a monopoly or exclusive privilege. The grant of a bank, or of an insurance company, or of a manufacturing company, becomes a monopoly, and excludes all injurious competition. With the greatest deference and respect for those who press such an argument, I cannot but express my surprise that it should be urged. As long ago as the case in the year book, 22 Hen. VI., 14, the difference was pointed out in argument between such grants as involve public duties and public matters for the common benefit of the people, and such as are for mere private benefit, involving no such consideration. If a bank, or insurance company, or manufacturing company, is established in any town by an act of incorporation, no one ever imagined that the corporation was bound to do business, to employ its capital, to manufacture goods, to make insurance. The privilege is a mere private corporate privilege for the benefit of the stockholders, to be used or not at their own pleasure, to operate when they please, and to stop when they please. Did any man ever imagine that he had a right to have a note discounted by a bank, or a policy

underwritten by an insurance company? Such grants are always deemed *privati juris*. No indictment lies for a non-user. But in cases of ferries and bridges, and other franchises of a like nature (as has been shown), they are affected with a *jus publicum*. Such grants are made for the public accommodation, and pontage and passage are authorized to be levied upon travelers, which can only be by public authority, and, in return, the proprietors are bound to keep up all suitable accommodations for travelers under the penalty of indictment for their neglect.

The tolls are deemed an equivalent for the burden, and are deemed exclusive because they might not otherwise afford any just indemnity. In the very case at bar the proprietors of Charles River Bridge (as we have seen) are compellable to keep their draws and bridge in good repair during the period of seventy years; to pay an annuity to Harvard College; to give all reasonable accommodations to the public travel; and if they do not, they may be grievously amerced. The burdens being exclusively on them, must not the tolls granted by way of remuneration (I repeat it), must they not be equally exclusive to insure an indemnity? Is there any analogy in such a case to the case of a bank, or an insurance company, or a manufacturing company? The case of *Jackson v. Lamphire*, 3 Pet., 280 (§§ 1845-48, *supra*), contains no doctrine which in the slightest degree interferes with that which I have been endeavoring to establish in the present case. In that decision I believe that I concurred, and I see no reason now to call in question the soundness of that decision. That case does not pretend to inculcate the doctrine that no implications can be made as to matters of contract beyond the express terms of a grant. If it did it would be in direct conflict with other most profoundly considered adjudications of this court. It asserted only that the grant in that case carried no implication that the grantee should enjoy the land therein granted free from any legislative regulations to be made in violation of the constitution of the state. Such an implication, so broad and so unmeasured, which might extend far beyond any acts which could be held in any just sense to revoke or impair the grant, could, by no fit reasoning, be deduced from the nature of the grant. What said the court on that occasion? "The only contract made by the state is a grant to J. C., his heirs and assigns, of the land in question. The patent contains no covenant to do or not to do any further act in relation to the land, and we do not in this case feel at liberty to create one by implication. The state has not by this act impaired the force of the grant. It does not profess or attempt to take the land from the assigns of C. and give it to one not claiming under him. Neither does the award produce that effect. The grant remains in full force; the property conveyed is held by the grantee, and the state asserts no claim to it." But suppose the reverse had been the fact. Suppose that the state had taken away the land and granted it to another, or asserted its own right otherwise to impair the grant; does it not follow from this very reasoning of the court, that it would have been held to have violated the implied obligations of the grant? Certainly it must have been so held or the court would have overturned its own most solemn judgments in other cases. Now, there is not, and cannot be, any real distinction between a grant of land and a grant of franchises. The implication in each case must be the same, namely, that the thing granted shall not be resumed or impaired by the grantor.

It has been further argued that even if the charter of the Charles River Bridge does imply such a contract on the part of the legislature as is contended

for, it is void for want of authority in the legislature to make it; because it is a surrender of the right of eminent domain, intrusted to the legislature and its successors for the benefit of the public, which it is not at liberty to alienate. If the argument means no more than that the legislature, being intrusted with the power to grant franchise, cannot by contract agree to surrender or part with this power generally, it would be unnecessary to consider the argument, for no one supposes that the legislature can rightfully surrender its legislative power. If the argument means no more than that the legislature, having the right by the constitution to take private property (among which property are franchises) for public purposes, cannot divest itself of such a right by contract, there would be as little reason to contest it. Neither of these cases is like that before the court. But the argument (if I do not misunderstand it) goes further, and denies the right of the legislature to make a contract granting the exclusive right to build a bridge between Charlestown and Boston, and thereby taking from itself the right to grant another bridge between Charlestown and Boston, at its pleasure, although the contract does not exclude the legislature from taking it for public use upon making actual compensation, because it trenches upon the sovereign right of eminent domain.

It is unnecessary to consider whether the phrase "eminent domain," in the sense in which it is used in the objection, is quite accurate. The right of eminent domain is usually understood to be the ultimate right of the sovereign power to appropriate, not only the public property, but the private property of all citizens within the territorial sovereignty, to public purposes. Vattel (B. 1, c. 20, § 244) seems so to have understood the terms; for he says that the right which belongs to the society of the sovereign of disposing, in case of necessity, and for the public safety, of all the wealth (the property) contained in the state, is called the "eminent domain." And he adds, that it is placed among the prerogatives of majesty, which, in another section (B. 1, c. 4, § 45), he defines to be "all the prerogatives without which the sovereign command, or authority, could not be exerted in the manner most conducive to the public welfare." The right of "eminent domain," then, does not comprehend all, but only is among, the prerogatives of majesty.

But the objection uses the words in a broader sense, as including what may be deemed the essential and ordinary attributes of sovereignty; such as the right to provide for the public welfare, to open highways, to build bridges, and from time to time to make grants of franchises for the public good. Without doubt these are proper attributes of sovereignty, and prerogatives resulting from its general nature and functions. And so Vattel considers them in the passage cited at the bar. B. 1, c. 9, §§ 100, 101. But they are attributes and prerogatives of sovereignty only, and can be exercised only by itself, unless especially delegated.

But, without stopping to examine into the true meaning of phrases, it may be proper to say that, however extensive the prerogatives and attributes of sovereignty may theoretically be, in free governments they are universally held to be restrained within some limits. Although the sovereign power in free governments may appropriate all the property, public as well as private, for public purposes, making compensation therefor, yet it has never been understood, at least never in our republic, that the sovereign power can take the private property of A and give it to B, by the right of "eminent domain;" or that it can take it at all, except for public purposes, or that it can take it for public purposes without the duty and responsibility of making compensation for the

sacrifice of the private property of one for the good of the whole. These limitations have been held to be fundamental axioms in free governments like ours; and have accordingly received the sanction of some of our most eminent judges and jurists. Vattel himself lays them down, in discussing the question of the right of eminent domain, as among the fundamental principles of government, binding even upon sovereignty itself. "If," says he, "the nation itself disposes of the public property in virtue of this eminent domain, the alienation is valid, as having been made with a sufficient power. When it disposes in like manner, in a case of necessity, of the possessions (the property) of a community, or of an individual, the alienation will be valid for the same reason. But justice demands that this community, or this individual, be recompensed out of the public money, and if the treasury is not able to pay, all the citizens are obliged to contribute to it." Vattel, b. 1, c. 20, § 244. They have also been incorporated into most of our state constitutions, and into that of the United States; and, what is most important to the present argument, with the state constitution of Massachusetts. So long as they remain in those constitutions, they must be treated as limitations imposed by the sovereign authority upon itself, and, *a fortiori*, upon all its delegated agents. The legislature of Massachusetts is in no just sense sovereign. It is but the agent, with limited authority, of the state sovereignty; and it cannot rightfully transcend the bounds fixed in the constitution. What those limits are, I shall presently consider. It is but justice to the argument to say that I do not understand it to maintain that the legislature ought not in all cases, as a matter of duty, to give compensation, where private property or franchises are taken away. But that the legislature is the final judge as to the time, the manner, and the circumstances, under which it should be given or withheld, whether when the property is taken or afterwards, and whether it is, or is not, a case for compensation at all.

But let us see what the argument is in relation to sovereignty in general. It admits that the sovereign power has, among its prerogatives, the right to make grants, to build bridges, to erect ferries, to lay out highways, and to create franchises for public and private purposes. If it has a right to make such grants, it follows that the grantees have a right to take and to hold these franchises. It would be a solecism to declare that the sovereign power could grant, and yet no one could have a right to take. If it may grant such franchises, it may define and limit the nature and extent of such franchises; for, as the power is general, the limitations must depend upon the good pleasure and discretion of the sovereign power in making the particular grant. If it may prescribe the limits, it may contract that these limits shall not be invaded by itself or by others.

It follows, from this view of the subject, that if the sovereign power grants any franchise, it is good and irrevocable within the limits granted, whatever they may be, or else, in every case, the grant will be held only during pleasure, and the identical franchise may be granted to any other person, or may be revoked at the will of the sovereign. This latter doctrine is not pretended, and indeed is unmaintainable in our systems of free government. If, on the other hand, the argument be sound, that the sovereign power cannot grant a franchise to be exclusive within certain limits, and cannot contract not to grant the same, or any like franchise, within the same limits, to the prejudice of the first grant, because it would abridge the sovereign power in the exercise of its right to grant franchises, the argument applies equally to all grants of franchises,

whether they are broad or narrow; for, *pro tanto*, they do abridge the exercise of the sovereign power to grant the same franchise within the same limits. Thus, for example, if the sovereign power should expressly grant an exclusive right to build a bridge over navigable waters, between the towns of A and B, and should expressly contract with the grantees that no other bridge should be built between the same towns, the grant would, upon the principles of the argument, be equally void in regard to the franchise within the planks of the bridge, as it would be in regard to the franchise outside of the planks of the bridge; for in each case it would, *pro tanto*, abridge or surrender the right of the sovereign to grant a new bridge within the local limits. I am aware that the argument is not pressed to this extent, but it seems to me a necessary consequence flowing from it. The grant of the franchise of a bridge twenty feet wide, to be exclusive within those limits, is certainly, if obligatory, an abridgment or surrender of the sovereign power to grant another bridge within the same limits, if we mean to say that every grant that diminishes the things upon which that power can rightfully act is such an abridgment. Yet the argument admits that within the limits and planks of the bridge itself the grant is exclusive and cannot be recalled. There is no doubt that there is a necessary exception in every such grant, that, if it is wanted for public use, it may be taken by the sovereign power for such use upon making compensation. Such a taking is not a violation of the contract, but it is strictly an exception resulting from the nature and attributes of sovereignty; implied from the very terms, or at least acting upon the subject-matter of the grant, *suo jure*.

But the legislature of Massachusetts is, as I have already said, in no just sense the sovereign of the state. The sovereignty belongs to the people of the state in their original character as an independent community; and the legislature possesses those attributes of sovereignty, and those only, which have been delegated to it by the people of the state under its constitution.

§ 2078. *Under the constitution of Massachusetts the legislature of the state has power to grant the exclusive franchise of erecting a bridge over a river between two places and of taking toll.*

There is no doubt that among the powers so delegated to the legislature is the power to grant the franchises of bridges and ferries and others of a like nature. The power to grant is not limited by any restrictive terms in the constitution; and it is of course general and unlimited as to the terms, the manner and the extent of granting franchises. These are matters resting in its sound discretion, and having the right to grant, its grantees have a right to hold, according to the terms of their grant, and to the extent of the exclusive privileges conferred thereby. This is the necessary result of the general authority upon the principles already stated. But this doctrine does not stand upon general reasoning alone. It is directly and positively affirmed by all the judges of the state court (the true and rightful expositors of the state constitution) in this very case. All of them admit that the grant of an exclusive franchise of this sort, made by the legislature, is absolutely obligatory upon the legislature, and cannot be revoked or resumed; and that it is a part of the contract, implied in the grant, that it shall not be revoked or resumed; and that, as a contract, it is valid to the extent of the exclusive franchise granted. So that the highest tribunal in the state which is entitled to pass judgment on this very point has decided against the soundness of the very objection now stated, and has affirmed the validity and obligation of such a grant of the franchise. The question, among the learned judges, was not whether the grant was valid or not,

for all of them admitted it to be good and irrevocable. But the question was, what was, in legal construction, the nature and extent of the exclusive franchise granted. This is not all.

§ 2079. — *and it cannot take away such franchise except for public use and upon just compensation.*

Although the legislature have an unlimited power to grant franchises by the constitution of Massachusetts, they are not intrusted with any general sovereign power to recall or resume them. On the contrary, there is an express prohibition in the bill of rights in that constitution restraining the legislature from taking any private property, except upon two conditions: first, that it is wanted for public use; and secondly, that due compensation is made. So that the power to grant franchises, which are confessedly property, is general, while the power to impair the obligation of the grant and to resume the property is limited. An act of the legislature transcending these bounds is utterly void, and so it has been constantly held by the state judges. The same doctrine has been maintained by this court on various occasions, and especially in *Fletcher v. Peck*, 6 Cranch, 136 (§§ 1805–12, *supra*), and in *Dartmouth College v. Woodward*, 4 Wheat., 518 (§§ 2099–2117, *infra*).

Another answer to the argument has been, in fact, already given. It is, that by the grant of a particular franchise the legislature does not surrender its power to grant franchises, but merely parts with its power to grant the same franchise; for it cannot grant that which it has already parted with. Its power remains the same, but the thing on which it can alone operate is disposed of. It may, indeed, take it again for public uses, paying a compensation. But it cannot resume it, or grant it to another person, under any other circumstances or for any other purposes.

In truth, however, the argument itself proceeds upon a ground which the court cannot act upon or sustain. The argument is that if the state legislature makes a grant of a franchise exclusive, and contracts that it shall remain exclusive within certain local limits, it is an excess of power, and void as an abridgment or surrender of the rights of sovereignty under the state constitution. But this is a point over which this court has no jurisdiction. We have no right to inquire, in this case, whether a state law is repugnant to its own constitution, but only whether it is repugnant to the constitution of the United States. If the contract has been made, we are to say whether its obligation has been impaired, and not to ascertain whether the legislature could rightfully make it. Such was the doctrine of this court in the case of *Jackson v. Lamphire*, already cited. 3 Pet., 280 (§§ 1845–48, *supra*). But the conclusive answer is, that the state judges have already settled that point, and held the present grant a contract, to be valid to the extent of the exclusive limits of the grant, whatever they are.

To sum up, then, the whole argument on this head, I maintain that, upon the principles of common reason and legal interpretation, the present grant carries with it a necessary implication that the legislature shall do no act to destroy or essentially to impair the franchise; that (as one of the learned judges of the state court expressed it) there is an implied agreement that the state will not grant another bridge between Boston and Charlestown, so near as to draw away the custom from the old one; and (as another learned judge expressed it) that there is an implied agreement of the state to grant the undisturbed use of the bridge and its tolls, so far as respects any acts of its own, or of any persons acting under its authority. In other words, the state, impliedly,

contracts not to resume its grant, or to do any act to the prejudice or destruction of its grant. I maintain that there is no authority or principle established in relation to the construction of crown grants, or legislative grants, which does not concede and justify this doctrine. Where the thing is given, the incidents, without which it cannot be enjoyed, are also given, *ut res magis valeat quam pereat*. I maintain that a different doctrine is utterly repugnant to all the principles of the common law, applicable to all franchises of a like nature, and that we must overturn some of the best securities of the rights of property before it can be established. I maintain that the common law is the birthright of every citizen of Massachusetts, and that he holds the title-deeds of his property, corporeal and incorporeal, under it. I maintain that under the principles of the common law there exists no more right in the legislature of Massachusetts to erect the Warren Bridge, to the ruin of the franchise of the Charles River Bridge, than exists to transfer the latter to the former, or to authorize the former to demolish the latter. If the legislature does not mean in its grant to give any exclusive rights, let it say so, expressly, directly, and in terms admitting of no misconstruction. The grantees will then take at their peril, and must abide the results of their overweening confidence, indiscretion and zeal. My judgment is formed upon the terms of the grant, its nature and objects, its design and duties; and in its interpretation, I seek for no new principles, but I apply such as are as old as the very rudiments of the common law.

§ 2080. *The Charles River Bridge Company are also the equitable assignees of the old ferry belonging to Harvard College.*

But if I could persuade myself that this view of the case were not conclusive upon the only question before this court, I should rely upon another ground which, in my humble judgment, is equally decisive in favor of the plaintiffs. I hold that the plaintiffs are the equitable assignees (during the period of their ownership of the bridge) of the old ferry, belonging to Harvard College, between Charlestown and Boston, for a valuable consideration, and as such assignees they are entitled to an exclusive right to the ferry, so as to exclude any new bridge from being erected between those places during that period. If Charles River Bridge did not exist, the erection of Warren Bridge would be a nuisance to that ferry, and would, in fact, ruin it. It would be exactly the case of *Chadwick v. The Proprietors of Haverhill Bridge*, 2 Dane's Abr., 686, which, notwithstanding all I have heard to the contrary, I deem of the very highest authority. But, independently of that case, I should arrive at the same conclusion upon general principles. The general rights and duties of the owners of ferries, at the common law, were not disputed by any of the learned judges in the state court to be precisely the same in Massachusetts as in England. I shall not, therefore, attempt to go over that ground with any further illustrations than what have already, in another part of this opinion, been suggested. I cannot accede to the argument that the ferry was extinguished by operation of law by the grant of the bridge, and the acceptance of the annuity. In my judgment, it was indispensable to the existence of the bridge, as to its *termini*, that the ferry should be deemed to be still a subsisting franchise, for otherwise the right of landing on each side would be gone. I shall not attempt to go over the reasoning by which I shall maintain this opinion, as it is examined with great clearness and ability by Mr. Justice Putnam, in his opinion in the state court, to which I gladly refer, as expressing mainly all my own views on this topic. Indeed, there is in the whole of that opinion such a masculine vigor, such a soundness and depth of learning, such a forcible

style of argumentation and illustration, that in every step of my own progress I have sedulously availed myself of his enlightened labors. For myself, I can only say that I have as yet heard no answer to his reasoning, and my belief is, that, in a juridical sense, it is unanswerable.

§ 2081. *The Charles River Bridge Company did not, by its acceptance of the extension of its charter, relinquish any title to the exclusive franchise granted it originally.*

Before I close, it is proper to notice, and I shall do it briefly, another argument strongly pressed at the bar against the plaintiffs, and that is, that the extension of the term of the franchise of the plaintiffs for thirty years, by the act of 1792 (erecting the West Boston Bridge, between Boston and Cambridge), and the acceptance thereof by the plaintiffs, amounted to a surrender or extinguishment of their exclusive franchise, if they ever had any, to build bridges over Charles river; so that they are barred from now setting it up against the Warren Bridge. In my judgment, there is no foundation whatsoever, either in law or in the facts, to sustain this objection. If any legitimate conclusion be deducible from the terms of that act, it is that the plaintiffs, if they had claimed any such exclusive right over the whole river, would, by their acceptance of the new term of years, have been estopped to claim any damages done to their franchise by the erection of West Boston Bridge; and that their consent must be implied to its erection. But there is no warrant for the objection in any part of the language of the act. The extension of the term is not granted upon any condition whatsoever. No surrender of any right is asked or required. The clause extending the term purports, in its face, to be a mere donation or bounty of the legislature, founded on motives of public liberality and policy. It is granted expressly as an encouragement to enterprise, and as a compensation for the supposed diminution of tolls which West Boston Bridge would occasion to Charles River Bridge; and in no manner suggests any sacrifice or surrender of right whatsoever to be made by the plaintiffs. In the next place the erection of West Boston Bridge was no invasion whatsoever of the franchise of the plaintiffs. Their right, as I have endeavored to show, was limited to a bridge, and the travel between Charlestown and Boston, and did not extend beyond those towns. West Boston Bridge was between Boston and Cambridge, at the distance of more than a mile by water, and by land of nearly three miles; and as the roads then ran, the line of travel for West Boston Bridge would scarcely ever, perhaps never, approach nearer than that distance to Charles River Bridge. The grant, therefore, could not have been founded in any notion of any surrender or extinguishment of the exclusive franchise of the plaintiffs, for it did reach to such an extent. It did not reach Cambridge, and never had reached it.

As to the report of the committee, on the basis of which the West Boston Bridge was granted, it has, in my judgment, no legal bearing on the question. The committee say that they are of opinion that the act of 1785 did not confer "an exclusive grant of the right to build over the waters of Charles river." That is true; and it is equally true that the plaintiffs never asserted or pretended to have any such right. In their remonstrance against the erection of West Boston Bridge they asserted no such right; but they put themselves upon mere equitable considerations, addressing themselves to the sound discretion of the legislature. If they had asserted such a broad right, it would not justify any conclusion that they were called upon to surrender, or did surrender, their real and unquestionable rights. The legislature understood itself to be

granting a boon, and not making a bargain or asking a favor. It was liberal, because it meant to be just, in a case of acknowledged hazard and of honorable enterprise, very beneficial to the public. To suppose that the plaintiffs meant to surrender their present valuable and exclusive right of franchise for thirty-four remaining years, and to put it in the power of the legislature the next day, or the next year, to erect a bridge, toll or free, which by its contiguity should ruin theirs or take away all its profits, is a supposition, in my judgment, truly extravagant, and without a scintilla of evidence to support it. The burdens of maintaining the bridge were to remain; the payment of the annuity to Harvard College was to remain; and yet, upon this supposition, the extension of the term of their charter, granted in the shape of bounty, would amount to a right to destroy the franchise the next day or the next hour, at the pleasure of the legislature. I cannot perceive upon what ground such an implication can be made, an implication not arising from any words or intent expressed on the face of the act, or fairly inferable from its purposes, and wholly repugnant to the avowed objects of the grant, which are to confer a benefit, and not to impose an oppressive burden or create a ruinous competition.

§ 2082. *The Massachusetts act impairs the obligation of a contract.*

Upon the whole, my judgment is, that the act of the legislature of Massachusetts, granting the charter of Warren Bridge, is an act impairing the obligation of the prior contract and grant to the proprietors of Charles River Bridge; and by the constitution of the United States, it is therefore utterly void. I am for reversing the decree of the state court dismissing the bill, and for remanding the cause to the state court for further proceedings as to law and justice shall appertain.

MR. JUSTICE THOMPSON concurred with MR. JUSTICE STORY.

EAST HARTFORD v. THE HARTFORD BRIDGE COMPANY.

(10 Howard, 511-540. 1850.)

STATEMENT OF FACTS.—The origin of the ferry privilege in controversy is referred to in the opinion. This ferry belonged to the town of Hartford, was leased from time to time, and the tolls were regulated by legislative enactment. In 1783 one-half of the ferry was granted to the town of East Hartford, during the pleasure of the legislature. In 1808 a company was incorporated and authorized to erect a bridge. The bridge was erected, and in 1818 a new charter was granted. In the same year, also, on the petition of the bridge company, the legislature passed an act discontinuing the ferry, but in 1836 this act was repealed. In 1841 the repealing part of the act of 1836 was repealed, thus again discontinuing the ferry. The controversy has reference particularly to the constitutionality of the acts of 1818 and 1841.

Opinion by MR. JUSTICE WOODBURY.

This is a writ of error, under the twenty-fifth section of the judiciary act (1 Stats. at Large, 85), brought to reverse a judgment rendered by the supreme court of the state of Connecticut.

It is claimed by the plaintiff that the clause in the constitution of the United States against impairing the obligation of contracts was set up there in defense to certain proceedings which had been instituted against that corporation by virtue of rights derived from legislative acts of that state, which acts, the plaintiff insisted, had impaired the obligation of a contract existing in behalf of East

Hartford. It being manifest from the record that such a defense was set up, and that the court overruled the objection, so that jurisdiction exists here to revise the case, we proceed to examine whether, on the facts of the case, any such contract appears to have existed, and to have been violated by the state legislation which was drawn in question.

It will be seen that the point before us is one of naked constitutional law, depending on no equities between the parties, but on the broad principle in our jurisprudence whether power existed in the legislature of Connecticut to pass the acts in 1818 and 1841 which are complained of in this writ of error. The supposed contract claimed to have been impaired related to certain rights in a ferry, which were alleged to have been granted by the state, across the Connecticut river. This grant is believed to have been made to Hartford as early as the year 1680, and half of it transferred to East Hartford in 1783. But no copy of the first grant being produced, nor any original referred to or found, it is difficult to fix the terms or character of it, except from the nature of the subject and the subsequent conduct of the parties, including the various acts of the legislature afterwards passed regulating this matter.

From these it is manifest that two leading considerations arise in deciding, in the first place, whether by this grant a contract like that contemplated in the constitution can be deemed to exist. They are, first, the nature of the subject-matter of the grant, and, next, the character of the parties to it. As to the former, it is certain that Connecticut passed laws regulating ferries in 1695, and Massachusetts began to grant ferries as early as 1644 (Col. Charter, p. 110), and to exercise jurisdiction over some even in 1630. *Charles River Bridge v. Warren Bridge*, 11 Pet., 430 (§§ 2058-82, *supra*). In 1691 she provided that no one should keep a ferry without license from the quarter sessions, and under bonds to comply with the duties and regulations imposed (p. 280). In the rest of New England it is probable that a similar course was pursued by the legislatures, making, as a general rule, the tolls and exercise of the franchise entirely dependent on their discretion. But in some instances the owners of the lands on the banks of small rivers opened ferries upon them, and claimed private interests therein. And in still other cases of public grants to private corporations or individuals, a similar interest has been claimed.

§ 2083. *A grant to a municipality of the right to keep a ferry may be revoked.*

It is highly probable, too, that, in some instances, public corporations, like the plaintiff in this case, may have set up a like interest, claiming that the subject-matter granted was one proper for a contract, or incident to some other rights, like private interests owned on the bank of a river. Supposing, then, that a ferry may in some cases be private property, and be held by individuals or corporations under grants in the nature of contracts, it is still insisted here that the ferry across a large navigable river, and whose use and control were entirely within the regulation of the colonial legislature, and came from it, would be a mere public privilege or public license, and a grant of it not within the protection of the constitution of the United States as a matter of contract. But it is not found necessary for us to decide finally on this first and more doubtful question, as our opinion is clearly in favor of the defendant in error on the other question, namely, that the parties to this grant did not by their charter stand in the attitude towards each other of making a contract by it, such as is contemplated in the constitution, and as could not be modified by subsequent legislation. The legislature was acting here on the one part, and

public municipal and political corporations on the other. They were acting, too, in relation to a public object, being virtually a highway across the river, over another highway up and down the river. From this standing and relation of these parties, and from the subject-matter of their action, we think that the doings of the legislature as to this ferry must be considered rather as public laws than as contracts. They related to public interests. They changed as those interests demanded. The grantees likewise, the towns being mere organizations for public purposes, were liable to have their public powers, rights and duties modified or abolished at any moment by the legislature. They are incorporated for public and not private objects. They are allowed to hold privileges or property only for public purposes. The members are not shareholders nor joint partners in any corporate estate, which they can sell or devise to others, or which can be attached and levied on for their debts. Hence, generally, the doings between them and the legislature are in the nature of legislation rather than compact, and subject to all the legislative conditions just named, and therefore to be considered as not violated by subsequent legislative changes.

§ 2084. *The legislature of a state retains all its power over public corporations.*

It is hardly possible to conceive the grounds on which a different result could be vindicated, without destroying all legislative sovereignty, and checking most legislative improvements and amendments, as well as supervision over its subordinate public bodies. Thus, to go a little into details, one of the highest attributes and duties of a legislature is to regulate public matters with all public bodies, no less than the community, from time to time, in the manner which the public welfare may appear to demand. It can neither devolve these duties permanently on other public bodies, nor permanently suspend or abandon them itself, without being usually regarded as unfaithful, and, indeed, attempting what is wholly beyond its constitutional competency.

It is bound, also, to continue to regulate such public matters and bodies, as much as to organize them at first. Where not restrained by some constitutional provision, this power is inherent in its nature, design and attitude; and the community possess as deep and permanent an interest in such power remaining in and being exercised by the legislature, when the public progress and welfare demand it, as individuals or corporations can, in any instance, possess in restraining it. See Taney, C. J., in 11 Pet., 547, 548 (§§ 2058-82, *supra*).

In *Goszler v. Corporation of Georgetown*, 6 Wheat., 596 (CORPORATIONS, §§ 2335-36), it was held that a city with some legislative power as to by-laws, streets, etc., could, after establishing a graduation for its streets, and after individuals had built in conformity to it, change materially its height. This case appears to settle the principle that a legislative body cannot part with its powers by any proceeding, so as not to be able to continue the exercise of them. It can and should exercise them, again and again, as often as the public interests require. And though private interests may intervene, and then should not be injured except on terms allowed by the constitution, yet public interests in one place or corporation may be affected injuriously by laws, without any redress, as legislation on public matters looks to the whole and not a part, and may, for the benefit of the whole to the injury of a part, change what is held under it by public bodies for public purposes. The legislature, therefore, could not properly divest itself of such control, nor devolve it on towns or counties,

nor cease from any cause to exercise it on all suitable occasions. *Clark v. Corporation of Washington*, 12 Wheat., 54.

Its members are made, by the people, agents or trustees for them on this subject, and can possess no authority to sell or grant their power over the trust to others. *Presbyterian Church v. City of New York*, 5 Cowen, 542; *Fairtitle v. Gilbert*, 2 D. & E., 169. Nor can the public be estopped by such attempts, since the acts of their agents are to be for the public, and for its benefit, and not for themselves individually, and are under a limited authority or jurisdiction, so as to be void if exceeding it. Looking to the subject, when, as here, the grantees as well as the grantors are public bodies, and created solely for municipal and political objects, the continued right of the legislature to make regulations and changes is still clearer. Perhaps a stronger illustration of this principle than any yet cited exists in another of our own decisions.

In *State of Maryland v. Baltimore & Ohio Railroad*, 3 How., 551, this court held that a grant by the legislature to a county, of a sum forfeited, could be dispensed with by the legislature afterwards, as it was made for public, not private, purposes, and to a public body. There is no private interest or property affected by this course, but only public corporations and public privileges. It may be otherwise in case of private bodies or individuals, or of private property granted or acquired. The legislature might not be justified to revoke, transfer or abolish them on account of the private character of the party or the subject. *Town of Pawlet v. Clark*, 9 Cranch, 292; *Terrett v. Taylor*, id., 48-50. But everything here is public.

While maintaining the exemption of private corporations from legislative interference, Justice Washington, in 4 Wheat., 659 (§§ 2099-2117, *infra*), in the *Dartmouth College* case, still admits that corporations for "public government," such as a "town or city," are under the control of legislation; whereas private corporations are governed by the statutes of their founders, or by their charters. pp. 660, 661. He remarks further, that the members of such a public corporation "accepted the charter for the public benefit alone, and there would seem to be no reason why the government, under proper limitations, should not alter or modify such a grant at pleasure." pp. 661, 663. And Justice Story concurs with him by saying: "It may also be admitted that corporations for mere public government, such as towns, cities and counties, may, in many respects, be subject to legislative contract." 4 Wheat., 694. When they are wished to be in some respects not so subject, but to act exclusively, it should be so expressed in the constitutions of their states. What is exclusive in them would there appear expressly, and when it is not, a legislative provision, if made for the purpose of rendering it exclusive, is, for the reasons beforestated, doubtful in its validity. The public character of all the parties to this grant, no less than its subject-matter, seems, therefore, to show that nothing in the nature of a contract, with terms to be fulfilled or impaired like private stipulations, existed in this case so as to prevent subsequent interference with the matter by the legislature, as the public interests should appear to require.

§ 2085. *Where a ferry privilege was granted a town "during the pleasure of the assembly," a law discontinuing it would not, even if the grant be regarded as a contract, impair it.*

But in order to justify the plaintiff in what it set up below, there must not only have been a contract, or *quasi* contract, but a violation of its obligation. It will therefore be useful to follow out further the nature and conditions of this supposed contract, in order to throw more light on both the questions

whether this grant was such a contract as the constitution contemplates, and whether it has been at all impaired. The authority of a legislature may probably supersede such a ferry as is public, and across a great public highway of a navigable river, by allowing a bridge over the same place, as has before been virtually held by this court. 11 Pet., 422 (§§ 2058–82, *supra*); 6 How., 507 (§§ 2188–90, *infra*). It could also alter or abolish wholly the public political corporation to which the grant was made, as this is yearly done in dividing towns and counties, and discontinuing old ones. It is therefore clear, that, whatever in the nature of a contract could be considered to exist in such a case, by a grant to a town of some public privilege, there must be implied in it a condition that the power still remained or was reserved in the legislature to modify or discontinue the privilege in future, as the public interests might from time to time appear to require. *Charles River Bridge v. Warren Bridge*, 11 Pet., 421 (§§ 2058–82, *supra*); *West River Bridge v. Dix*, 6 How., 507 (§§ 2188–90, *infra*).

Accordingly, it is admitted in this case, that the legislature, as early as 1695, in fact regulated the tolls of this ferry, and continued to do it until 1783, when it granted to East Hartford one-half of the privilege, and that only “during the pleasure of the assembly.” All concerned in the privilege, therefore, became thus estopped to deny that this ferry was to be used by the town as a mere public license, and to be used in conformity with the views of the legislature as to what in future might be deemed most useful to the community at large. Because the old town of Hartford acquiesced in this regulation of tolls, and in this transfer of half to East Hartford in this limited or conditional manner, and the latter acquiesced in the acceptance of it on the terms expressed, to hold it during “the pleasure of the assembly.” Such being, then, the public character of the subject and parties of the grant, and such the terms and conditions of it,—rather than being one of private property, for private purposes, to private corporations or individuals, and absolutely rather than conditionally,—in what respect has it been violated by the legislature? No pretense is made that it has been, unless by the discontinuance of the ferry in 1818 and in 1841. The former act of the legislature was passed under the following circumstances: a bridge had been authorized over the river near the ferry as early as 1808, and no provision was then made as to the ferry, probably from a belief that it would, after the bridge was finished, fall into disuse, and be of no importance to anybody.

No objection was made or could be sustained to the constitutionality of this incorporation in this way. 11 Pet., 420; 4 Pick., 463. But when the bridge became damaged greatly in 1818, and the company was subjected to large expenses in rebuilding, the legislature deemed it proper to provide, in its behalf, that the ferry should not be kept up afterwards, except when the bridge became impassable. The words were, that, “after the company shall have repaired the bridge, etc., the ferries by law established between the towns of Hartford and East Hartford shall be discontinued, and said towns shall never thereafter be permitted to transport passengers across said river,” etc. This bridge corporation, being the present defendant in error, proceeded, therefore, to rebuild and keep up their bridge in a more costly manner, and beneficially and safely to the community. They were a private, pecuniary body, and were aided much by the suspension or discontinuance of the ferry in their additional charter. The legislature, in making the discontinuance, did only what it supposed was advantageous to the public, by securing a better, quicker and surer method of

passing the river on the bridge; and it thus appears to have violated no condition or terms of any contract or *quasi* contract, if it had made any with the plaintiff. 11 Pet., 542. On the contrary, as before suggested, the legislature merely acted within its reserved rights, and only passed a new law on a public subject, and affecting only a public body. But beside the implied powers continuing in the legislature, as heretofore explained, and which warrant all it did in 1818, and the exercise of which cannot be regarded as impairing any contract, we have seen that there was an express provision in the grant to East Hartford, limiting the half of the ferry transferred to it "during the pleasure of the assembly." The legislative pleasure expressed in 1818, that the ferry should cease, came then directly within this condition; and the permission to exercise that pleasure in this way was not only acquiesced in from 1818 to 1836, but was treated as the deliberate understanding on both sides from 1783 to 1836.

The statute-books of Connecticut are full of acts regulating ferries, including this, and modifying their tolls from 1783 downwards, and in many instances imposing new and onerous duties. See 1 Stats. of Conn., 314 to 327. And to show how closely the power of the legislature was exercised to regulate this matter, without being regarded as impairing in that way any contract or obligation, it appears that when Hartford was incorporated into a city, about 1820 (R. S., 110), it was expressly provided: "But said city shall have no power to regulate or affect the fisheries in, or the ferry upon, said river" (Connecticut). Well, too, might East Hartford, in 1783, be not unwilling to take her charter and half the ferry, subject to this suspension; as her own existence at all, then and thereafter, depended on legislative pleasure, and as all the property or privileges of the old town would remain with the old one, when a new was carved out of it, unless otherwise expressly provided. 4 Mass., 384; 2 N. Hamp., 20.

Our inquiries would terminate here, as this legislation, in 1818, is the supposed violation of a contract that was chiefly relied on below, had there not been several other acts of legislation as to this ferry in 1836, 1841 and 1842, some of which are claimed to have impaired contracts made with the plaintiff, either then or in 1783.

§ 2086. *Where the highest court of a state decides a state law as void under the state constitution, such decision is regarded as final by this court.*

But the act of 1836, about which much has been said in the argument here, and much was very properly urged in the court below, simply repealed that part of the act of 1818 discontinuing the ferry. It thus affected the bridge company deeply and injuriously, but did not impair any supposed contract with East Hartford, was not hostile to its rights, and is not, therefore, complained of by that town, nor open to be considered as a ground for revising the judgment below under this writ of error. On this see *Satterlee v. Matthewson*, 2 Pet., 413 (§§ 1630-35, *supra*); *Jackson v. Lamphire*, 3 Pet., 289 (§§ 1845-48, *supra*); 7 Pet., 243; 11 Pet., 540 (§§ 2058-82, *supra*); *Strader v. Graham*, 10 How., 82. The state court, however, pronounced it unconstitutional, and had jurisdiction to do it, and if they had not arrived at such a result, they could not have sustained some of their other conclusions. This decision of theirs being founded on their own constitution and statutes, must be respected by us, and in this inquiry must be considered *prima facie* final. *Luther v. Borden*, 7 How., 1, and cases there collected. We shall, therefore, not revise the legal correctness of that decision, but refer only to a few of the facts connected with the repeal of 1836, and with the decision on it below, so far as is necessary to explain the

legislation subsequent to it, and which is yet to be examined. The legislature does not appear to have proceeded at that time on any allegation of wrong or neglect on the part of the bridge company; nor did they make any compensation to the latter for thus taking from it the benefits of a discontinuance of the ferry, and attempting to revive half the privileges again in East Hartford. The state court appears to have considered such a repeal, under all the circumstances, as contrary at least to the vested rights of the bridge company, and to certain provisions in the state constitution. See, also, *Enfield Bridge v. Hartford & New Haven R. Co.*, 17 Conn., 464.

But, without going further into the history of this proceeding in 1836, and the decision on it by the state court, it is manifest that the dissatisfaction and complaints growing out of it, or some other important reason, induced the legislature in 1841 to repeal the repealing act of 1836, and thus to leave the bridge company once more in the full enjoyment of its former privileges after the ferry had been discontinued in 1818. To this conduct of the legislature the plaintiff in error objected, and under this writ asks our decision, whether it does not impair contracts which had before been made with it by the legislature. In reply, it need only be stated that we think it does not, and this for the reasons already assigned why it was competent for the legislature to pass the discontinuing part of the act of 1818, if it thought proper, and in this did not violate the constitution of the United States as to contracts.

But matters were not permitted to remain long in this position. In 1842 the legislature proceeded to repeal the act of 1841, and thus sought virtually to restore the ferry to Hartford and East Hartford, as it stood before 1818. It appears to have done this on the complaint of East Hartford that half of the ferry had been taken away from her without making "any compensation." It is unnecessary, in relation to this last repeal, to say more than that, like the repeal of 1836, and for like reasons, the state court pronounced it void; and, on the ground before explained, we are not called on by this writ to reconsider or reverse that decision.

It follows, then, finally, that East Hartford, in proceeding to exercise the ferry privilege again since 1842, and to the special injury of the bridge company, has done it without legal authority, and should therefore be restrained by injunction from exercising it longer. The judgment below must be affirmed. (a)

BRIDGE PROPRIETORS v. HOBOKEN COMPANY.

(1 Wallace, 116-155. 1863.)

STATEMENT OF FACTS.—The state of New Jersey authorized a turnpike company to erect a bridge and take tolls. The act also provided that it should not be lawful for any person or persons to erect any other bridge within certain limits. In 1860 the legislature authorized the construction of a railroad bridge, and its construction was commenced within the limits claimed by the bridge company. The bridge proprietors filed a bill for an injunction and for general relief. There was a decree of dismissal in the chancery court, which was affirmed in the court of errors and appeals.

Opinion by MR. JUSTICE MILLER.

The first point arising in the case is that which relates to the jurisdiction of this court to review the decision of the state court of New Jersey. This is a

(a) It was also decided, in *East Hartford v. Hartford Bridge Co.*,* 10 How., 511, that the town of East Hartford was liable in damages for continuing to use the ferry to the injury of the bridge company after it had been twice discontinued.

question which this court has always looked into in this class of cases whether the point be raised by counsel or not; but here it is much pressed, and we proceed to examine it. It is asserted by the plaintiffs in error that the validity of the act of the New Jersey legislature of 1860 is drawn in question as being contrary to that provision of the constitution of the United States which declares that no state shall pass any law impairing the obligation of a contract; and that the decision of the state court was in favor of its validity, and the case is therefore embraced by the twenty-fifth section of the judiciary act.

§ 2087. *Provision of the constitution need not be pleaded in state court to give supreme court jurisdiction.*

It is objected, however, by the defendants that the pleadings do not, in words, say that the statute is void because it conflicts with the constitution of the United States, and do not point out the special clause of the constitution supposed to render the act invalid. It would be a new rule of pleading, and one altogether superfluous, to require a party to set out specially the provision of the constitution of the United States on which he relies for the action of the court in the protection of his rights. If the courts of this country, and especially this court, can be supposed to take judicial notice of anything without pleading it specially, it is the constitution of the United States. And if the plaintiff and defendant in their pleadings make a case which necessarily comes within some of the provisions of that instrument, this court surely can recognize the fact without requiring the pleader to say in words: "This paragraph of the constitution is the one involved in this case."

Very few questions have been as often before this court as those which relate to the circumstances under which it will review the decision of the state courts; and the very objection now raised by defendants has more than once been considered and decided. In the case of *Crowell v. Randell*, 10 Pet., 368, the motion to dismiss for want of jurisdiction was argued at much length by Mr. Webster, Mr. Sergeant and Mr. Clayton, whose names are a sufficient guaranty that the matter was well considered. The opinion was delivered by Mr. Justice Story. He reviews all the cases reported up to that time, and lays down these four propositions as necessary to bring a case within the twenty-fifth section of the judiciary act: "1st. That some one of the questions stated in that section did arise in the state court. 2d. That the question was decided by the state court as required in the same section. 3d. That it is not necessary that the question should appear on the record to have been raised and the decision made in direct and positive terms, *ipsissimis verbis*, but that it is sufficient if it appears by clear and necessary intendment, that the question must have been raised and must have been decided, in order to have induced the judgment. 4th. That it is not sufficient to show that the question might have arisen or been applicable to the case, unless it is further shown in the record that it did arise, and was applied by the state court to the case."

In the case of *Armstrong v. Treasurer of Athens County*, 16 Pet., 281, Judge Catron, in delivering the opinion of the court, said that the question of jurisdiction under the twenty-fifth section of the act of 1789 had so often arisen, and parties had been subject to so much unnecessary expense, that the court thought it a fit occasion to state the principles on which it acted in such cases. Referring especially to the manner in which the question on which the jurisdiction must rest shall be made to appear, he lays down six different modes in which that may be done. The first of these is, "either by express averment or by necessary intendment in the pleadings in the case." The sixth is, "that it

must appear from the record that the question was necessarily involved in the decision, and that the state court could not have given the judgment or decree which they passed, without deciding it." Now, although there are other decisions in which it is said that the point raised must appear on the record, and that the particular act of congress, or part of the constitution, supposed to be infringed by the state law, ought to be pointed out, it has never been held that this should be done in express words. But the true and rational rule is, that the court must be able to see clearly, from the whole record, that a certain provision of the constitution or act of congress was relied on by the party who brings the writ of error, and that the right thus claimed by him was denied.

§ 2088. *Where the state court dismisses a bill, thereby holding a law valid under the federal constitution, this court has jurisdiction.*

Looking at the record before us, and applying to it these principles, we find no difficulty in the matter. The defendants claim, under the act of 1860 of the New Jersey legislature, a right to build their railroad bridge or viaduct over the Hackensack river, inside the limits prohibited by the act of 1790. The plaintiffs say, that to permit this is to violate the contract which they have with the state of New Jersey, and therefore the act of 1860, so far as it confers such authority on the defendants, is made void by the constitution of the United States, because it impairs the obligation of a contract. The state court dismissed the bill on these pleadings alone. It could not have done this without holding the act of 1860 to be valid, as it was the only authority on which defendants rested their right to build any structure whatever over the Hackensack river. In holding that act to be valid, notwithstanding plaintiffs claim that it was void as impairing the obligation of their contract with the state of New Jersey, a decision was made within the very terms of the twenty-fifth section of the act of congress of 1789.

§ 2089. — *whether the validity of the act or its construction is drawn in question.*

It is said, however, that it is not the validity of the act of 1860 which is complained of by plaintiffs, but the construction placed upon that act by the state court. If this construction is one which violates the plaintiffs' contract, and is the one on which the defendants are acting, it is clear that the plaintiffs have no relief except in this court, and that this court will not be discharging its duty to see that no state legislature shall pass a law impairing the obligation of a contract, unless it takes jurisdiction of such cases. The case of the Commercial Bank v. Buckingham, 5 How., 317, does not conflict with this view, because that was a case in which the prior and the subsequent statutes were both admitted to be valid under any construction of them, and therefore no construction placed by the state court on either of them could draw in question its validity, as being repugnant to the constitution of the United States, or any act of congress. But there is a misconception as to what was construed in this case by the state court. It is very obvious that the statute of 1860 was *not* construed. No doubt is entertained by this court, none could have been entertained by the state court, that it was intended by the framers of that act to authorize the defendants to build the railroad bridge which they were building, and which plaintiffs sought to enjoin. The act which was really the subject of construction was the act of 1790, under which plaintiffs claim. For if that act and the proceedings under it amounted to a contract, and that contract prohibited the kind of structure which the defendants were about to erect under the act of 1860, then the latter act must be void as impairing that contract. If, on

the other hand, the first act and the agreement under it was not a contract, or if, being a contract, it did not prohibit the erection of such a structure as that authorized by the act of 1860, the latter act was valid, because it did not impair the obligation of a contract. It was then the act of 1790 which required construction, and not that of 1860, in order to determine whether the latter was valid or invalid.

In the case of the *Jefferson Branch Bank v. Skelly*, 1 Black, 436, this court says: "Of what use would the appellate power of this court be to the litigant who feels himself aggrieved by some particular state legislation, if this court could not decide, independently of all adjudication by the supreme court of a state, whether or not the instrument in controversy was expressive of a contract and within the protection of the constitution of the United States, and that its obligation should be enforced notwithstanding a contrary conclusion by the supreme court of a state? It never was intended, and cannot be sustained by any course of reasoning, that this court should or could, with fidelity to the constitution of the United States, follow the supreme court of a state in such matters, when it entertains a different opinion." We are, therefore, of opinion that the record before us presents a case for the revisory power of this court over the state courts, under the twenty-fifth section of the act of congress of 1789.

§ 2090. *A legislative act granting a bridge franchise is a contract, and the state can pass no law impairing its obligation.*

Approaching the merits of the case, the first question that presents itself for solution is whether the act of 1790, and the agreement made under it by the commissioners with the bridge builders, constitute a contract that no bridge shall be built within the designated limits but the two which that statute authorized. This we think to be so very clear as not to need argument or illustration. The parties who built the bridges had the positive enactment of the legislature, in the very statute which authorized the contract with them, that no other bridge should be built. They had a grant of tolls on their bridges for ninety-nine years, and the prohibition against the erection of other bridges was the necessary and only means of securing to them the monopoly of those tolls. Without this they would not have invested their money in building the bridges, which were then much needed, and which could not have been built without some such security for a permanent and sufficient return for the capital so expended. On the faith of this enactment they invested the money necessary to erect the bridges. These acts and promises, on the one side and the other, are wanting in no element necessary to constitute a contract. Such legislative provisions of the states have so often been held to be contracts, that a reference to authorities is superfluous.

§ 2091. *Railroad bridge does not infringe franchise of bridge for footmen and vehicles.*

We are next led, in the natural order of the investigation, to inquire if the contract of the state forbid the erection of such a structure as the defendants were authorized to erect, and which they proposed to erect, under the act of 1860. This question, upon the decision of which the whole case must turn, we approach with some degree of hesitation. It is now over seventy years since the contract was made. A period of time equal to three generations of the human race has elapsed. During that time the progress of the world in arts and sciences has been rapid. In no department of human enterprise have more radical changes been made than in that which relates to the means of

transportation of persons and property from one point to another, including the means of crossing water-courses, large and small. The application of steam to these purposes, on water and on land, has produced a total revolution in the modes in which men and property are carried from one place to another. Perhaps the most remarkable invention of modern times, in the influence which it has had, and is yet to have, on the affairs of the world, as well as in its total change of all the elements on which land transportation formerly depended, is the railroad system. It is not strange, then, that when we are called to construe a statute relating to this class of subjects, passed before a steam-engine or a railroad was thought of, in its application to this modern system, we should be met by difficulties of the gravest character. On the one hand, we are told that the structure about to be erected by defendants is a bridge: simply that, and nothing more or less; that such is the name by which it is now called, and that it is, therefore, within the literal terms of the act; and that it performs the functions of a bridge, and is, therefore, within the spirit of the act. On the other hand, it is denied that the structure is a bridge, even in the modern sense of that word, since it is urged that the word is never applied to such a structure without the use of the word railroad, prefixed or implied; and that it performs none of the functions of a real bridge, as that term was understood in the year 1790.

In all the departments of knowledge, it has been a constant source of perplexity to those who have attempted to reduce discoveries and inventions to scientific rules and classifications, that old terms, with well-defined meanings, have been applied so often to things totally new, either in their essence or in their combination. It is to avoid the danger of being misled by the use of a term well understood before, but which is a very poor representative of the new idea desired to be conveyed, that our modern science is enriched with so many terms, compounded of Greek and Latin words, or parts of words. It does not follow, that when a newly invented or discovered thing is called by some familiar word, which comes nearest to expressing the new idea, that the thing so styled is really the thing formerly meant by the familiar word. Matters most intimately connected with the immediate subject of our discussion may well illustrate this. The track on which the steam cars now transport the traveler or his property is called a road, sometimes, perhaps generally, a railroad. The term road is applied to it, no doubt, because in some sense it is used for the same purpose that roads had been used. But until the thing was made and seen, no imagination, even the most fertile, could have pictured it, from any previous use of the word road. So we call the inclosure in which passengers travel on a railroad, a coach; but it is more like a house than a coach, and is less like a coach than are several other vehicles which are rarely if ever called coaches. It does not, therefore, follow that when a word was used in a statute or a contract seventy years since, that it must be held to include everything to which the same word is applied at the present day. For instance, if a Philadelphia manufacturer had agreed with a company, seventy years ago, to furnish all the coaches which might be necessary to transport passengers between that city and Baltimore for a hundred years, would he now be required by his contract to build railroad coaches? Or, if a company had then contracted with the government to build and keep up good and sufficient roads, to accommodate mails and passengers between those points, for the same time, would that company be bound to build railroads under that contract? Yet the structure which the defendants propose to build over the Hackensack is not more like a

bridge of the olden time than a railroad is like one of its roads, or a railroad coach is like one of its coaches. It is not, then, a necessary inference, that because the word bridge may now be applied by common usage to the structure of the defendants, that it was therefore the thing intended by the act of 1790.

Let us see what kind of structure the defendants proposed to build. It is an extension of the iron rails, which compose the material part of their road over the Hackensack river, together with such substructure as is necessary to keep them in place, and enable them to support the cars which cross on them. There is no planked bottom, no roadway or path, nothing on which man, or beast, or vehicle can pass, save as it is carried over in the cars of the defendants. Was this kind of thing in the minds of the framers of the act of 1790, or of the commissioners who let the contract? Or would the term bridge, as then used by them, or by common usage, have included such a thing? We have no hesitation in answering both these questions in the negative. We are, therefore, quite clear that the adoption of that word to express the modern invention does not bring it within the terms of the act, if it is not within the intent of it. We will inquire, therefore, a moment, if it is within the spirit of the act, and the accompanying contract with the commissioners.

There is no doubt that it was the intention of those who framed those two documents to confer on the persons now represented by the plaintiffs some exclusive privilege for ninety-nine years. If we can arrive at a clear and precise idea what that privilege is, we shall, perhaps, be enabled to decide whether the erection proposed by defendants will infringe it. In the first place it is not an exclusive right to transport passengers and property over the Hackensack and Passaic rivers, within the prescribed limits, for there is no prohibition of ferries, nor is it pretended that *they* would violate the contract. In the next place, it is not a monopoly of the right to build bridges within the prescribed limits, because they were only authorized to build one bridge over each river, and the statute enacted expressly, that it was unlawful to build any other bridge, by any person or persons, without excepting them. Besides, the building of a bridge was not the privilege, but the duty, of those who had the contract; a duty which constituted the consideration for the privilege which was granted to them. The right to collect toll of persons and things passing over their bridges is the privilege or franchise which they have, and that right is rendered valuable by the prohibition to build other bridges within the limits designated. This prohibition of other bridges is so far a part of the contract, and only so far, as it is necessary to enable plaintiffs to reap the benefit of their right to collect toll for the use of their bridges. The extent to which tolls may be levied by the bridge owners, and the classes of persons and things on which they may be levied, are enumerated distinctly, and fixed by the contract. They may be summed up shortly as persons on foot, animals and vehicles, passing over the bridges. If the proposed structure is essentially calculated to interfere with, or impair, the right of plaintiffs to collect these tolls, we are unable to see it. No animal can pass over it on foot. No vehicle which can pass over the bridge of plaintiffs can by any possibility pass over that of defendants. No class of persons, or things, of which plaintiffs can exact toll, can evade that toll by using the structure of defendants.

It may be said that passengers and property, now transported by that railroad, would be compelled to use the bridge of plaintiffs if there were no such road and no such viaduct. This might be true to a very limited extent if

plaintiffs could annihilate all railroads running in the direction of the road which passes over their bridge. But this they cannot do. And, as to the road of the defendants, if they are not permitted to pass the Hackensack within the limits claimed by plaintiffs, they can with more expense cross it somewhere else. That being done, it is not believed that the number of passengers, or the amount of freight carried in wagons which would cross on the bridges of plaintiffs, in consequence of this change in the location of the railroad viaduct, is appreciable. As the plaintiffs have no right to build any more bridges, and as the viaduct of defendants does not impair that which is really their exclusive franchise, we do not perceive how the law which authorizes such a structure can impair the obligation of the contract, made in 1790, by the state, with the bridge owners. These views are not without the support of adjudged cases, which, if not in all respects precisely such as the one before us, are sufficiently so to show that they were considered, and entered largely into the reasoning upon which the judgments of the courts were founded.

§ 2092. *Cases considered.*

In the *Mohawk Bridge Co. v. Utica & Schenectady R. Co.*, 6 Paige, 564, the plaintiffs claimed an exclusive franchise, similar to that held by the plaintiffs in this case, which the defendants, as they alleged, were about to violate by erecting a structure for the use of the railroad over the same stream within the prescribed limits. The chancellor refused the injunction upon the ground that the grant to plaintiffs was not exclusive, which was at that time a very doubtful question in New York; and also upon the ground that the exclusive right to the toll-bridge would not be infringed by the erection of a railroad bridge within the limits over which the exclusive right extended. In the case of *Thompson v. New York & Harlem R. Co.*, 3 Sandf., 625, where the contest was again between a bridge owner claiming exclusive rights and a railroad company seeking to cross the stream within the bounds of plaintiff's claim, the assistant vice-chancellor refers to the case above mentioned, and says that he refuses the relief on both the grounds therein mentioned. The case of *McRee v. Wilmington & Raleigh R. Co.*, 2 Jones, Law, 186, was an action at law by the owner of a bridge, who set up an exclusive franchise, against a railroad company whose track crossed the stream within the limits of his franchise, for a penalty allowed by statute for any violation of his right of toll. It is true that the court rests its decision mainly on the ground that by the bill of rights of the state of North Carolina, no such monopoly as that claimed by plaintiff can exist. But they argue very forcibly that a railroad bridge is no violation of a franchise for an ordinary toll-bridge, and intimate strongly that they would so hold if the case required the decision of the point.

The case of the *Enfield Toll-Bridge Co. v. Hartford & New Haven R. Co.*, 17 Conn., 56, has been cited by counsel and much relied on, as deciding the principle in question the other way. And perhaps a fair consideration of the case, and the line of argument of the learned judge who delivered the opinion, justifies counsel in claiming that it is in conflict with the views we have here expressed. In that case, however, it was found by special verdict, as one of the facts on which the action of the court was asked, that the defendants' road and bridge would, to a certain extent, diminish the tolls of plaintiff; a fact which is not found in the case before us, and which, as we have already shown, we cannot infer from its record. What influence this fact may have had in the minds of that court we cannot say. We are, however, satisfied that sound principle and the weight of authority are to be found on the side of the judg-

ment rendered by the New Jersey court of errors and appeals in this case; and accordingly that judgment is affirmed.

MR. JUSTICE GRIER dissented, on the ground that the court had no jurisdiction.

THE BINGHAMTON BRIDGE.

(8 Wallace, 51-53. 1865.)

ERROR to the Court of Appeals of New York.

Opinion by MR. JUSTICE DAVIS.

STATEMENT OF FACTS.—The constitution of the United States declares that no state shall pass any law impairing the obligation of contracts; and the twenty-fifth section of the judiciary act provides that the final judgment or decree of the highest court of a state in which a decision in a suit can be had may be examined and reviewed in this court, if there was drawn in question in the suit the validity of a statute of the state, on the ground of its being repugnant to the constitution of the United States, and the decision was in favor of its validity. The plaintiffs in error brought a suit in equity in the supreme court in New York, alleging that they were created a corporation by the legislature of that state on the 1st of April, 1803, to erect and maintain a bridge across the Chenango river at Binghamton, with perpetual succession, the right to take tolls, and a covenant that no other bridge should be built within a distance of two miles either way from their bridge, which was a grant in the nature of a contract that cannot be impaired. The complaint of the bill is that, notwithstanding the Chenango Bridge Company have faithfully kept their contract with the state, and maintained for a period of nearly fifty years a safe and suitable bridge for the accommodation of the public, the legislature of New York, on the 5th of April, 1855, in plain violation of the contract of the state with them, authorized the defendants to build a bridge across the Chenango river within the prescribed limits, and that the bridge is built and open for travel.

§ 2093. *Where a state court holds a statute valid under the federal constitution, the supreme court has jurisdiction.*

The bill seeks to obtain a perpetual injunction against the Binghamton Bridge Company from using or allowing to be used the bridge thus built, on the sole ground that the statute of the state which authorizes it is repugnant to that provision of the constitution of the United States which says that no state shall pass any law impairing the obligation of contracts. Such proceedings were had in the inferior courts of New York that the case finally reached and was heard in the court of appeals, which is the highest court of law or equity of the state in which a decision of the suit could be had. And that court held that the act by virtue of which the Binghamton bridge was built was a valid act, and rendered a final decree dismissing the bill. Everything, therefore, concurs to bring into exercise the appellate power of this court over cases decided in a state court, and to support the writ of error, which seeks to re-examine and correct the final judgment of the court of appeals in New York. The questions presented by this record are of importance, and have received deliberate consideration.

§ 2094. *An act of incorporation is a contract between the state and the stockholders.*

It is said that the revising power of this court over state adjudications is

viewed with jealousy. If so, we say, in the words of Chief Justice Marshall, "that the course of the judicial department is marked out by law. As this court has never grasped at ungranted jurisdiction, so it never will, we trust, shrink from that which is conferred upon it." The constitutional right of one legislature to grant corporate privileges and franchises, so as to bind and conclude a succeeding one, has been denied. We have supposed, if anything was settled by an unbroken course of decisions in the federal and state courts, it was that an act of incorporation was a contract between the state and the stockholders. All courts at this day are estopped from questioning the doctrine. The security of property rests upon it, and every successful enterprise is undertaken in the unshaken belief that it will never be forsaken. A departure from it *now* would involve dangers to society that cannot be foreseen, would shock the sense of justice of the country, unhinge its business interests, and weaken, if not destroy, that respect which has always been felt for the judicial department of the government. An attempt even to reaffirm it could only tend to lessen its force and obligation. It received its ablest exposition in the case of *Dartmouth College v. Woodward*, 4 Wheat., 418 (§§ 2099–2117, *infra*), which case has ever since been considered a landmark by the profession, and no court has since disregarded the doctrine that the charters of private corporations are contracts, protected from invasion by the constitution of the United States. And it has since so often received the solemn sanction of this court, that it would unnecessarily lengthen this opinion to refer to the cases, or even enumerate them.

The principle is supported by reason as well as authority. It was well remarked by the chief justice, in the *Dartmouth College* case, "that the objects for which a corporation is created are universally such as the government wishes to promote. They are deemed beneficial to the country, and this benefit constitutes the consideration, and in most cases the sole consideration, for the grant." The purposes to be attained are generally beyond the ability of individual enterprise, and can only be accomplished through the aid of associated wealth. This will not be risked unless privileges are given and securities furnished in an act of incorporation. The wants of the public are often so imperative that a duty is imposed on government to provide for them; and as experience has proved that a state should not directly attempt to do this, it is necessary to confer on others the faculty of doing what the sovereign power is unwilling to undertake. The legislature, therefore, says to public-spirited citizens: "If you will embark, with your time, money and skill, in an enterprise which will accommodate the public necessities, we will grant to you, for a limited period, or in perpetuity, privileges that will justify the expenditure of your money and the employment of your time and skill." Such a grant is a contract, with mutual considerations, and justice and good policy alike require that the protection of the law should be assured to it.

It is argued, as a reason why courts should not be rigid in enforcing the contracts made by states, that legislative bodies are often overreached by designing men, and dispose of franchises with great recklessness. If the knowledge that a contract made by a state with individuals is equally protected from invasion as a contract made between natural persons does not awaken watchfulness and care on the part of the law-makers, it is difficult to perceive what would. The corrective to improvident legislation is not in the courts, but is to be found elsewhere.

§ 2095. *All contracts are to be construed to accomplish the intentions of the parties to it. Charters, however, are construed most favorably to the state, and in a grant nothing passes by implication.*

A great deal of the argument at the bar was devoted to the consideration of the proper rule of construction to be adopted in the interpretation of legislative contracts. In this there is no difficulty. All contracts are to be construed to accomplish the intention of the parties; and in determining their different provisions, a liberal and fair construction will be given to the words, either singly or in connection with the subject-matter. It is not the duty of a court, by legal subtlety, to overthrow a contract, but rather to uphold it and give it effect; and no strained or artificial rule of construction is to be applied to any part of it. If there is no ambiguity, and the meaning of the parties can be clearly ascertained, effect is to be given to the instrument used, whether it is a legislative grant or not. In the case of the *Charles River Bridge v. Warren Bridge*, 11 Pet., 514 (§§ 2058-82, *supra*), the rules of construction known to the English common law were adopted and applied in the interpretation of legislative grants, and the principle was recognized that charters are to be construed most favorably to the state, and that in grants by the public nothing passes by implication. This court has repeatedly since reasserted the same doctrine, and the decisions in the several states are nearly all the same way. The principle is this: that all rights which are asserted against the state must be clearly defined, and not raised by inference or presumption; and if the charter is silent about a power, it does not exist. If, on a fair reading of the instrument, reasonable doubts arise as to the proper interpretation to be given to it, those doubts are to be solved in favor of the state; and where it is susceptible of two meanings, the one restricting and the other extending the powers of the corporation, that construction is to be adopted which works the least harm to the state. But if there is no ambiguity in the charter, and the powers conferred are plainly marked, and their limits can be readily ascertained, then it is the duty of the court to sustain and uphold it, and to carry out the true meaning and intention of the parties to it. Any other rule of construction would defeat all legislative grants, and overthrow all other contracts. What, then, are the rights of the parties to this controversy?

§ 2096. *Recital of the legislation in question.*

In 1805 the state of New York passed an act, in forty-two sections, creating five different corporations. The main purpose of the act was, at that early day, to secure for the convenience of the public good turnpike roads; but the country was new; the undertaking hazardous; the roads crossed large and rapid streams, and the legislature, in its wisdom, thought proper to create two separate and distinct bridge incorporations, with larger powers than were conferred on the turnpike corporations.

The preamble to the twenty-third section declares the motives and purpose of the legislature. Heavy freshets and dangerous obstructions to which the streams were subject seemed likely to endanger the permanency of the bridges, and to require frequent renewals of the whole capital; and it was thought but just that the corporations for erecting the bridges should be relieved from the policy of reversion which attached to the corporations for constructing the turnpike roads, and that full powers, adequate to the execution of the work in the best manner, should be assured to those citizens who would successfully accomplish the building of the bridges. It is impossible to read this recital, and escape the conclusion that the legislature thought the enterprise did not

promise present remuneration, and that large powers and exclusive privileges must be given to get the stock taken and the bridges built. It is evident that what was then considered a great scheme of internal improvement was in the mind of the legislature. Such a scheme was, at that early period in the history of the state, not of easy solution. It required more energy and foresight, and involved greater hazard, in the commencement of this century, to build turn-pike roads through an unbroken wilderness, and erect bridges over dangerous streams, than it would *now* to checker the surface of a state with railways. These considerations are great helps in arriving at a correct knowledge of the intention of the legislature, and in giving a proper construction to the grants that were made. For it should never be lost sight of, that the main canon of interpretation of a contract is to ascertain what the parties themselves meant and understood. In order to connect the turnpike roads, it was necessary to cross the east and west branches of the Delaware, the Susquehanna and Chenango rivers. These streams were all in the same category. The work of improvement was incomplete until each was spanned with substantial bridges; and there is nothing to show that the dangers apprehended, and which formed the inducements to the grant of large powers, did not apply to all of them alike. Fifteen sections of the act are devoted to the creation of the Delaware Bridge Company, for the purpose of erecting bridges over the east and west branches of the Delaware river, with the usual faculties, powers and incidents of a corporation, and subject to the usual duties, regulations, restraints and penalties. The duration of the company was limited to thirty years, and competing bridges or ferries, within the prescribed limits of two miles above and below, were forbidden. These were important privileges, and justified by the peculiar circumstances of the country, and it is easy to see that without them prudent men would not have engaged in the enterprise. The Delaware Bridge Company having been constituted with great minuteness of detail, a few words and a single section sufficed to bring into existence the Susquehanna Bridge Company. The thirty-eighth section of the act created the latter corporation, to erect and maintain toll-bridges across the Susquehanna and Chenango rivers, at certain localities; and further declared that the "Susquehanna Bridge Company be, and hereby are, invested with all and singular the powers, rights, privileges, immunities and advantages, and shall be subject to all the duties, regulations, restraints and penalties which are contained in the foregoing incorporation of the Delaware Bridge Company; and all and singular the *provisions, sections and clauses* thereof, not inconsistent with the particular provisions therein contained, shall be, and hereby are, fully extended to the president and directors of this corporation."

No one can read the entire act through and fail to perceive that the legislature *intended* to create two bridge incorporations, exactly similar in all material respects. Protection was alike necessary to both; the public wants required both; the scheme of improvement embraced both; the danger of present loss applied to both; and there were the same motives to give valuable franchises to both.

§ 2097. *Where a grant is made to one corporation of all the rights included in the charter of another, not inconsistent, etc., the former is vested with the same duration and freedom from competition conferred on the latter.*

The inquiry, then, is, has the legislature used language that clearly conveys that intention? and on this point we entertain no doubt. It is not questioned that the provision limiting the Delaware charter to thirty years was carried

into the Susquehanna charter; but it is denied that the prohibition against competition was also imported.

The clause in the Delaware charter on that subject is in the following words: "that it shall not be lawful for any person or persons to erect any bridge, or establish any ferry, across the said west and east branches of the Delaware river, within two miles, either above or below the bridges to be erected and maintained in pursuance of this act." This was, undoubtedly, a covenant with the Delaware company that they should be free from competition within the prescribed limits. It is argued, because the east and west branches of the Delaware are named, that the prohibition was not intended to reach the Susquehanna company. But this construction is narrow and technical, and would defeat the very end the legislature had in view. It is true there were certain minor provisions in the Delaware charter which were peculiar to it, and of course it would be absurd to suppose that they were transferred, or intended to be transferred, to the Susquehanna company; but, by the terms of the law, whatever provisions were applicable, were extended to the latter company. It is easy to see that the legislature never meant that the judges of Delaware county, who were to visit and inspect the Delaware bridges, should also visit and inspect the Susquehanna, because there were similar officers in Tioga county, where the Susquehanna bridges were located. But the privilege against competition was applicable to both corporations, and, in the unsettled state of the country, necessary to the existence of both; for the legislature well knew that it would be madness for adventurers to build toll-bridges in a new country, where travel was limited and settlers few, if the right was retained to authorize other adventurers to build other bridges, so near as to divide even that limited travel. The form adopted in making the grants has weight in arriving at the true legislative intention, and it is worthy of consideration that it is not unusual in the legislation of this country to grant vast powers in a short act, by referring to and adopting the provisions of other corporations of like purposes. In fact, some of the great enterprises of the day have sprung into existence and distributed their blessings by virtue of legislation similar to that which created the Susquehanna Bridge Company. The object is apparent,—not to incumber the statute-book by useless repetition and unnecessary verbiage. The legislature of New York, at great length, and with commendable care and circumspection, incorporated the Delaware company, and then, to avoid repetition, gave to the Susquehanna company all the rights and advantages which, in the same act, were conferred on the Delaware corporation. *This was enough*; but in fear of cavil, and to avoid any misconstruction, and out of superabundant caution, it was declared that all the provisions, sections and clauses in the Delaware charter, not *inconsistent* with the particular provisions of the Susquehanna charter, should be fully extended to the president and directors of the latter corporation. There were no inconsistencies between the two corporations, except such as would arise from difference in *locality*, and in every other respect the corporations were alike. Each was to bridge two streams, and each needed, and did receive, the fostering care of the legislature. When it is conceded, as it must be, that a franchise which prohibits competition is an advantage, and that it was enjoyed by the Delaware company, and that there is nothing in the peculiar provisions of the Susquehanna charter which prevents that company from enjoying it, then it is conferred, and there is an end to controversy.

The history of the subsequent legislation of the state, on the subject of these

bridges, is explanatory of the intention of the legislature of 1805, and confirmatory of the view already taken. In 1808 the Susquehanna and Chenango bridges were not built, and longer time and greater privileges were required to insure the success of that enterprise. The legislature, in fear that the scheme of internal improvement, which was not complete without the bridges, would fail, furnished still greater inducements to the parties proposing to erect them. The thirty years limitation was repealed, and the charter made perpetual, and the time limited for building the bridges was extended four years. And these provisions of the Susquehanna charter, which were thus altered, and treated by the legislature of 1808 as belonging to it, were, if part of it, imported from the Delaware charter. Can it be supposed, when the Susquehanna company was demanding higher privileges in order to *live*, that it was the intention of the legislature to deprive it of the right to shut out competition, with which the Delaware company was invested, and which was nearly as valuable as the right to take tolls?

The intention of the legislature was manifest to confer on the Susquehanna corporation all the advantages enjoyed by the Delaware company that were applicable to it, and consistent with the different locality it occupied; and the language used, in our opinion, gives effect to that intention; and the two-mile restriction is as much a part of the charter of the Susquehanna company as if it had been directly inserted in it. It is argued that the restriction cannot apply to the Chenango bridge, because it is located less than two miles from the confluence of the Chenango river with the Susquehanna. But the restriction is for two miles, either above or below the bridges, and is applicable to a bridge built above and within the prohibitory limits, although a question might arise whether it was extended to a bridge which was built below the junction of the streams. The Susquehanna company, by the original charter, was to erect bridges over both the Susquehanna and Chenango rivers; but, with the amendments which were made in 1808, it was declared to exist for the sole purpose of building and maintaining a bridge over the Susquehanna, while at the same time the privilege of bridging the Chenango was given to "The Chenango Bridge Company," a new corporation, created with the same faculties and franchises, and subject to the same duties and restrictions, as the Susquehanna corporation.

The construction which has been given by us to the Susquehanna charter is necessarily a solution of all questions pertaining to the charter of the Chenango Bridge Company. The legislature, therefore, contracted with this company, if they would build and maintain a safe and suitable bridge across the Chenango river, at Chenango Point, for the accommodation of the public, they should have in consideration for it a perpetual charter, the right to take certain specified tolls, and that it should not be lawful for any person or persons to erect any bridge or establish any ferry within a distance of two miles on the Chenango river either above or below their bridge.

§ 2098. *A provision in a bridge charter, that no other bridge should be built within a certain distance, is a contract the obligation of which cannot be impaired.*

Has the legislature of 1855 broken the contract which the legislatures of 1805 and 1808 made with the plaintiffs? The foregoing discussion affords an easy answer to this question. The legislature has the power to license ferries and bridges and so to regulate them that no rival ferries or bridges can be established within certain fixed distances. No individual without a license can build a bridge or establish a ferry for general travel, for "it is a well-settled

principle of common law that no man may set up a ferry for all passengers without prescription time out of mind, or a charter from the king. He may make a ferry for his own use, or the use of his family, but not for the common use of all the king's subjects passing that way, because it doth in consequence tend to a common charge, and is become a thing of public interest and use; and every ferry ought to be under a public regulation." Hargrave's Law Tracts, ch. ii, 16; *Enfield Toll-Bridge Co. v. Hartford & New Haven R. Co.*, 17 Conn., 63; *Hooker v. Cummings*, 20 Johns., 100; *Bowman v. Wathan*, 2 McL., 383. As there was no necessity of laying a restraint on unauthorized persons, it is clear that such a restraint was not within the meaning of the legislature. The restraint was on the legislature itself. The plain reading of the provision, "that it shall not be lawful for any person or persons to erect a bridge within a distance of two miles," is, that the legislature *will not make it lawful* by licensing any person, or association of persons, to do it. And the obligation includes a free bridge as well as a toll-bridge, for the security would be worthless to the corporation if the right by implication was reserved, to authorize the erection of a bridge which should be free to the public. The Binghamton Bridge Company was chartered to construct a bridge for general road travel, like the Chenango bridge, and near to it, and within the prohibited distance. This was a plain violation of the contract which the legislature made with the Chenango Bridge Company, and as such a contract is within the protection of the constitution of the United States, it follows that the charter of the Binghamton Bridge Company is null and void.

Decree of the court of appeals of New York reversed, and a mandate ordered to issue with directions to enter a judgment for the plaintiff in error, the Chenango Bridge Company, in conformity with this opinion.

The CHIEF JUSTICE, and JUSTICES FIELD and GRIER, dissented.

THE TRUSTEES OF DARTMOUTH COLLEGE v. WOODWARD.

(4 Wheaton, 518-715. 1819.)

ERROR to the Superior Court of New Hampshire.

Opinion by MARSHALL, C. J.

STATEMENT OF FACTS.— This is an action of trover, brought by the Trustees of Dartmouth College against William H. Woodward, in the state court of New Hampshire, for the book of records, corporate seal and other corporate property, to which the plaintiffs allege themselves to be entitled. A special verdict, after setting out the rights of the parties, finds for the defendant, if certain acts of the legislature of New Hampshire, passed on the 27th of June, and on the 18th of December, 1816, be valid and binding on the trustees without their assent, and not repugnant to the constitution of the United States; otherwise it finds for the plaintiffs. The superior court of judicature of New Hampshire rendered a judgment upon this verdict for the defendant, which judgment has been brought before this court by writ of error. The single question now to be considered is, do the acts to which the verdict refers violate the constitution of the United States?

This court can be insensible neither to the magnitude nor delicacy of this question. The validity of a legislative act is to be examined, and the opinion of the highest law tribunal of a state is to be revised; an opinion which carries with it intrinsic evidence of the diligence, of the ability and the integrity

with which it was formed. On more than one occasion this court has expressed the cautious circumspection with which it approaches the consideration of such questions, and has declared that in no doubtful case would it pronounce a legislative act to be contrary to the constitution. But the American people have said, in the constitution of the United States, that "no state shall pass any bill of attainder, *ex post facto* law or law impairing the obligation of contracts." In the same instrument they have also said "that the judicial power shall extend to all cases in law and equity arising under the constitution." On the judges of this court, then, is imposed the high and solemn duty of protecting, from even legislative violation, those contracts which the constitution of our country has placed beyond legislative control; and however irksome the task may be, this is a duty from which we dare not shrink.

The title of the plaintiffs originates in a charter, dated the 13th day of December, in the year 1769, incorporating twelve persons therein mentioned, by the name of "The Trustees of Dartmouth College," granting to them and their successors the usual corporate privileges and powers, and authorizing the trustees who are to govern the college to fill up all vacancies which may be created in their own body.

The defendant claims under three acts of the legislature of New Hampshire, the most material of which was passed on the 27th of June, 1816, and is entitled "An act to amend the charter and enlarge and improve the corporation of Dartmouth College." Among other alterations in the charter, this act increases the number of trustees to twenty-one, gives the appointment of the additional members to the executive of the state, and creates a board of overseers, with power to inspect and control the most important acts of the trustees. This board consists of twenty-five persons. The president of the senate, the speaker of the house of representatives of New Hampshire and the governor and lieutenant-governor of Vermont, for the time being, are to be members *ex officio*. The board is to be completed by the governor and council of New Hampshire, who are also empowered to fill all vacancies which may occur. The acts of the 18th and 26th of December are supplemental to that of the 27th of June, and are principally intended to carry that act into effect. The majority of the trustees of the college have refused to accept this amended charter and have brought this suit for the corporate property, which is in possession of a person holding by virtue of the acts which have been stated.

§ 2099. *The contracts protected by the constitution are those respecting property or valuable objects, or conferring rights which may be asserted in courts of justice.*

It can require no argument to prove that the circumstances of this case constitute a contract. An application is made to the crown for a charter to incorporate a religious and literary institution. In the application it is stated that large contributions have been made for the object, which will be conferred on the corporation as soon as it shall be created. The charter is granted, and on its faith the property is conveyed. Surely, in this transaction, every ingredient of a complete and legitimate contract is to be found. The points for consideration are: 1. Is this contract protected by the constitution of the United States? 2. Is it impaired by the acts under which the defendant holds?

1. On the first point it has been argued that the word "contract," in its broadest sense, would comprehend the political relations between the government and its citizens, would extend to offices held within a state for state purposes, and to many of those laws concerning civil institutions which must

change with circumstances and be modified by ordinary legislation, which deeply concern the public, and which, to preserve good government, the public judgment must control. That even marriage is a contract and its obligations are affected by the laws respecting divorces. That the clause in the constitution, if construed in its greatest latitude, would prohibit these laws. Taken in its broad, unlimited sense, the clause would be an unprofitable and vexatious interference with the internal concerns of a state, would unnecessarily and unwisely embarrass its legislation, and render immutable those civil institutions which are established for purposes of internal government, and which, to subserve those purposes, ought to vary with varying circumstances. That as the framers of the constitution could never have intended to insert in that instrument a provision so unnecessary, so mischievous and so repugnant to its general spirit, the term "contract" must be understood in a more limited sense. That it must be understood as intended to guard against a power of at least doubtful utility, the abuse of which had been extensively felt; and to restrain the legislature in future from violating the right to property. That anterior to the formation of the constitution, a course of legislation had prevailed in many, if not in all, of the states, which weakened the confidence of man in man, and embarrassed all transactions between individuals, by dispensing with a faithful performance of engagements. To correct this mischief, by restraining the power which produced it, the state legislatures were forbidden "to pass any law impairing the obligation of contracts," that is, of contracts respecting property, under which some individual could claim a right to something beneficial to himself; and that since the clause in the constitution must, in construction, receive some limitation, it may be confined, and ought to be confined, to cases of this description; to cases within the mischief it was intended to remedy.

The general correctness of these observations cannot be controverted. That the framers of the constitution did not intend to restrain the states in the regulation of their civil institutions, adopted for internal government, and that the instrument they have given us is not to be so construed, may be admitted. The provision of the constitution never has been understood to embrace other contracts than those which respect property, or some object of value, and confer rights which may be asserted in a court of justice. It never has been understood to restrict the general right of the legislature to legislate on the subject of divorces. Those acts enable some tribunal, not to impair a marriage contract, but to liberate one of the parties because it has been broken by the other. When any state legislature shall pass an act annulling all marriage contracts, or allowing either party to annul it without the consent of the other, it will be time enough to inquire whether such an act be constitutional.

§ 2100. — *charters to public corporations, in which the government alone is interested, are not such contracts.*

The parties in this case differ less on general principles, less on the true construction of the constitution in the abstract, than on the application of those principles to this case, and on the true construction of the charter of 1769. This is the point on which the cause essentially depends. If the act of incorporation be a grant of political power, if it create a civil institution to be employed in the administration of the government, or if the funds of the college be public property, or if the state of New Hampshire, as a government, be alone interested in its transactions, the subject is one in which the legislature of the state may act according to its own judgment, unrestrained by any limitation of its power imposed by the constitution of the United States.

§ 2101. — *but whether charters to private corporations do not stand in a different attitude.*

But if this be a private eleemosynary institution, endowed with a capacity to take property for objects unconnected with government, whose funds are bestowed by individuals on the faith of the charter; if the donors have stipulated for the future disposition and management of those funds in the manner prescribed by themselves, there may be more difficulty in the case, although neither the persons who have made these stipulations, nor those for whose benefit they were made, should be parties to the cause. Those who are no longer interested in the property may yet retain such an interest in the preservation of their own arrangements as to have a right to insist that those arrangements shall be held sacred. Or, if they have themselves disappeared, it becomes a subject of serious and anxious inquiry, whether those whom they have legally empowered to represent them forever may not assert all the rights which they possessed while in being; whether, if they be without personal representatives who may feel injured by a violation of the compact, the trustees be not so completely their representatives, in the eye of the law, as to stand in their place, not only as respects the government of the college, but also as respects the maintenance of the college charter.

FURTHER STATEMENT OF FACTS.—It becomes then the duty of the court most seriously to examine this charter, and to ascertain its true character. From the instrument itself, it appears that, about the year 1754, the Rev. Eleazer Wheelock established, at his own expense, and on his own estate, a charity school for the instruction of Indians in the Christian religion. The success of this institution inspired him with the design of soliciting contributions in England for carrying on and extending his undertaking. In this pious work, he employed the Rev. Nathaniel Whitaker, who, by virtue of a power of attorney from Dr. Wheelock, appointed the Earl of Dartmouth and others trustees of the money which had been and should be contributed; which appointment Dr. Wheelock confirmed by a deed of trust authorizing the trustees to fix on a site for the college. They determined to establish the school on Connecticut river, in the western part of New Hampshire; that situation being supposed favorable for carrying on the original design among the Indians, and also for promoting learning among the English, and the proprietors in the neighborhood having made large offers of land, on condition that the college should there be placed. Dr. Wheelock then applied to the crown for an act of incorporation, and represented the expediency of appointing those whom he had, by his last will, named as trustees in America, to be members of the proposed corporation. "In consideration of the premises," "for the education and instruction of the youth of the Indian tribes," etc., "and also of English youth, and any others," the charter was granted, and the trustees of Dartmouth College were by that name created a body corporate, with power, for the use of the said college, to acquire real and personal property, and to pay the president, tutors, and other officers of the college, such salaries as they shall allow.

The charter proceeds to appoint Eleazer Wheelock, "the founder of said college," president thereof, with power, by his last will, to appoint a successor, who is to continue in office until disapproved by the trustees. In case of vacancy, the trustees may appoint a president, and in case of the ceasing of a president, the senior professor or tutor, being one of the trustees, shall exercise the office until an appointment shall be made. The trustees have power to appoint and displace professors, tutors, and other officers, and to supply any vacancies

which may be created in their own body, by death, resignation, removal or disability; and also to make orders, ordinances and laws for the government of the college, the same not being repugnant to the laws of Great Britain, or of New Hampshire, and not excluding any person on account of his speculative sentiments in religion, or his being of a religious profession different from that of the trustees. This charter was accepted, and the property, both real and personal, which had been contributed for the benefit of the college, was conveyed to, and vested in, the corporate body.

From this brief review of the most essential parts of the charter, it is apparent that the funds of the college consisted entirely of private donations. It is, perhaps, not very important who were the donors. The probability is, that the Earl of Dartmouth, and the other trustees in England, were, in fact, the largest contributors. Yet the legal conclusion, from the facts recited in the charter, would probably be that Dr. Wheelock was the founder of the college. The origin of the institution was, undoubtedly, the Indian charity school, established by Dr. Wheelock at his own expense. It was at his instance, and to enlarge this school, that contributions were solicited in England. The person soliciting these contributions was his agent; and the trustees who received the money were appointed by, and acted under, his authority. It is not too much to say that the funds were obtained by him, in trust, to be applied by him to the purposes of his enlarged school. The charter of incorporation was granted at his instance. The persons named by him in his last will, as the trustees of his charity school, compose a part of the corporation, and he is declared to be the founder of the college, and its president for life. Were the inquiry material, we should feel some hesitation in saying that Dr. Wheelock was not, in law, to be considered as the founder (1 Bl. Com., 481) of this institution, and as possessing all the rights appertaining to that character. But be this as it may, Dartmouth College is really endowed by private individuals, who have bestowed their funds for the propagation of the Christian religion among the Indians, and for the promotion of piety and learning generally. From these funds the salaries of the tutors are drawn; and these salaries lessen the expense of education to the students.

§ 2102. *The fact that a corporation is created for charitable or educational purposes does not per se make it a public corporation.*

It is then an eleemosynary (1 Bl. Com., 471), and, as far as respects its funds, a private corporation. Do its objects stamp on it a different character? Are the trustees and professors public officers, invested with any portion of political power, partaking in any degree in the administration of civil government, and performing duties which flow from the sovereign authority?

That education is an object of national concern, and a proper subject of legislation, all admit. That there may be an institution founded by government, and placed entirely under its immediate control, the officers of which would be public officers, amenable exclusively to government, none will deny. But is Dartmouth College such an institution? Is education altogether in the hands of government? Does every teacher of youth become a public officer, and do donations for the purpose of education necessarily become public property, so far that the will of the legislature, not the will of the donor, becomes the law of the donation? These questions are of serious moment to society, and deserve to be well considered.

Doctor Wheelock, as the keeper of his charity school, instructing the Indians in the art of reading, and in our holy religion; sustaining them at his own ex-

pense, and on the voluntary contributions of the charitable, could scarcely be considered as a public officer, exercising any portion of those duties which belong to government; nor could the legislature have supposed that his private funds, or those given by others, were subject to legislative management, because they were applied to the purposes of education. When, afterwards, his school was enlarged, and the liberal contributions made in England and in America enabled him to extend his cares to the education of the youth of his own country, no change was wrought in his own character, or in the nature of his duties. Had he employed assistant tutors with the funds contributed by others, or had the trustees in England established a school, with Dr. Wheelock at its head, and paid salaries to him and his assistants, they would still have been private tutors; and the fact that they were employed in the education of youth could not have converted them into public officers, concerned in the administration of public duties, or have given the legislature a right to interfere in the management of the fund. The trustees in whose care that fund was placed by the contributors would have been permitted to execute their trust, uncontrolled by legislative authority. Whence, then, can be derived the idea that Dartmouth College has become a public institution, and its trustees public officers, exercising powers conferred by the public for public objects? Not from the source whence its funds were drawn, for its foundation is purely private and eleemosynary. Not from the application of those funds; for money may be given for education, and the persons receiving it do not, by being employed in the education of youth, become members of the civil government. Is it from the act of incorporation? Let this subject be considered.

§ 2103. *Nature and powers of corporations.*

A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created. Among the most important are immortality, and, if the expression may be allowed, individuality; properties by which a perpetual succession of many persons are considered as the same, and may act as a single individual. They enable a corporation to manage its own affairs, and to hold property without the perplexing intricacies, the hazardous and endless necessity of perpetual conveyances, for the purpose of transmitting it from hand to hand. It is chiefly for the purpose of clothing bodies of men, in succession, with these qualities and capacities, that corporations were invented, and are in use. By these means a perpetual succession of individuals are capable of acting for the promotion of the particular object, like one immortal being. But this being does not share in the civil government of the country, unless that be the purpose for which it was created. Its immortality no more confers on it political power, or a political character, than immortality would confer such power or character on a natural person. It is no more a state instrument than a natural person exercising the same powers would be. If, then, a natural person, employed by individuals in the education of youth, or for the government of a seminary in which youth is educated, would not become a public officer, or be considered as a member of the civil government, how is it that this artificial being, created by law for the purpose of being employed by the same individuals for the same purposes, should become a part of the civil government of the country? Is it because its existence, its capacities, its powers, are given by law? Because the govern-

ment has given it the power to take and to hold property in a particular form, and for particular purposes, has the government a consequent right substantially to change that form, or to vary the purposes to which the property is to be applied? This principle has never been asserted or recognized, and is supported by no authority. Can it derive aid from reason?

The objects for which a corporation is created are universally such as the government wishes to promote. They are deemed beneficial to the country, and this benefit constitutes the consideration, and in most cases the sole consideration, of the grant. In most eleemosynary institutions the object would be difficult, perhaps unattainable, without the aid of a charter of incorporation. Charitable or public-spirited individuals, desirous of making permanent appropriations for charitable or other useful purposes, find it impossible to effect their design, securely and certainly, without an incorporating act. They apply to the government, state their beneficent object, and offer to advance the money necessary for its accomplishment, provided the government will confer on the instrument which is to execute their designs the capacity to execute them. The proposition is considered and approved. The benefit to the public is considered as an ample compensation for the faculty it confers, and the corporation is created. If the advantages to the public constitute a full compensation for the faculty it gives, there can be no reason for exacting a further compensation, by claiming a right to exercise over this artificial being a power which changes its nature, and touches the fund for the security and application of which it was created. There can be no reason for implying in a charter, given for a valuable consideration, a power which is not only not expressed, but is in direct contradiction to its express stipulations.

§ 2104. *The fact of incorporation does not determine the character of an institution.*

From the fact, then, that a charter of incorporation has been granted, nothing can be inferred which changes the character of the institution, or transfers to the government any new power over it. The character of civil institutions does not grow out of their incorporation, but out of the manner in which they are formed, and the objects for which they are created. The right to change them is not founded on their being incorporated, but on their being the instruments of government, created for its purposes. The same institutions, created for the same objects, though not incorporated, would be public institutions, and, of course, be controllable by the legislature. The incorporating act neither gives nor prevents this control. Neither, in reason, can the incorporating act change the character of a private eleemosynary institution.

§ 2105. *The charter of Dartmouth College is a contract.*

We are next led to the inquiry, for whose benefit the property given to Dartmouth College was secured? The counsel for the defendant have insisted that the beneficial interest is in the people of New Hampshire. The charter, after reciting the preliminary measures which had been taken, and the application for an act of incorporation, proceeds thus: "Know ye, therefore, that we, considering the premises, and being willing to encourage the laudable and charitable design of spreading Christian knowledge among the savages of our American wilderness, and, also, that the best means of education be established, in our province of New Hampshire, for the benefit of said province, do, of our special grace," etc. Do these expressions bestow on New Hampshire any exclusive right to the property of the college, any exclusive interest in the labors of the professors? Or do they merely indicate a willingness that New Hampshire

should enjoy those advantages which result to all from the establishment of a seminary of learning in the neighborhood? On this point we think it impossible to entertain a serious doubt. The words themselves, unexplained by the context, indicate that the "benefit intended for the province" is that which is derived from "establishing the best means of education therein;" that is, from establishing in the province, Dartmouth College, as constituted by the charter. But if these words, considered alone, could admit of doubt, that doubt is completely removed by an inspection of the entire instrument.

The particular interests of New Hampshire never entered into the mind of the donors, never constituted a motive for their donation. The propagation of the Christian religion among the savages; and the dissemination of useful knowledge among the youth of the country, were the avowed and the sole objects of their contributions. In these, New Hampshire would participate; but nothing particular or exclusive was intended for her. Even the site of the college was selected, not for the sake of New Hampshire, but because it was "most subservient to the great ends in view," and because liberal donations of land were offered, by the proprietors, on condition that the institution should be there established. The real advantages from the location of the college are, perhaps, not less considerable to those on the west, than to those on the east, side of Connecticut river. The clause which constitutes the incorporation, and expresses the objects for which it was made, declares those objects to be the instruction of the Indians, "and also of English youth and any others." So that the objects of the contributors, and the incorporating act, were the same: the promotion of Christianity and of education generally, not the interests of New Hampshire particularly.

From this review of the charter, it appears that Dartmouth College is an eleemosynary institution, incorporated for the purpose of perpetuating the application of the bounty of the donors to the specified objects of that bounty; that its trustees or governors were originally named by the founder, and invested with the power of perpetuating themselves; that they are not public officers, nor is it a civil institution, participating in the administration of government, but a charity school or a seminary of education, incorporated for the preservation of its property, and the perpetual application of that property to the objects of its creation.

Yet a question remains to be considered, of more real difficulty, on which more doubt has been entertained than on all that have been discussed. The founders of the college, at least those whose contributions were in money, have parted with the property bestowed upon it, and their representatives have no interest in that property. The donors of land are equally without interest, so long as the corporation shall exist. Could they be found, they are unaffected by any alteration in its constitution, and probably regardless of its form or even of its existence. The students are fluctuating, and no individual among our youth has a vested interest in the institution which can be asserted in a court of justice. Neither the founders of the college, nor the youth for whose benefit it was founded, complain of the alteration made in its charter, or think themselves injured by it. The trustees alone complain, and the trustees have no beneficial interest to be protected. Can this be such a contract as the constitution intended to withdraw from the power of state legislation? Contracts, the parties to which have a vested beneficial interest, and those only, it has been said, are the objects about which the constitution is solicitous, and to which its protection is extended.

The court has bestowed on this argument the most deliberate consideration, and the result will be stated. Dr. Wheelock, acting for himself, and for those who, at his solicitation, had made contributions to his school, applied for this charter, as the instrument which should enable him and them to perpetuate their beneficent intention. It was granted. An artificial, immortal being was created by the crown, capable of receiving and distributing forever, according to the will of the donors, the donations which should be made to it. On this being, the contributions which had been collected were immediately bestowed. These gifts were made, not indeed to make a profit for the donors or their posterity, but for something in their opinion of inestimable value; for something which they deemed a full equivalent for the money with which it was purchased. The consideration for which they stipulated is the perpetual application of the fund to its object in the mode prescribed by themselves. Their descendants may take no interest in the preservation of this consideration. But in this respect their descendants are not their representatives. They are represented by the corporation. The corporation is the assignee of their rights, stands in their place and distributes their bounty, as they would themselves have distributed it had they been immortal. So with respect to the students who are to derive learning from this source. The corporation is a trustee for them also. Their potential rights, which, taken distributively, are imperceptible, amount, collectively, to a most important interest. These are, in the aggregate, to be exercised, asserted and protected by the corporation. They were as completely out of the donors at the instant of their being vested in the corporation, and as incapable of being asserted by the students, as at present.

According to the theory of the British constitution their parliament is omnipotent. To annul corporate rights might give a shock to public opinion which that government has chosen to avoid; but its power is not questioned. Had parliament, immediately after the emanation of this charter and the execution of those conveyances which followed it, annulled the instrument so that the living donors would have witnessed the disappointment of their hopes, the perfidy of the transaction would have been universally acknowledged. Yet then, as now, the donors would have had no interest in the property; then, as now, those who might be students would have had no rights to be violated; then, as now, it might be said that the trustees, in whom the rights of all were combined, possessed no private, individual, beneficial interest in the property confided to their protection. Yet the contract would at that time have been deemed sacred by all. What has since occurred to strip it of its inviolability? Circumstances have not changed it. In reason, in justice and in law, it is now what it was in 1769.

This is plainly a contract to which the donors, the trustees and the crown (to whose rights and obligations New Hampshire succeeds) were the original parties. It is a contract made on a valuable consideration. It is a contract for the security and disposition of property. It is a contract on the faith of which real and personal estate has been conveyed to the corporation. It is then a contract within the letter of the constitution, and within its spirit also, unless the fact that the property is invested by the donors in trustees, for the promotion of religion and education, for the benefit of persons who are perpetually changing, though the objects remain the same, shall create a particular exception, taking this case out of the prohibition contained in the constitution.

It is more than possible that the preservation of rights of this description was not particularly in the view of the framers of the constitution when the

clause under consideration was introduced into that instrument. It is probable that interferences of more frequent recurrence, to which the temptation was stronger, and of which the mischief was more extensive, constituted the great motive for imposing this restriction on the state legislatures. But although a particular and a rare case may not, in itself, be of sufficient magnitude to induce a rule, yet it must be governed by the rule when established, unless some plain and strong reason for excluding it can be given. It is not enough to say that this particular case was not in the mind of the convention when the article was framed, nor of the American people when it was adopted. It is necessary to go further, and to say that had this particular case been suggested the language would have been so varied as to exclude it, or it would have been made a special exception. The case being within the words of the rule, must be within its operation likewise, unless there be something in the literal construction so obviously absurd or mischievous, or repugnant to the general spirit of the instrument, as to justify those who expound the constitution in making it an exception.

On what safe and intelligible ground can this exception stand? There is no expression in the constitution, no sentiment delivered by its contemporaneous expounders, which would justify us in making it. In the absence of all authority of this kind, is there, in the nature and reason of the case itself, that which would sustain a construction of the constitution not warranted by its words? Are contracts of this description of a character to excite so little interest that we must exclude them from the provisions of the constitution as being unworthy of the attention of those who framed the instrument? Or does public policy so imperiously demand their remaining exposed to legislative alteration, as to compel us, or rather permit us, to say that these words which were introduced to give stability to contracts, and which, in their plain import, comprehend this contract, must yet be so construed as to exclude it?

Almost all eleemosynary corporations, those which are created for the promotion of religion, of charity, or of education, are of the same character. The law of this case is the law of all. In every literary or charitable institution, unless the objects of the bounty be themselves incorporated, the whole legal interest is in trustees, and can be asserted only by them. The donors, or claimants of the bounty, if they can appear in court at all, can appear only to complain of the trustees. In all other situations, they are identified with, and personated by, the trustees, and their rights are to be defended and maintained by them. Religion, charity and education are, in the law of England, legatees or donees capable of receiving bequests or donations in this form. They appear in court, and claim or defend by the corporation. Are they of so little estimation in the United States, that contracts for their benefit must be excluded from the protection of words which, in their natural import, include them? Or do such contracts so necessarily require new modeling by the authority of the legislature, that the ordinary rules of construction must be disregarded in order to leave them exposed to legislative alteration? All feel that these objects are not deemed unimportant in the United States. The interest which this case has excited proves that they are not. The framers of the constitution did not deem them unworthy of its care and protection. They have, though in a different mode, manifested their respect for science by reserving to the government of the Union the power "to promote the progress of science and useful arts, by securing for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries." They

have, so far, withdrawn science and the useful arts from the action of the state governments. Why, then, should they be supposed regardless of contracts made for the advancement of literature, as to intend to exclude them from provisions made for the security of ordinary contracts between man and man? No reason for making this supposition is perceived.

If the insignificance of the object does not require that we should exclude contracts respecting it from the protection of the constitution, neither, as we conceive, is the policy of leaving them subject to legislative alteration so apparent as to require a forced construction of that instrument in order to effect it. These eleemosynary institutions do not fill the place which would otherwise be occupied by government, but that which would otherwise remain vacant. They are complete acquisitions to literature. They are donations to education, donations which any government must be disposed rather to encourage than to discountenance. It requires no very critical examination of the human mind, to enable us to determine that one great inducement to these gifts is the conviction felt by the giver that the disposition he makes of them is immutable. It is probable that no man ever was, and that no man ever will be, the founder of a college, believing at the time that an act of incorporation constitutes no security for the institution; believing that it is immediately to be deemed a public institution, whose funds are to be governed and applied, not by the will of the donor, but by the will of the legislature. All such gifts are made in the pleasing, perhaps delusive, hope, that the charity will flow forever in the channel which the givers have marked out for it. If every man finds in his own bosom strong evidence of the universality of this sentiment, there can be but little reason to imagine that the framers of our constitution were strangers to it, and that, feeling the necessity and policy of giving permanence and security to contracts, of withdrawing them from the influence of legislative bodies, whose fluctuating policy and repeated interferences produced the most perplexing and injurious embarrassments, they still deemed it necessary to leave these contracts subject to those interferences. The motives for such an exception must be very powerful to justify the construction which makes it.

The motives suggested at the bar grow out of the original appointment of the trustees, which is supposed to have been in a spirit hostile to the genius of our government, and the presumption that, if allowed to continue themselves, they now are, and must remain forever, what they originally were. Hence is inferred the necessity of applying to this corporation, and to other similar corporations, the correcting and improving hand of the legislature. It has been urged repeatedly, and certainly with a degree of earnestness which attracted attention, that the trustees, deriving their power from a regal source, must, necessarily, partake of the spirit of their origin; and that their first principles, unimproved by that resplendent light which has been shed around them, must continue to govern the college, and to guide the students. Before we inquire into the influence which this argument ought to have on the constitutional question, it may not be amiss to examine the fact on which it rests. The first trustees were undoubtedly named in the charter by the crown; but at whose suggestion were they named? By whom were they selected? The charter informs us. Dr. Wheelock had represented, "that, for many weighty reasons, it would be expedient that the gentlemen whom he had already nominated, in his last will, to be trustees in America, should be of the corporation now proposed." When, afterwards, the trustees are named in the charter, can it be

doubted that the persons mentioned by Dr. Wheelock in his will were appointed? Some were probably added by the crown, with the approbation of Dr. Wheelock. Among these is the doctor himself. If any others were appointed at the instance of the crown, they are the governor, three members of the council, and the speaker of the house of representatives, of the colony of New Hampshire. The stations filled by these persons ought to rescue them from any other imputation than too great a dependence on the crown. If, in the Revolution that followed, they acted under the influence of this sentiment, they must have ceased to be trustees; if they took part with their countrymen, the imputation which suspicion might excite would no longer attach to them. The original trustees, then, or most of them, were named by Dr. Wheelock, and those who were added to his nomination, most probably with his approbation, were among the most eminent and respectable individuals in New Hampshire.

The only evidence which we possess of the character of Dr. Wheelock is furnished by this charter. The judicious means employed for the accomplishment of his object, and the success which attended his endeavors, would lead to the opinion that he united a sound understanding to that humanity and benevolence which suggested his undertaking. It surely cannot be assumed that his trustees were selected without judgment. With as little probability can it be assumed, that, while the light of science and of liberal principles pervades the whole community, these originally benighted trustees remain in utter darkness, incapable of participating in the general improvement; that, while the human race is rapidly advancing, they are stationary. Reasoning *a priori*, we should believe that learned and intelligent men, selected by its patrons for the government of a literary institution, would select learned and intelligent men for their successors; men as well fitted for the government of a college as those who might be chosen by other means. Should this reasoning ever prove erroneous in a particular case, public opinion, as has been stated at the bar, would correct the institution. The mere possibility of the contrary would not justify a construction of the constitution which should exclude these contracts from the protection of a provision whose terms comprehend them.

The opinion of the court, after mature deliberation, is that this is a contract, the obligation of which cannot be impaired without violating the constitution of the United States. This opinion appears to us to be equally supported by reason and by the former decisions of this court.

2. We next proceed to the inquiry whether its obligation has been impaired by those acts of the legislature of New Hampshire to which the special verdict refers. From the review of this charter which has been taken, it appears that the whole power of governing the college, of appointing and removing tutors, of fixing their salaries, of directing the course of study to be pursued by the students, and of filling up vacancies created in their own body, was vested in the trustees. On the part of the crown it was expressly stipulated that this corporation, thus constituted, should continue forever, and that the number of trustees should forever consist of twelve, and no more. By this contract the crown was bound, and could have made no violent alteration in its essential terms without impairing its obligation.

§ 2106. *Contracts and property rights remained unchanged by the Revolution; also the charter of Dartmouth College.*

By the Revolution, the duties as well as the powers of government devolved on the people of New Hampshire. It is admitted that among the latter was comprehended the transcendent power of parliament as well as that of the ex-

ecutive department. It is too clear to require the support of argument that all contracts and rights respecting property remained unchanged by the Revolution. The obligations then which were created by the charter to Dartmouth College were the same in the new that they had been in the old government. The power of the government was also the same. A repeal of this charter at any time prior to the adoption of the present constitution of the United States would have been an extraordinary and unprecedented act of power, but one which could have been contested only by the restrictions upon the legislature to be found in the constitution of the state. But the constitution of the United States has imposed this additional limitation, that the legislature of a state shall pass no act "impairing the obligation of contracts."

§ 2107. *The laws of New Hampshire modifying the charter of Dartmouth College are unconstitutional, being laws impairing the obligation of a contract.*

It has been already stated that the act "to amend the charter and enlarge and improve the corporation of Dartmouth College" increases the number of trustees to twenty-one, gives the appointment of the additional members to the executive of the state, and creates a board of overseers, to consist of twenty-five persons, of whom twenty-one are also appointed by the executive of New Hampshire, who have power to inspect and control the most important acts of the trustees. On the effect of this law two opinions cannot be entertained. Between acting directly, and acting through the agency of trustees and overseers, no essential difference is perceived. The whole power of governing the college is transferred from trustees, appointed according to the will of the founder, expressed in the charter, to the executive of New Hampshire. The management and application of the funds of this eleemosynary institution, which are placed by the donors in the hands of trustees named in the charter and empowered to perpetuate themselves, are placed by this act under the control of the government of the state. The will of the state is substituted for the will of the donors, in every essential operation of the college. This is not an immaterial change. The founders of the college contracted, not merely for the perpetual application of the funds which they gave to the objects for which those funds were given; they contracted, also, to secure that application by the constitution of the corporation. They contracted for a system which should, as far as human foresight can provide, retain forever the government of the literary institution they had formed in the hands of persons approved by themselves. This system is totally changed. The charter of 1769 exists no longer. It is reorganized; and reorganized in such a manner as to convert a literary institution, moulded according to the will of its founders, and placed under the control of private literary men, into a machine entirely subservient to the will of government. This may be for the advantage of this college in particular, and may be for the advantage of literature in general; but it is not according to the will of the donors, and is subversive of that contract on the faith of which their property was given.

In the view which has been taken of this interesting case, the court has confined itself to the rights possessed by the trustees, as the assignees and representatives of the donors and founders, for the benefit of religion and literature. Yet it is not clear that the trustees ought to be considered as destitute of such beneficial interest in themselves as the law may respect. In addition to their being the legal owners of the property, and to their having a freehold right in the powers confided to them, the charter itself countenances the idea that trustees may also be tutors, with salaries. The first president was one of the orig-

inal trustees; and the charter provides that, in case of vacancy in that office, "the senior professor or tutor, being one of the trustees, shall exercise the office of president until the trustees shall make choice of and appoint a president." According to the tenor of the charter, then, the trustees might, without impropriety, appoint a president and other professors from their own body. This is a power not entirely unconnected with an interest. Even if the proposition of the counsel for the defendant were sustained; if it were admitted that those contracts only are protected by the constitution, a beneficial interest in which is vested in the party who appears in court to assert that interest,—yet it is by no means clear that the trustees of Dartmouth College have no beneficial interest in themselves.

But the court has deemed it unnecessary to investigate this particular point, being of opinion, on general principles, that in these private eleemosynary institutions, the body corporate, as possessing the whole legal and equitable interest, and completely representing the donors, for the purpose of executing the trust, has rights which are protected by the constitution.

It results from this opinion that the acts of the legislature of New Hampshire, which are stated in the special verdict found in this cause, are repugnant to the constitution of the United States, and that the judgment on this special verdict ought to have been for the plaintiffs. The judgment of the state court must, therefore, be reversed.

Opinion by MR. JUSTICE STORY.

This is a cause of great importance, and, as the very learned discussions, as well here as in the state court, show, of no inconsiderable difficulty. There are two questions to which the appellate jurisdiction of this court properly applies. 1. Whether the original charter of Dartmouth College is a contract within the prohibitory clause of the constitution of the United States, which declares that no state shall pass any "law impairing the obligation of contracts." 2. If so, whether the legislative acts of New Hampshire of the 27th of June and of the 18th and 27th of December, 1816, or any of them, impair the obligations of that charter. It will be necessary, however, before we proceed to discuss these questions, to institute an inquiry into the nature, rights and duties of aggregate corporations at common law, that we may apply the principles drawn from this source to the exposition of this charter, which was granted emphatically with reference to that law.

§ 2108. *Nature, rights and duties of aggregate corporations discussed.*

An aggregate corporation at common law is a collection of individuals united into one collective body, under a special name, and possessing certain immunities, privileges and capacities in its collective character, which do not belong to the natural persons composing it. Among other things it possesses the capacity of perpetual succession, and of acting by the collected vote or will of its component members, and of suing and being sued in all things touching its corporate rights and duties. It is, in short, an artificial person existing in contemplation of law, and endowed with certain powers and franchises which, though they must be exercised through the medium of its natural members, are yet considered as subsisting in the corporation itself, as distinctly as if it were a real personage. Hence, such a corporation may sue and be sued by its own members, and may contract with them in the same manner as with any strangers. 1 Bl. Com., 469, 475; 1 Kyd, Corp., 13, 69, 189; 1 Woodes., 471, etc., etc. A great variety of these corporations exist in every country gov-

erned by the common law; in some of which the corporate existence is perpetuated by new elections made from time to time, and in others by a continual accession of new members without any corporate act. Some of these corporations are, from the particular purposes to which they are devoted, denominated spiritual, and some lay; and the latter are again divided into civil and eleemosynary corporations. It is unnecessary, in this place, to enter into any examination of civil corporations. Eleemosynary corporations are such as are constituted for the perpetual distribution of the free alms and bounty of the founder, in such manner as he has directed; and in this class are ranked hospitals for the relief of poor and impotent persons, and colleges for the promotion of learning and piety, and the support of persons engaged in literary pursuits. 1 Bl. Com., 469, 470, 471, 482; 1 Kyd, Corp., 25; 1 Woodes., 474; *Attorney-General v. Whorwood*, 1 Ves., 534; *St. John's College v. Todington*, 1 Bl. Rep., 84; S. C., 1 Burr., 200; *Philips v. Bury*, 1 Ld. Raym., 5; S. C., 2 Term R., 346; *Porter's Case*, 1 Coke, 22, b. 23.

Another division of corporations is into public and private. Public corporations are generally esteemed such as exist for public political purposes only, such as towns, cities, parishes and counties; and in many respects they are so, although they involve some private interests; but strictly speaking, public corporations are such only as are founded by the government for public purposes, where the whole interests belong also to the government. If, therefore, the foundation be private, though under the charter of the government, the corporation is private, however extensive the uses may be to which it is devoted, either by the bounty of the founder, or the nature and objects of the institution. For instance, a bank created by the government for its own uses, whose stock is exclusively owned by the government, is, in the strictest sense, a public corporation. So a hospital created and endowed by the government for general charity. But a bank whose stock is owned by private persons is a private corporation, although it is erected by the government, and its objects and operations partake of a public nature. The same doctrine may be affirmed of insurance, canal, bridge and turnpike companies. In all these cases the uses may, in a certain sense, be called public; but the corporations are private; as much so, indeed, as if the franchises were vested in a single person. This reasoning applies in its full force to eleemosynary corporations. A hospital founded by a private benefactor is, in point of law, a private corporation, although dedicated by its charter to general charity. So a college founded and endowed in the same manner, although being for the promotion of learning and piety, it may extend its charity to scholars from every class in the community, and thus acquire the character of a public institution. This is the unequivocal doctrine of the authorities, and cannot be shaken but by undermining the most solid foundations of the common law. *Philips v. Bury*, 1 Ld. Raym., 5, 9; S. C., 2 Term R., 346.

It was indeed supposed at the argument, that if the uses of an eleemosynary corporation be for general charity, this alone would constitute it a public corporation. But the law is certainly not so. To be sure, in a certain sense, every charity which is extensive in its reach may be called a public charity, in contradistinction to a charity embracing but a few definite objects. In this sense the language was unquestionably used by Lord Hardwicke, in the case cited at the argument. *Attorney-General v. Pearse*, 2 Atk., 87; 1 Bac. Abr., tit. *Charitable Uses*, E., 589. And, in this sense, a private corporation may well enough be denominated a public charity. So it would be if the endowment, instead of

being vested in a corporation, were assigned to a private trustee; yet in such a case no one would imagine that the trust ceased to be private, or the funds became public property. That the mere act of incorporation will not change the charity from a private to a public one is most distinctly asserted in the authorities. Lord Hardwicke, in the case already alluded to, says, "the charter of the crown cannot make a charity more or less public, but only more permanent than it would otherwise be; but it is the extensiveness which will constitute it a public one. A devise to the poor of the parish is a public charity. Where testators leave it to the discretion of a trustee to choose out the objects, though each particular object may be said to be private, yet, in the extensiveness of the benefit accruing from them, they may properly be called public charities. A sum to be disposed of by A B, and his executors, at their discretion, among poor housekeepers, is of this kind." The charity then, may, in this sense, be public, although it may be administered by private trustees; and, for the same reason, it may thus be public, though administered by a private corporation. The fact, then, that the charity is public, affords no proof that the corporation is also public; and, consequently, the argument, so far as it is built on this foundation, falls to the ground. If, indeed, the argument were correct, it would follow that almost every hospital and college would be a public corporation; a doctrine utterly irreconcilable with the whole current of decisions since the time of Lord Coke. *The Case of Sutton's Hospital*, 10 Coke, 23.

§ 2109. *A charitable corporation is not per se a public corporation.*

When, then, the argument assumes that, because the charity is public, the corporation is public, it manifestly confounds the popular with the strictly legal sense of the terms. And if it stopped here, it would not be very material to correct the error. But it is on this foundation that a superstructure is erected, which is to compel a surrender of the cause. When the corporation is said at the bar to be public, it is not merely meant that the whole community may be the proper objects of the bounty, but that the government have the sole right, as trustees of the public interests, to regulate, control and direct the corporation and its funds and its franchises at its own good will and pleasure. Now, such an authority does not exist in the government, except where the corporation is, in the strictest sense, public; that is, where its whole interests and franchises are the exclusive property and domain of the government itself. If it had been otherwise, courts of law would have been spared many laborious adjudications in respect to eleemosynary corporations, and the visitatorial powers over them, from the time of Lord Holt down to the present day. *Philips v. Bury*, 1 Ld. Raym., 5; S. C., Comb., 265; *Holt*, 715; 1 Show., 360; 4 Mod., 106; *Skin.*, 447, and Ld. Holt's opinion from his own MS., in 2 Term R., 346. Nay, more, private trustees for charitable purposes would have been liable to have the property confided to their care taken away from them without any assent or default on their part, and the administration submitted, not to the control of law and equity, but to the arbitrary discretion of the government. Yet who ever thought before, that the munificent gifts of private donors for general charity became instantaneously the property of the government, and that the trustees appointed by the donors, whether corporate or unincorporated, might be compelled to yield up their rights to whomsoever the government might appoint to administer them? If we were to establish such a principle, it would extinguish all future eleemosynary endowments, and we should find as little of public policy as we now find of law to sustain it.

§ 2110. *Eleemosynary corporations; their incidents and responsibilities discussed.*

An eleemosynary corporation, then, upon a private foundation, being a private corporation, it is next to be considered what is deemed a foundation, and who is the founder. This cannot be stated with more brevity and exactness than in the language of the elegant commentator upon the laws of England: "The founder of all corporations (says Sir William Blackstone), in the strictest and original sense, is the king alone, for he only can incorporate a society; and in civil corporations, such as mayor, commonalty, etc., where there are no possessions or endowments given to the body, there is no other founder but the king; but in eleemosynary foundations, such as colleges and hospitals, where there is an endowment of lands, the law distinguishes and makes two species of foundation, the one *fundatio incipiens*, or the incorporation, in which sense the king is the general founder of all colleges and hospitals; the other *fundatio perficiens*, or the dotation of it, in which sense the first gift of the revenues is the foundation, and he who gives them is, in the law, the founder; and it is in this last sense we generally call a man the founder of a college or hospital." 1 Bl. Com., 480; 10 Coke, 33.

To all eleemosynary corporations a visitatorial power attaches, as a necessary incident; for these corporations being composed of individuals, subject to human infirmities, are liable, as well as private persons, to deviate from the end of their institution. The law, therefore, has provided that there shall somewhere exist a power to visit, inquire into, and correct all irregularities and abuses in such corporations, and to compel the original purposes of the charity to be faithfully fulfilled. 1 Bl. Com., 480. The nature and extent of this visitatorial power has been expounded with admirable fullness and accuracy by Lord Holt, in one of his most celebrated judgments. *Philips v. Bury*, 1 Ld. Raym., 5; S. C., 2 Term R., 346. And of common right, by the dotation, the founder and his heirs are the legal visitors, unless the founder has appointed and assigned another person to be visitor. For the founder may, if he please, at the time of the endowment, part with his visitatorial power, and the person to whom it is assigned will, in that case, possess it in exclusion of the founder's heirs. 1 Bl. Com., 482. This visitatorial power is, therefore, an hereditament, founded in property, and valuable in intendment of law; and stands upon the maxim that he who gives his property has a right to regulate it in future. It includes also the legal right of patronage, for, as Lord Holt justly observes, "patronage and visitation are necessary consequents one upon another." No technical terms are necessary to assign or vest the visitatorial power; it is sufficient if, from the nature of the duties to be performed by particular persons under the charter, it can be inferred that the founder meant to part with it in their favor; and he may divide it among various persons, or subject it to any modifications or control by the fundamental statutes of the corporation. But where the appointment is given in general terms the whole power vests in the appointee. *Eden v. Foster*, 2 P. Wms., 325; *Attorney-General v. Middleton*, 2 Ves., 327; *St. John's College v. Todington*, 1 Bl. Rep., 84; S. C., 2 Burr., 200; *Attorney-General v. Clare College*, 3 Atk., 662; S. C., 1 Ves., 78. In the construction of charters, too, it is a general rule that, if the objects of the charity are incorporated, as, for instance, the master and fellows of a college, or the master and poor of a hospital, the visitatorial power, in the absence of any special appointment, silently vests in the founder and his heirs. But where trustees or governors are incorporated to manage the charity, the visitatorial

power is deemed to belong to them in their corporate character. *Philips v. Bury*, 1 *Ld. Raym.*, 5; *S. C.*, 2 *Term R.*, 346; *Green v. Rutherford*, 1 *Ves.*, 472; *Attorney-General v. Middleton*, 2 *Ves.*, 327; *Case of Sutton Hospital*, 10 *Coke*, 23, 31.

When a private eleemosynary corporation is thus created by the charter of the crown, it is subject to no other control on the part of the crown than what is expressly or implicitly reserved by the charter itself. Unless a power be reserved for this purpose, the crown cannot, in virtue of its prerogative, without the consent of the corporation, alter or amend the charter, or divest the corporation of any of its franchises, or add to them; or add to or diminish the number of the trustees, or remove any of the members, or change or control the administration of the charity, or compel the corporation to receive a new charter. This is the uniform language of the authorities, and forms one of the most stubborn and well settled doctrines of the common law. See *Rex v. Pasmore*, 3 *Term R.*, 199, and the cases there cited.

But an eleemosynary, like every other corporation, is subject to the general law of the land. It may forfeit its corporate franchises by misuser or non-user of them. It is subject to the controlling authority of its legal visitor, who, unless restrained by the terms of the charter, may amend and repeal its statutes, remove its officers, correct abuses, and generally superintend the management of the trusts. Where, indeed, the visitatorial power is vested in the trustees of the charity, in virtue of their incorporation, there can be no motion of them from their corporate capacity. But they are not, therefore, placed beyond the reach of the law. As managers of the revenues of the corporation they are subject to the general superintending power of the court of chancery, not as itself possessing a visitatorial power, or a right to control the charity, but as possessing a general jurisdiction in all cases of an abuse of trusts to redress grievances and suppress frauds. 2 *Fonb. Eq.*, B. 2, pt. 2, ch. 1, sec. 1, note (a); *Coop. Eq. Pl.*, 292; 2 *Kyd, Corp.*, 195; *Green v. Rutherford*, 1 *Ves.*, 462; *Attorney-General v. Foundling Hospital*, 4 *Bro. Ch.*, 165; *S. C.*, 2 *Ves. Jr.*, 42; *Eden v. Foster*, 2 *P. Wms.*, 325; 1 *Woodes*, 476; *Attorney-General v. Price*, 3 *Atk.*, 108; *Attorney-General v. Lock*, 3 *Atk.*, 164; *Attorney-General v. Dixie*, 13 *Ves. Jr.*, 519; *Ex parte Kirkby Ravensworth Hospital*, 15 *Ves. Jr.*, 304, 314; *Attorney-General v. Earl of Clarendon*, 17 *Ves. Jr.*, 491, 499; *Berkhamstead Free School*, 2 *Ves. & Beames*, 134; *Attorney-General v. Corporation of Carmarthen*, *Coop. R.*, 30; *Mayor, etc., of Colchester v. Lowten*, 1 *Ves. & Beames*, 226; *Rex v. Watson*, 2 *Term R.*, 199; *Attorney-General v. Utica Ins. Co.*, 2 *Johns. Ch.*, 371; *Attorney-General v. Middleton*, 2 *Ves.*, 327. And where a corporation is a mere trustee of a charity, a court of equity will go yet further; and though it cannot appoint or remove a corporator, it will yet, in a case of gross fraud or abuse of trust, take away the trust from the corporation and vest it in other hands. *Mayor, etc., of Coventry v. Attorney-General*, 7 *Bro. Parl. Cases*, 235; *Attorney-General v. Earl of Clarendon*, 17 *Ves. Jr.*, 491, 499.

Thus much it has been thought proper to premise respecting the nature, rights and duties of eleemosynary corporations, growing out of the common law. We may now proceed to an examination of the original charter of Dartmouth College. It begins by a recital, among other things, that the Rev. Eleazer Wheelock, of Lebanon, in Connecticut, about the year 1754, at his own expense, on his own estate, set on foot an Indian charity school, and, by the assistance of other persons, educated a number of the children of the Indians and em-

played them as missionaries and schoolmasters among the savage tribes; that the design became reputable among the Indians, so that more desired the education of their children at the school than the contributions in the American colonies would support; that the said Wheelock thought it expedient to endeavor to procure contributions in England, and requested the Rev. Nathaniel Whitaker to go to England, as his attorney, to solicit contributions, and also solicited the Earl of Dartmouth and others to receive the contributions and become trustees thereof, which they cheerfully agreed to, and he constituted them trustees accordingly, by a power of attorney, and they testified their acceptance by a sealed instrument; that the said Wheelock also authorized the trustees to fix and determine upon the place for the said school, and, to enable them understandingly to give the preference, laid before them the several offers of the governments in America, inviting the settlement of the school among them; that a large number of the proprietors of lands in the western parts of New Hampshire, to aid the design, and considering that the same school might be enlarged and improved to promote learning among the English, and to supply the churches there with an orthodox ministry, promised large tracts of land for the uses aforesaid, provided the school should be settled in the western part of said province; that the trustees thereupon gave a preference to the western part of said province, lying on Connecticut river, as a situation most convenient for said school; that the said Wheelock further represented the necessity for a legal incorporation, in order to the safety and well-being of said seminary, and its being capable of the tenure and disposal of lands and bequests for the use of the same; that, in the infancy of said institution, certain gentlemen whom he had already nominated in his last will (which he had transmitted to the trustees in England) to be trustees in America, should be the corporation now proposed; and, lastly, that there were already large contributions for said school in the hands of the trustees in England, and further success might be expected; for which reason the said Wheelock desired they might be invested with all that power therein which could consist with their distance from the same. The charter, after these recitals, declares that the king, considering the premises, and being willing to encourage the charitable design, and that the best means of education might be established in New Hampshire, for the benefit thereof, does, of his special grace, certain knowledge and mere motion, ordain and grant that there be a college erected in New Hampshire, by the name of Dartmouth College, for the education and instruction of youth of the Indian tribes, and also of English youth and others; that the trustees of said college shall be a corporation forever, by the name of the Trustees of Dartmouth College; that the then governor of New Hampshire, the said Wheelock, and ten other persons specially named in the charter, shall be trustees of the said college, and that the whole number of trustees shall forever thereafter consist of twelve, and no more; that the said corporation shall have power to sue and to be sued by their corporate name, and to acquire and hold, for the use of the said Dartmouth College, lands, tenements, hereditaments and franchises; to receive, purchase and build any houses for the use of said college in such town in the western part of New Hampshire as the trustees, or a major part of them, shall, by a written instrument, agree on; and to receive, accept and dispose of any lands, goods, chattels, rents, gifts, legacies, etc., etc., not exceeding the yearly value of 6,000*l*. It further declares that the trustees, or a major part of them, regularly convened (for which purpose seven shall form a quorum), shall

have authority to appoint and remove the professors, tutors and other officers of the college, and to pay them, and also such missionaries and schoolmasters as shall be employed by the trustees for instructing the Indians, salaries and allowances, as well as other corporate expenses, out of the corporate funds. It further declares that the said trustees, as often as one or more of the trustees shall die, or by removal or otherwise shall, according to their judgment, become unfit or incapable to serve the interests of the college, shall have power to elect and appoint other trustees in their stead, so that, when the whole number shall be complete, of twelve trustees, eight shall be resident freeholders of New Hampshire, and seven of the whole number laymen. It further declares that the trustees shall have power, from time to time, to make and establish rules, ordinances and laws for the government of the college, not repugnant to the laws of the land, and to confer collegiate degrees. It further appoints the said Wheelock, whom it denominates "the founder of the college," to be president of the college, with authority to appoint his successor, who shall be president until disapproved of by the trustees. It then concludes with a direction that it shall be the duty of the president to transmit to the trustees in England, so long as they should perpetuate their board, and as there should be Indian natives remaining to be proper objects of the bounty, an annual account of all the disbursements from the donations in England, and of the general plans and prosperity of the institution.

Such are the most material clauses of the charter. It is observable, in the first place, that no endowment whatever is given by the crown; and no power is reserved to the crown or government in any manner to alter, amend or control the charter. It is also apparent, from the very terms of the charter, that Dr. Wheelock is recognized as the founder of the college, and that the charter is granted upon his application, and that the trustees were in fact nominated by him. In the next place, it is apparent that the objects of the institution are purely charitable, for the distribution of the private contributions of private benefactors. The charity was, in the sense already explained, a public charity; that is, for the general promotion of learning and piety; but, in this respect, it was just as much public before as after the incorporation. The only effect of the charter was to give permanency to the design, by enlarging the sphere of its action, and granting a perpetuity of corporate powers and franchises, the better to secure the administration of the benevolent donations. As founder, too, Dr. Wheelock and his heirs would have been completely clothed with the visitatorial power; but the whole government and control, as well of the officers as of the revenues of the college, being, with his consent, assigned to the trustees in their corporate character, the visitatorial power, which is included in this authority, rightfully devolved on the trustees. As managers of the property and revenues of the corporation, they were amenable to the jurisdiction of the judicial tribunals of the state; but, as visitors, their discretion was limited only by the charter, and liable to no supervision or control, at least, unless it was fraudulently misapplied.

From this summary examination, it follows that Dartmouth College was, under its original charter, a private eleemosynary corporation, endowed with the usual privileges and franchises of such corporations, and, among others, with a legal perpetuity, and was exclusively under the government and control of twelve trustees, who were to be elected and appointed, from time to time, by the existing board, as vacancies or removals should occur.

§ 2111. *A charter or grant from the king of England is a contract.*

We are now led to the consideration of the first question in the cause: whether this charter is a contract, within the clause of the constitution prohibiting the states from passing any law impairing the obligation of contracts. In the case of *Fletcher v. Peck*, 6 C., 87, 136, this court laid down its exposition of the word "contract," in this clause, in the following manner: "A contract is a compact between two or more persons, and is either executory or executed. An executory contract is one in which a party binds himself to do or not to do a particular thing. A contract executed is one in which the object of the contract is performed; and this, says Blackstone, differs in nothing from a grant. A contract executed, as well as one that is executory, contains obligations binding on the parties. A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right. A party is always estopped by his own grant." This language is perfectly unambiguous, and was used in reference to a grant of land by the governor of a state under a legislative act. It determines, in the most unequivocal manner, that the grant of a state is a contract within the clause of the constitution now in question, and that it implies a contract not to reassume the rights granted. *A fortiori*, the doctrine applies to a charter or grant from the king.

§ 2112. *The grant to Dartmouth College was supported by a valuable consideration.*

But it is objected that the charter of Dartmouth College is not a contract contemplated by the constitution, because no valuable consideration passed to the king as an equivalent for the grant, it purporting to be granted *ex mero motu*; and further, that no contracts merely voluntary are within the prohibitory clause. It must be admitted that mere executory contracts cannot be enforced at law, unless there be a valuable consideration to sustain them; and the constitution certainly did not mean to create any new obligations, or give any new efficacy to *nude pacts*. But it must, on the other hand, be also admitted that the constitution did intend to preserve all the obligatory force of contracts, which they have by the general principles of law. Now, when a contract has once passed, *bona fide*, into grant, neither the king nor any private person, who may be the grantor, can recall the grant of the property, although the conveyance may have been purely voluntary. A gift, completely executed, is irrevocable. The property conveyed by it becomes, as against the donor, the absolute property of the donee; and no subsequent change of intention of the donor can change the rights of the donee. 2 Bl. Com., 441; Jenk. Cent., 104. And a gift by the crown of incorporeal hereditaments, such as corporate franchises, when executed, comes completely within the principle, and is, in the strictest sense of the terms, a grant. 2 Bl. Com., 317, 346; Shep. Touch., ch. 12, p. 228. Was it ever imagined that land, voluntarily granted to any person by a state, was liable to be resumed at its own good pleasure? Such a pretension would, under any circumstances, be truly alarming; but, in a country like ours, where thousands of land titles had their origin in gratuitous grants of the states, it would go far to shake the foundations of the best settled estates. And a grant of franchises is not, in point of principle, distinguishable from a grant of any other property. If, therefore, this charter were a pure donation, when the grant was complete and accepted by the grantees, it involved a contract that the grantees should hold, and the grantor should not resume, the grant, as much as if it had been founded on the most valuable consideration.

But it is not admitted that this charter was not granted for what the law deems a valuable consideration. For this purpose, it matters not how trifling the consideration may be; a pepper-corn is as good as a thousand dollars. Nor is it necessary that the consideration should be a benefit to the grantor. It is sufficient if it import damage or loss, or forbearance of benefit, or any act done or to be done, on the part of the grantee. It is unnecessary to state cases; they are familiar to the mind of every lawyer. *Pillans v. Van Mierop*, per Yates, J., 3 Burr., 1663; *Forth v. Staunton*, 1 Saund., 211; Williams' note 2, and the cases there cited.

With these principles in view let us now examine the terms of this charter. It purports, indeed, on its face, to be granted "of the special grace, certain knowledge and mere motion" of the king; but these words were introduced for a very different purpose from that now contended for. It is a general rule of the common law (the reverse of that applied in ordinary cases), that a grant of the king, at the suit of the grantee, is to be construed most beneficially for the king, and most strictly against the grantee. Wherefore it is usual to insert in the king's grants a clause that they are made, not at the suit of the grantee, but of the special grace, certain knowledge and mere motion of the king; and then they receive a more liberal construction. This is the true object of the clause in question, as we are informed by the most accurate authorities. 2 Bl. Com., 347; Finch's Law, 100, 10 Rep., 112; 1 Shep. Abridg., 136; Bull. N. P., 136. But the charter also, on its face, purports to be granted in consideration of the premises in the introductory recitals. Now, among these recitals, it appears that Dr. Wheelock had founded a charity school at his own expense on his own estate; that divers contributions had been made in the colonies, by others, for its support; that new contributions had been made, and were making, in England for this purpose, and were in the hands of trustees appointed by Dr. Wheelock to act in his behalf; that Dr. Wheelock had consented to have the school established at such other place as the trustees should select; that offers had been made by several of the governments in America, inviting the establishment of the school among them; that offers of land had also been made by divers proprietors of lands in the western parts of New Hampshire, if the school should be established there; that the trustees had finally consented to establish it in New Hampshire; and that Dr. Wheelock represented that, to effectuate the purposes of all parties, an incorporation was necessary. Can it be truly said that these recitals contain no legal consideration of benefit to the crown, or of forbearance of benefit on the other side? Is there not an implied contract by Dr. Wheelock, if a charter is granted, that the school shall be removed from his estate to New Hampshire? and that he will relinquish all his control over the funds collected, and to be collected, in England, under his auspices and subject to his authority? that he will yield up the management of his charity school to the trustees of the college? that he will relinquish all the offers made by other American governments, and devote his patronage to this institution? It will scarcely be denied that he gave up the right any longer to maintain the charity school already established on his own estate, and that the funds collected for its use, and subject to his management, were yielded up by him as an endowment of the college. The very language of the charter supposes him to be the legal owner of the funds of the charity school, and, in virtue of this endowment, declares him the founder of the college. It matters not whether the funds were great or small; Dr. Wheelock had procured them by his own influence, and they were under his control, to be applied to the

support of his charity school; and when he relinquished this control, he relinquished a right founded in property acquired by his labors. Besides, Dr. Wheelock impliedly agreed to devote his future services to the college, when erected, by becoming president thereof, at a period when sacrifices must necessarily be made to accomplish the great design in view. If, indeed, a pepper-corn be, in the eye of the law, of sufficient value to found a contract as upon a valuable consideration, are these implied agreements, and these relinquishments of right and benefit, to be deemed wholly worthless? It has never been doubted that an agreement not to exercise a trade in a particular place was a sufficient consideration to sustain a contract for the payment of money. *A fortiori*, the relinquishment of property which a person holds, or controls the use of, as a trust, is a sufficient consideration; for it is parting with a legal right. Even a right of patronage (*jus patronatus*) is of great value in intendment of law. Nobody doubts that an advowson is a valuable hereditament; and yet, in fact, it is but a mere trust, or right of nomination to a benefice, which cannot be legally sold to the intended incumbent. 2 Bl. Com., 22, note by Christian.

In respect to Dr. Wheelock, then, if a consideration be necessary to support the charter as a contract, it is to be found in the implied stipulations, on his part, in the charter itself. He relinquished valuable rights, and undertook a laborious office, in consideration of the grant of the incorporation. This is not all. A charter may be granted upon an executory, as well as an executed or present, consideration. When it is granted to persons who have not made application for it until their acceptance thereof, the grant is yet *in fieri*. Upon the acceptance there is an implied contract on the part of the grantees, in consideration of the charter, that they will perform the duties and exercise the authorities conferred by it. This was the doctrine asserted by the late learned Mr. Justice Buller, in a modern case. *Rex v. Pasmore*, 3 Term R., 199, 239, 246. He there said: "I do not know how to reason on this point better than in the manner urged by one of the relator's counsel, who considered the grant of incorporation to be a compact between the crown and a certain number of the subjects, the latter of whom undertake, in consideration of the privileges which are bestowed, to exert themselves for the good government of the place" (that is, the place incorporated). It will not be pretended that if a charter be granted for a bank, and the stockholders pay in their own funds, the charter is to be deemed a grant without consideration, and, therefore, revocable at the pleasure of the grantor. Yet here the funds are to be managed and the services performed exclusively for the use and benefit of the stockholders themselves. And where the grantees are mere trustees to perform services without reward, exclusively for the benefit of others, for public charity, can it be reasonably argued that these services are less valuable to the government than if performed for the private emolument of the trustees themselves? In respect, then, to the trustees, also, there was a valuable consideration for the charter, the consideration of services agreed to be rendered by them in execution of a charter from which they could receive no private remuneration.

There is yet another view of this part of the case which deserves the most weighty consideration. The corporation was expressly created for the purpose of distributing, in perpetuity, the charitable donations of private benefactors. By the terms of the charter the trustees and their successors, in their corporate capacity, were to receive, hold and exclusively manage all the funds so contributed. The crown, then, upon the face of the charter, pledged its faith that the donations of private benefactors should be perpetually devoted to their

original purposes, without any interference on its own part, and should be forever administered by the trustees of the corporation, unless its corporate franchises should be taken away by due process of law. From the very nature of the case, therefore, there was an implied contract, on the part of the crown, with every benefactor, that, if he would give his money, it should be deemed a charity protected by the charter, and be administered by the corporation according to the general law of the land. As soon, then, as a donation was made to the corporation, there was an implied contract springing up, and founded on a valuable consideration, that the crown would not revoke or alter the charter, or change its administration, without the consent of the corporation. There was also an implied contract between the corporation itself and every benefactor upon a like consideration, that it would administer his bounty according to the terms, and for the objects, stipulated in the charter.

In every view of the case, if a consideration were necessary (which I utterly deny) to make the charter a valid contract, a valuable consideration did exist, as to the founder, the trustees and the benefactors. And upon the soundest legal principles the charter may be properly deemed, according to the various aspects in which it is viewed, as a several contract with each of these parties, in virtue of the foundation or the endowment of the college, or the acceptance of the charter, or the donations to the charity. And here we might pause; but there is yet remaining another view of the subject which cannot consistently be passed over without notice. It seems to be assumed by the argument of the defendant's counsel that there is no contract whatsoever, in virtue of the charter, between the crown and the corporation itself. But it deserves consideration, whether this assumption can be sustained upon a solid foundation.

If this had been a new charter granted to an existing corporation, or a grant of lands to an existing corporation, there could not have been a doubt that the grant would have been an executed contract with the corporation; as much so as if it had been to any private person. But it is supposed that, as this corporation was not then in existence, but was created and its franchises bestowed *uno flatu*, the charter cannot be construed a contract, because there was no person *in rerum natura* with whom it might be made. Is this, however, a just and legal view of the subject? If the corporation had no existence so as to become a contracting party, neither had it for the purpose of receiving a grant of the franchises. The truth is, that there may be a priority of operation of things in the same grant; and the law distinguishes and gives such priority, wherever it is necessary to effectuate the objects of the grant. Case of Sutton's Hospital, 10 Coke, 23; Buckland v. Fowcher, cited 10 Coke, 27, 28; and recognized in Attorney-General v. Bowyer, 3 Ves. Jr., 714, 726, 727; S. P., Highmore on Mortm., 200, etc. From the nature of things, the artificial person called a corporation must be created before it can be capable of taking anything. When, therefore, a charter is granted, and it brings the corporation into existence without any act of the natural persons who compose it, and gives such corporation any privileges, franchises or property, the law deems the corporation to be first brought into existence and then clothes it with the granted liberties and property. When, on the other hand, the corporation is to be brought into existence by some future acts of the corporators, the franchises remain in abeyance until such acts are done, and when the corporation is brought into life the franchises instantaneously attach to it. There may be, in intention of law, a priority of time, even in an instant, for this purpose. Case of Sutton's Hospital, 10 Coke, 23; Buckland v. Fowcher, cited 10 Coke, 27, 28;

and recognized in *Attorney-General v. Bowyer*, 3 Ves. Jr., 714, 726, 727; S. P., *Highmore on Mortm.*, 200, etc. And if the corporation have an existence before the grant of its other franchises attaches, what more difficulty is there in deeming the grant of these franchises a contract with it, than if granted by another instrument at a subsequent period? It behooves those, also, who hold that a grant to a corporation, not then in existence, is incapable of being deemed a contract on that account, to consider whether they do not at the same time establish that the grant itself is a nullity for precisely the same reason. Yet such a doctrine would strike us all as pregnant with absurdity, since it would prove that an act of incorporation could never confer any authorities, or rights, or property, on the corporation it created. It may be admitted that two parties are necessary to form a perfect contract; but it is denied that it is necessary that the assent of both parties must be at the same time. If the legislature were voluntarily to grant land in fee to the first child of A, to be hereafter born, as soon as such child should be born the estate would vest in it. Would it be contended that such grant, when it took effect, was revocable, and not an executed contract, upon the acceptance of the estate? The same question might be asked in a case of a gratuitous grant by the king or the legislature to A for life, and afterwards to the heirs of B, who is then living. Take the case of a bank, incorporated for a limited period, upon the express condition that it shall pay out of its corporate funds a certain sum, as the consideration for the charter, and after the corporation is organized a payment duly made of the sum out of the corporate funds; will it be contended that there is not a subsisting contract between the government and the corporation, by the matters thus arising *ex post facto*, that the charter shall not be revoked during the stipulated period? Suppose an act declaring that all persons, who should thereafter pay into the public treasury a stipulated sum, should be tenants in common of certain lands belonging to the state in certain proportions; if a person, afterwards born, pays the stipulated sum into the treasury, is it less a contract with him than it would be with a person *in esse* at the time the act passed? We must admit that there may be future springing contracts in respect to persons not now *in esse*, or we shall involve ourselves in inextricable difficulties. And if there may be in respect to natural persons, why not also in respect to artificial persons, created by the law for the very purpose of being clothed with corporate powers? I am unable to distinguish between the case of a grant of land or of franchises to an existing corporation, and a like grant to a corporation brought into life for the very purpose of receiving the grant. As soon as it is *in esse*, and the franchises and property become vested and executed in it, the grant is just as much an executed contract as if its prior existence had been established for a century.

§ 2113. *The charter of Dartmouth College is a contract within the meaning of the word in article 1, section 10, of the federal constitution.*

Supposing, however, that in either of the views which have been suggested the charter of Dartmouth College is to be deemed a contract, we are yet met with several objections of another nature.

It is, in the first place, contended that it is not a contract within the prohibitory clause of the constitution, because that clause was never intended to apply to mere contracts of civil institution, such as the contract of marriage, or to grants of power to state officers, or to contracts relative to their offices, or to grants of trust to be exercised for purposes merely public, where the grantees take no beneficial interest. It is admitted that the state legislatures have

power to enlarge, repeal and limit the authorities of public officers in their official capacities, in all cases where the constitutions of the states respectively do not prohibit them; and this, among others, for the very reason that there is no express or implied contract that they shall always, during their continuance in office, exercise such authorities. They are to exercise them only during the good pleasure of the legislature. But when the legislature makes a contract with a public officer, as in the case of a stipulated salary for his services during a limited period, this, during the limited period, is just as much a contract, within the purview of the constitutional prohibition, as a like contract would be between two private citizens. Will it be contended that the legislature of a state can diminish the salary of a judge holding his office during good behavior? Such an authority has never yet been asserted to our knowledge. It may also be admitted that corporations for mere public government, such as towns, cities and counties, may in many respects be subject to legislative control. But it will hardly be contended that, even in respect to such corporations, the legislative power is so transcendent that it may, at its will, take away the private property of the corporation, or change the uses of its private funds acquired under the public faith. Can the legislature confiscate to its own use the private funds which a municipal corporation holds under its charter, without any default or consent of the corporators? If a municipal corporation be capable of holding devises and legacies to charitable uses (as many municipal corporations are), does the legislature, under our forms of limited government, possess the authority to seize upon those funds, and appropriate them to other uses, at its own arbitrary pleasure, against the will of the donors and donees? From the very nature of our governments, the public faith is pledged the other way; and that pledge constitutes a valid compact; and that compact is subject only to judicial inquiry, construction and abrogation. This court have already had occasion, in other causes, to express their opinion on this subject; and there is not the slightest inclination to retract it. *Terret v. Taylor*, 9 Cranch, 43; *Town of Pawlet v. Clark*, 9 Cranch, 292.

As to the case of the contract of marriage, which the argument supposes not to be within the reach of the prohibitory clause, because it is matter of civil institution, I profess not to feel the weight of the reason assigned for the exception. In a legal sense, all contracts recognized as valid in any country may be properly said to be matters of civil institution, since they obtain their obligation and construction *jure loci contractus*. Titles to land, constituting part of the public domain, acquired by grants under the provisions of existing laws by private persons, are certainly contracts of civil institution. Yet no one ever supposed that, when acquired *bona fide*, they were not beyond the reach of legislative revocation. And so, certainly, is the established doctrine of this court. *Terret v. Taylor*, 9 Cranch, 43; *Town of Pawlet v. Clark*, 9 Cranch, 292. A general law regulating divorces from the contract of marriage, like a law regulating remedies in other cases of breaches of contracts, is not necessarily a law impairing the obligation of such a contract. See *Holmes v. Lansing*, 3 Johns. Cas., 73. It may be the only effectual mode of enforcing the obligations of the contract on both sides. A law punishing a breach of a contract, by imposing a forfeiture of the rights acquired under it, or dissolving it because the mutual obligations were no longer observed, is in no correct sense a law impairing the obligations of the contract. Could a law, compelling a specific performance by giving a new remedy, be justly deemed an excess of legislative power? Thus far the contract of marriage has been considered with reference

to general laws regulating divorces upon breaches of that contract. But if the argument means to assert that the legislative power to dissolve such a contract, without any breach on either side, against the wishes of the parties, and without any judicial inquiry to ascertain a breach, I certainly am not prepared to admit such a power, or that its exercise would not entrench upon the prohibition of the constitution. If, under the faith of existing laws, a contract of marriage be duly solemnized, or a marriage settlement be made (and marriage is always, in law, a valuable consideration for a contract), it is not easy to perceive why a dissolution of its obligations without any default or assent of the parties may not as well fall within the prohibition as any other contract for a valuable consideration. A man has just as good a right to his wife as to the property acquired under a marriage contract. He has a legal right to her society and her fortune; and to divest such right without his default, and against his will, would be as flagrant a violation of the principles of justice as the confiscation of his own estate. I leave this case, however, to be settled, when it shall arise. I have gone into it, because it was urged with great earnestness upon us, and required a reply. It is sufficient now to say that, as at present advised, the argument, derived from this source, does not press my mind with any new and insurmountable difficulty.

§ 2114. *The prohibitory clause extends not only to contracts made for the benefits of the promisees themselves, but also to those made for the benefit of others.*

In respect also to grants and contracts, it would be far too narrow a construction of the constitution to limit the prohibitory clause to such only where the parties take for their own private benefit. A grant to a private trustee for the benefit of a particular *cestui que trust*, or for any special, private or public charity, cannot be the less a contract because the trustee takes nothing for his own benefit. A grant of the next presentation to a church is still a contract, although it limit the grantee to a mere right of nomination or patronage. 2 Bl. Com., 21. The fallacy of the argument consists in assuming the very ground in controversy. It is not admitted that a contract with a trustee is in its own nature revocable, whether it be for special or general purposes, for public charity or particular beneficence. A private donation, vested in a trustee for objects of a general nature, does not thereby become a public trust, which the government may, at its pleasure, take from the trustee and administer in its own way. The truth is that the government has no power to revoke a grant, even of its own funds, when given to a private person or a corporation for special uses. It cannot recall its own endowments granted to any hospital or college, or city or town, for the use of such corporations. The only authority remaining to the government is judicial, to ascertain the validity of the grant, to enforce its proper uses, to suppress frauds, and, if the uses are charitable, to secure their regular administration through the means of equitable tribunals in cases where there would otherwise be a failure of justice.

§ 2115. *The prohibitory clause is not limited to contracts respecting property in the strict sense of that term.*

Another objection growing out of and connected with that which we have been considering is, that no grants are within the constitutional prohibition except such as respect property in the strict sense of the term; that is to say, beneficial interests in lands, tenements and hereditaments, etc., etc., which may be sold by the grantees for their own benefit; and that grants of franchises, immunities and authorities not valuable to the parties as property are excluded from its purview. No authority has been cited to sustain this distinction, and

no reason is perceived to justify its adoption. There are many rights, franchises and authorities which are valuable in contemplation of law, where no beneficial interest can accrue to the possessor. A grant of the next presentation to a church, limited to the grantee alone, has been already mentioned. A power of appointment, reserved in a marriage settlement, either to a party or a stranger, to appoint uses in favor of third persons, without compensation, is another instance. A grant of lands to a trustee to raise portions or pay debts is, in law, a valuable grant, and conveys a legal estate. Even a power given by will to executors to sell an estate for payment of debts is, by the better opinions and authority, coupled with a trust and capable of survivorship. *Co. Lit.*, 113*a*; *Harg. and Butler's note*, 2; *Sugden on Powers*, 140; *Jackson v. Jansen*, 6 *Johns.*, 73; *Franklin v. Osgood*, 2 *Johns. Ch.*, 1; *S. C.*, 14 *Johns.*, 527; *Zebach v. Smith*, 3 *Binn.*, 69; *Moody v. Vandyke*, 4 *Binn.*, 31, 37; *Attorney-General v. Glegg*, 1 *Atk.*, 356; 1 *Bac. Abr.*, 586, *Gwillim edit.* Many dignities and offices, existing at common law, are merely honorary and without profit, and sometimes are onerous. Yet a grant of them has never been supposed the less a contract on that account. In respect to franchises, whether corporate or not, which include a pertainancy of profits, such as a right of fishery, or to hold a ferry, a market or a fair, or to erect a turnpike, bank or bridge, there is no pretense to say that grants of them are not within the constitution. Yet they may, in point of fact, be of no exchangeable value to the owners. They may be worthless in the market. The truth, however, is, that all incorporeal hereditaments, whether they be immunities, dignities, offices or franchises, or other rights, are deemed valuable in law. The owners have a legal estate and property in them, and legal remedies to support and recover them in case of any injury, obstruction or disseisin of them. Whenever they are the subjects of a contract or grant they are just as much within the reach of the constitution as any other grant. Nor is there any solid reason why a contract for the exercise of a mere authority should not be just as much guarded as a contract for the use and dominion of property. Mere naked powers which are to be exercised for the exclusive benefit of the grantor are revocable by him for that very reason. But it is otherwise where a power is to be exercised in aid of a right vested in the grantee. We all know that a power of attorney, forming a part of a security upon the assignment of a *chose in action*, is not revocable by the grantor. For it then sounds in contract, and is coupled with an interest. *Walsh v. Whitcomb*, 2 *Esp.*, 565; *Bergen v. Bennett*, 1 *Caines' Cases in Error*, 1, 15; *Raymond v. Squire*, 11 *Johns.*, 47. So if an estate be conveyed in trust for the grantor, the estate is irrevocable in the grantee, although he can take no beneficial interest for himself. Many of the best settled estates stand upon conveyances of this nature; and there can be no doubt that such grants are contracts within the prohibition in question.

In respect to corporate franchises, they are, properly speaking, legal estates vested in the corporation itself as soon as it is *in esse*. They are not mere naked powers granted to the corporation, but powers coupled with an interest. The property of the corporation vests upon the possession of its franchises; and whatever may be thought as to the corporators, it cannot be denied that the corporation itself has a legal interest in them. It may sue and be sued for them. Nay, more, this very right is one of its ordinary franchises. "It is likewise a franchise," says Mr. Justice Blackstone, "for a number of persons to be incorporated and subsist as a body politic, with power to maintain perpetual succession and do other corporate acts; and each individual member of such

corporation is also said to have a franchise or freedom." 2 Bl. Com., 37; 1 Kyd on Corp., 14, 16. In order to get rid of the legal difficulty of these franchises being considered as valuable hereditaments or property, the counsel for the defendant are driven to contend that the corporators or trustees are mere agents of the corporation, in whom no beneficial interest subsists, and so nothing but a naked power is touched by removing them from the trust; and then to hold the corporation itself a mere ideal being, capable indeed of holding property or franchises, but having no interest in them which can be the subject of contract. Neither of these positions is admissible. The former has been already sufficiently considered, and the latter may be disposed of in a few words. The corporators are not mere agents, but have vested rights in their character as corporators. The right to be a freeman of a corporation is a valuable temporal right. It is a right of voting and acting in the corporate concerns, which the law recognizes and enforces, and for a violation of which it provides a remedy. It is founded on the same basis as the right of voting in public elections; it is as sacred a right; and whatever might have been the prevalence of former doubts since the time of Lord Holt, such a right has always been deemed a valuable franchise or privilege. *Ashby v. White*, 2 Ld. Raym., 938; 1 Kyd on Corp., 16.

This reasoning, which has been thus far urged, applies with full force to the case of Dartmouth College. The franchises granted by the charter were vested in the trustees in their corporate character. The lands and other property, subsequently acquired, were held by them in the same manner. They were the private demesnes of the corporation, held by it, not, as the argument supposes, for the use and benefit of the people of New Hampshire, but as the charter itself declares, "for the use of Dartmouth College." There were not, and in the nature of things could not be, any other *cestui que use* entitled to claim those funds. They were, indeed, to be devoted to the promotion of piety and learning, not at large, but in that college, and the establishments connected with it; and the mode in which the charity was to be applied, and the objects of it, were left solely to the trustees, who were the legal governors and administrators of it. No particular person in New Hampshire possessed a vested right in the bounty, nor could he force himself upon the trustees as a proper object. The legislature itself could not deprive the trustees of the corporate funds, or annul their discretion in the application of them, or distribute them among its own favorites. Could the legislature of New Hampshire have seized the land given by the state of Vermont to the corporation, and appropriated it to uses distinct from those intended by the charity, against the will of the trustees? This question cannot be answered in the affirmative, until it is established that the legislature may lawfully take the property of A and give it to B; and if it could not take away or restrain the corporate funds, upon what pretense can it take away or restrain the corporate franchises? Without the franchises, the funds could not be used for corporate purposes; but without the funds, the possession of the franchises might still be of inestimable value to the college, and to the cause of religion and learning.

Thus far, the rights of the corporation itself, in respect to its property and franchises, have been more immediately considered. But there are other rights and privileges belonging to the trustees collectively and severally, which are deserving of notice. They are intrusted with the exclusive power to manage the funds, to choose the officers, and to regulate the corporate concerns, according to their own discretion. The *jus patronatus* is vested in them. The

visitatorial power, in its most enlarged extent, also belongs to them. When this power devolves upon the founder of a charity, it is an hereditament, descendible in perpetuity to his heirs, and in default of heirs it escheats to the government. *Rex v. St. Catherine's Hall*, 4 Term R., 233. It is a valuable right founded in property, as much so as the right of patronage in any other case. It is a right which partakes of a judicial nature. May not the founder as justly contract for the possession of this right in return for his endowment, as for any other equivalent; and if, instead of holding it as an hereditament, he assigns it in perpetuity to the trustees of the corporation, is it less a valuable hereditament in their hands? The right is not merely a collective right in all the trustees; each of them also has a franchise in it. Lord Holt says: "It is agreeable to reason and the rules of law that a franchise should be vested in the corporation aggregate, and yet the benefit redound to the particular members, and be enjoyed by them in their private capacities. Where the privilege of election is used by particular persons, it is a particular right vested in each particular man." *Ashby v. White*, 2 Ld. Raym., 938, 952; *Attorney-General v. Dixie*, 13 Ves. Jr., 519. Each of the trustees had a right to vote in all elections. If obstructed in the exercise of it, the law furnished him with an adequate recompense in damages. If ousted unlawfully from his office, the law would, by a *mandamus*, compel a restoration.

It is attempted, however, to establish that the trustees have no interest in the corporate franchises, because it is said that they may be witnesses in a suit brought against the corporation. The case cited at the bar certainly goes the length of asserting, that, in a suit brought against a charitable corporation for a recompense for services performed for the corporation, the governors, constituting the corporation (but whether intrusted with its funds or not by the act of incorporation does not appear), are competent witnesses against the plaintiff. *Weller v. The Governor of the Foundling Hospital*, Peake's N. P., 153. But assuming this case to have been rightly decided (as to which, upon the authorities, there may be room to doubt), the corporators being technically parties to the record (*Attorney-General v. City of London*, etc., 3 Bro. Ch. C., 171; *S. C.*, 1 Ves. Jr., 243; *Burton v. Hinde*, 5 Term R., 174; *Nason v. Thatcher*, 7 Mass., 398; *Phillips on Evid.*, 42, 52, 57, and notes; 1 *Kyd on Corp.*, 304, etc.; *Highmore on Mortm.*, 514), it does not establish that in a suit for the corporate property, vested in the trustees in their corporate capacity, the trustees are competent witnesses. At all events, it does not establish that in a suit for the corporate franchises to be exercised by the trustees, or to enforce their visitatorial power, the trustees would be competent witnesses. On a *mandamus* to restore a trustee to his corporate or visitatorial power, it will not be contended that the trustee is himself a competent witness to establish his own rights or the corporate rights. Yet why not, if the law deems that a trustee has no interest in the franchise? The test of interest assumed in the argument proves nothing in this case. It is not enough to establish that the trustees are sometimes competent witnesses; it is necessary to show that they are always so in respect to the corporate franchises and their own. It will not be pretended that in a suit for damages for obstruction in the exercise of his official powers, a trustee is a disinterested witness. Such an obstruction is not a *damnum absque injuria*. Each trustee has a vested right and legal interest in his office, and it cannot be divested but by due course of law. The illustration, therefore, lends no new force to the argument, for it does not establish that when their own rights are in controversy, the trustees have no legal interest in their offices.

The principal objections having been thus answered satisfactorily, at least to my own mind, it remains only to declare that my opinion, after the most mature deliberation, is, that the charter of Dartmouth College, granted in 1769, is a contract within the purview of the constitutional prohibition.

§ 2116. *Contracts and property rights remained unchanged by the Revolution; likewise the charter of Dartmouth College.*

I might now proceed to the discussion of the second question; but it is necessary previously to dispose of a doctrine which has been very seriously urged at the bar, namely, that the charter of Dartmouth College was dissolved at the Revolution, and is, therefore, a mere nullity. A case before Lord Thurlow has been cited in support of this doctrine. *Attorney-General v. City of London*, 3 Bro. Ch. C., 171; S. C., 1 Ves. Jr., 243. The principal question in that case was whether the corporation of William and Mary's College, in Virginia (which had received its charter from King William and Queen Mary), should still be permitted to administer the charity under Mr. Boyle's will, no interest having passed to the college under the will, but it acting as an agent or trustee under a decree in chancery, or whether a new scheme for the administration of the charity should be laid before the court. Lord Thurlow directed a new scheme, because the college, belonging to an independent government, was no longer within the reach of the court. And he very unnecessarily added, that he could not now consider the college as a corporation, or, as another report (1 Ves. Jr., 343) states, that he could not take notice of it as a corporation, it not having proved its existence as a corporation at all. If by this Lord Thurlow meant to declare that all charters acquired in America from the crown were destroyed by the Revolution, his doctrine is not law; and if it had been true, it would equally apply to all other grants from the crown, which would be monstrous. It is a principle of the common law, which has been recognized as well in this as in other courts, that the division of an empire works no forfeiture of previously vested rights of property. And this maxim is equally consonant with the common sense of mankind and the maxims of eternal justice. *Terret v. Taylor*, 9 Cranch, 43, 50; *Kelly v. Harrison*, 2 Johns. Cas., 29; *Jackson v. Lunn*, 3 Johns. Cas., 109; *Calvin's Case*, 7 Coke, 27. This objection, therefore, may be safely dismissed without further comment.

§ 2117. *No power being reserved by the government in the charter to Dartmouth College, the New Hampshire laws modifying its charter are unconstitutional, being laws impairing the obligations of contracts.*

The remaining inquiry is, whether the acts of the legislature of New Hampshire now in question, or any of them, impair the obligations of the charter of Dartmouth College. The attempt, certainly, is to force upon the corporation a new charter against the will of the corporators. Nothing seems better settled at the common law than the doctrine that the crown cannot force upon a private corporation a new charter, or compel the old members to give up their own franchises, or to admit new members into the corporation. *Rex v. Vice-Chancellor of Cambridge*, 3 Burr., 1656; *Rex v. Pasmore*, 3 Term R., 240; 1 Kyd on Corp., 65; *Rex v. Larwood*, Comb., 316. Neither can the crown compel a man to become a member of such corporation against his will. *Rex v. Dr. Askew*, 4 Burr., 2200. As little has it been supposed that, under our limited governments, the legislature possessed such transcendent authority. On one occasion, a very able court held that the state legislature had no authority to compel a person to become a member of a mere private corporation, created for the promotion of a private enterprise, because every man had a right to re-

fuse a grant. *Ellis v. Marshall*, 2 Mass., 269. On another occasion, the same learned court declared that they were all satisfied that the rights legally vested in a corporation cannot be controlled or destroyed by any subsequent statute unless a power for that purpose be reserved to the legislature in the act of incorporation. *Wales v. Stetson*, 2 Mass., 143, 146. These principles are so consonant with justice, sound policy and legal reasoning, that it is difficult to resist the impression of their perfect correctness. The application of them, however, does not, from our limited authority, properly belong to the appellate jurisdiction of this court in this case.

A very summary examination of the acts of New Hampshire will abundantly show that in many material respects they change the charter of Dartmouth College. The act of the 27th of June, 1816, declares that the corporation known by the name of the Trustees of Dartmouth College shall be called the Trustees of Dartmouth University. That the whole number of trustees shall be twenty-one, a majority of whom shall form a quorum; that they and their successors shall hold, use and enjoy forever, all the powers, authorities, rights, property, liberties, privileges and immunities heretofore held, etc., by the Trustees of Dartmouth College, except where the act otherwise provides; that they shall also have power to determine the times and places of their meetings and manner of notifying the same; to organize colleges in the university; to establish an institute, and elect fellows and members thereof; to appoint and displace officers and determine their duties and compensation; to delegate the power of supplying vacancies in any of the offices of the university for a limited term; to pass ordinances for the government of the students; to prescribe the course of education; and to arrange, invest and employ the funds of the university. The act then provides for the appointment of a board of twenty-five overseers, fifteen of whom shall form a quorum, of whom five are to be such *ex officio*, and the residue of the overseers, as well as the new trustees, are to be appointed by the governor and council. The board of overseers are, among other things, to have power "to inspect and confirm, or disapprove and negative, such votes and proceedings of the board of trustees as shall relate to the appointment and removal of president, professors and other permanent officers of the university, and determine their salaries; to the establishment of colleges and professorships and the erection of new college buildings." The act then provides that the president and professors shall be nominated by the trustees and appointed by the overseers, and shall be liable to be suspended and removed in the same manner; and that each of the two boards of trustees and overseers shall have power to suspend and remove any member of their respective boards. The supplementary act of the 18th of December, 1816, declares that nine trustees shall form a quorum, and that six votes at least shall be necessary for the passage of any act or resolution. The act of the 26th of December, 1816, contains other provisions not very material to the question before us.

From this short analysis, it is apparent that, in substance, a new corporation is created, including the old corporators with new powers and subject to a new control; or that the old corporation is newly organized and enlarged, and placed under an authority hitherto unknown to it. The board of trustees are increased from twelve to twenty-one. The college becomes a university. The property vested in the old trustees is transferred to the new board of trustees in their corporate capacities. The quorum is no longer seven, but nine. The old trustees have no longer the sole right to perpetuate their succession by electing other trustees, but the nine new trustees are in the first instance to be

appointed by the governor and council, and the new board are then to elect other trustees from time to time as vacancies occur. The new board, too, have the power to suspend or remove any member, so that a minority of the old board, co-operating with the new trustees, possess the unlimited power to remove the majority of the old board. The powers, too, of the corporation are varied. It has authority to organize new colleges in "the university, and to establish an institute, and elect fellows and members thereof." A board of overseers is created (a board utterly unknown to the old charter), and is invested with a general supervision and negative upon all the most important acts and proceedings of the trustees. And to give complete effect to this new authority, instead of the right to appoint, the trustees are in future only to nominate, and the overseers are to approve the president and professors of the university.

If these are not essential changes, impairing the rights and authorities of the trustees, and vitally affecting the interests and organization of Dartmouth College under its old charter, it is difficult to conceive what acts, short of an unconditional repeal of the charter, could have that effect. If a grant of land or franchises be made to A, in trust for special purposes, can the grant be revoked and a new grant thereof be made to A, B and C, in trust for the same purposes, without violating the obligation of the first grant? If property be vested by grant in A and B, for the use of a college or a hospital of private foundation, is not the obligation of that grant impaired when the estate is taken from their exclusive management, and vested in them in common with ten other persons? If a power of appointment be given to A and B, is it no violation of their right to annul the appointment, unless it be assented to by five other persons, and then confirmed by a distinct body? If a bank or insurance company, by the terms of its charter, be under the management of directors elected by the stockholders, would not the rights acquired by the charter be impaired if the legislature should take the right of election from the stockholders, and appoint directors unconnected with the corporation? These questions carry their own answers along with them. The common sense of mankind will teach us that all these cases would be direct infringements of the legal obligations of the grants to which they refer; and yet they are, with no essential distinction, the same as the case now at the bar.

In my judgment it is perfectly clear that any act of a legislature which takes away any powers or franchises vested by its charter in a private corporation or its corporate officers, or which restrains or controls the legitimate exercise of them, or transfers them to other persons without its assent, is a violation of the obligations of that charter. If the legislature mean to claim such an authority it must be reserved in the grant. The charter of Dartmouth College contains no such reservation; and I am, therefore, bound to declare that the acts of the legislature of New Hampshire, now in question, do impair the obligations of that charter, and are, consequently, unconstitutional and void.

In pronouncing this judgment, it has not for one moment escaped me how delicate, difficult and ungracious is the task devolved upon us. The predicament in which this court stands in relation to the nation at large is full of perplexities and embarrassments. It is called to decide on causes between citizens of different states, between a state and its citizens, and between different states. It stands, therefore, in the midst of jealousies and rivalries of conflicting parties with the most momentous interests confided to its care. Under such circumstances it never can have a motive to do more than its duty; and, I trust, it will

always be found to possess firmness enough to do that. Under these impressions I have pondered on the case before us with the most anxious deliberation. I entertain great respect for the legislature whose acts are in question. I entertain no less respect for the enlightened tribunal whose decision we are called upon to review. In the examination I have endeavored to keep my steps *super antiquas vias* of the law under the guidance of authority and principle. It is not for judges to listen to the voice of persuasive eloquence or popular appeal. We have nothing to do but to pronounce the law as we find it; and, having done this, our justification must be left to the impartial judgment of our country.

MR. JUSTICE DUVAL dissented.

PENNSYLVANIA COLLEGE CASES.

(18 Wallace, 190-222. 1871.)

ERROR to the Supreme Court of Pennsylvania.

Opinion by MR. JUSTICE CLIFFORD.

STATEMENT OF FACTS.—Jefferson College was incorporated on the 15th of January, 1802, by the name of the Trustees of Jefferson College in Canonsburg in the county of Washington, for the education of youth in the learned languages and the arts, sciences and useful literature. By the charter it was declared that the trustees should be a body politic and corporate, with perpetual succession, in deed and in law, to all intents and purposes whatsoever, and that the constitution of the college "shall not be altered or alterable by any ordinance or law of the said trustees, nor in any other manner than by an act of the legislature of the commonwealth."

Washington College was incorporated on the 28th of March, 1806, by the name of the Trustees of Washington College, for the education of youth in the learned and foreign languages, the useful arts, sciences and literature, and was located in the town of Washington, seven miles distant from Jefferson College, in the same county.

Experience showed in the progress of events that the interests of both institutions would be promoted in their union, and the friends of both united in a common effort to effect that object. Application was accordingly made to the legislature for that purpose, and on the 4th of March, 1865, the legislature passed the "Act to unite the colleges of Jefferson and Washington, in the county of Washington, and to erect the same into one corporation under the name of Washington and Jefferson College." Enough is stated in the preamble of the act to show that the application was made to promote the best interests of both institutions, and that the legislative act which is the subject of complaint was passed at their united request and to sanction the union which their respective trustees had previously agreed to establish. Inconveniences resulted from the provisions contained in the thirteenth section of the act, which impliedly forbid any change in the sites of the respective colleges, and also provided that the studies of certain classes of the students should be pursued at each of the two institutions, and to that end prescribed certain rules for appropriating to each certain portions of the income derived from the funds of the institution, and the manner in which the same should be expended and applied by the trustees. Such embarrassments increasing, the legislature passed a supplementary act, providing that the several departments of the two colleges

should be closely united, and that the united institution should be located as therein prescribed. Measures were also prescribed in the same act for determining the location of the united institution, and it appears that those measures, when carried into effect, resulted in fixing the location at Washington, in the county of the same name. Certain parties are dissatisfied with the new arrangement, and it appears that, on the 24th of August, 1869, three bills in equity were filed in the state court, praying that the last-named act of the legislature may be declared null and void as repugnant to the ninth article of the constitution of the state, and to the tenth section of the first article of the federal constitution. Different parties complain in each of the several cases, but the subject-matter of the complaint involves substantially the same considerations in all the cases. Those complaining in the first case are the trustees of Jefferson College. Complainants in the second case are certain members of the board of trustees of Washington and Jefferson College, who oppose the provisions of the act of the 26th of February, 1869, and deny that the board of trustees, even by a vote of two-thirds of the members, as therein required, can properly remove the college or dispose of the college buildings as therein contemplated. Objections are made by the complainants in the last case to both the before mentioned acts of the legislature, and they claim the right to ask the interposition of the court, upon the ground that they are owners of certain scholarships in Jefferson College, as more fully set forth in the bill of complainant, and they pray that both of the said acts of assembly may be declared null and void for the same reasons as those set forth in the other two cases.

I. Examination of these cases will be made in the order they appear on the calendar, commencing with the case in which the trustees of Jefferson College are the complainants. They bring their bill of complaint against the two colleges as united, under the first act of assembly passed for that purpose. Service was made, and the respondents appeared and pleaded in bar that the complainants, as such trustees, duly accepted the act of assembly creating the union of the two institutions, and that having accepted the same, they, as a corporation, became dissolved and ceased to exist, and have no authority to maintain their bill of complaint. Apart from the plea in bar they also filed an answer; but as the whole issue is presented in the plea in bar, it will not be necessary to enter into those details. Opposed to that plea is the replication of the complainants, in which they deny the allegation that they, as a corporation, became dissolved or that they ceased to exist as alleged in the plea in bar, and renew their prayer for relief. Both parties were heard, and the supreme court of the state entered a decree for the respondents dismissing the bill of complaint. Decrees for the respondents were also entered in the other two cases, and the respective complainants sued out writs of error under the twenty-fifth section of the judiciary act, and removed the respective causes into this court for re-examination.

§ 2118. *When a case is brought up by writ of error to a state court, this court cannot examine the question whether a statute of the state is in accordance with the constitution of the state.*

Whether the act of assembly in question in this case is or not repugnant to the constitution of the state is conclusively settled against the complainants by the decision in this very case, and the question is not one open to re-examination in this court, as it is not one of federal cognizance in a case brought here by a writ of error to a state court. Nothing, therefore, remains to be examined but the second question presented in the pleadings, which is, whether the supple-

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mentary act of assembly uniting the two institutions, and providing that there should be but one location of the same for any purpose, impairs the obligation of the contract between the state and the corporation of Jefferson College, as created by the original charter; or, in other words, whether it is repugnant to the tenth section of the first article of the federal constitution.

§ 2119. *Charters of corporations are executed contracts, and legislatures cannot impair their obligation.*

Corporate franchises granted to private corporations, if duly accepted by the corporators, partake of the nature of legal estates, as the grant, under such circumstances, becomes a contract within the protection of that clause of the constitution which ordains that no state shall pass any law impairing the obligation of contracts. *Dartmouth College v. Woodward*, 4 Wheat., 700 (§§ 2099-2117, *supra*). Charters of private corporations are regarded as executed contracts between the government and the corporators, and the rule is well settled that the legislature cannot repeal, impair or alter such a charter against the consent or without the default of the corporation judicially ascertained and declared. *Fletcher v. Peck*, 6 Cranch, 136 (§§ 1805-12, *supra*); *Terrett v. Taylor*, 9 id., 51.

§ 2120. — *unless the power be reserved.*

Of course these remarks apply only to acts of incorporation which do not contain any reservations or provisions annexing conditions to the charter modifying and limiting the nature of the contract. Cases often arise where the legislature, in granting an act of incorporation for a private purpose, either make the duration of the charter conditional or reserve to the state the power to alter, modify or repeal the same at pleasure. Where such a provision is incorporated in the charter it is clear that it qualifies the grant, and that the subsequent exercise of that reserved power cannot be regarded as an act within the prohibition of the constitution. Such a power, also, that is, the power to alter, modify or repeal an act of incorporation, is frequently reserved to the state by a general law applicable to all acts of incorporation, or to certain classes of the same, as the case may be, in which case it is equally clear that the power may be exercised whenever it appears that the act of incorporation is one which falls within the reservation, and that the charter was granted subsequent to the passage of the general law, even though the charter contains no such condition nor any allusion to such a reservation. *Dartmouth College v. Woodward*, 4 Wheat., 708 (§§ 2099-2117, *supra*); *General Hospital v. Insurance Co.*, 4 Gray, 227; *Suydam v. Moore*, 8 Barb., 358; *Angell & Ames on Corp.* (9th ed.), § 767, p. 787. Reservations in such a charter, it is admitted, may be made; and it is also conceded that where they exist, the exercise of the power reserved, by a subsequent legislature, does not impair the obligation of the contract created by the original act of incorporation.

§ 2121. — *but alterations which are accepted by the corporation are not prohibited.*

Subsequent legislation altering or modifying the provisions of such a charter, where there is no such reservation, is certainly unauthorized if it is prejudicial to the rights of the corporators, and was passed without their assent; but the converse of the proposition is also true, that if the new provisions altering and modifying the charter were passed with the assent of the corporation, and they were duly accepted by a corporate vote as amendments to the original charter, they cannot be regarded as impairing the obligation of the contract created by the original charter. *Mumma v. Potomac Co.*, 8 Pet., 286 (CORPORATIONS, §§ 1441-42); *Dartmouth College v. Woodward*, 4 Wheat., 712

(§§ 2099-2117, *supra*); *Slee v. Bloom*, 19 Johns., 474; *Riddle v. Locks and Canals*, 7 Mass., 185; *McLaren v. Pennington*, 1 Paige's Ch., 107; *Lincoln v. Kennebec Bank*, 1 Greenl., 79; *Navigation Co. v. Coon*, 6 Penn. St., 379; *Com. v. Cullen*, 13 id., 133; *Sprague v. Railroad*, 19 id., 174; *Joy v. Jackson Co.*, 11 Mich., 155. Private charters, or such as are granted for the private benefit of the corporators, are held to be contracts because they are based for their consideration on the liabilities and duties which the corporators assume by accepting the terms therein specified, and the grant of the franchise on that account can no more be resumed by the legislature, or its benefits diminished or impaired without the assent of the corporators, than any other grant of property or legal estate, unless the right to do so is reserved in the act of incorporation or in some general law of the state which was in operation at the time the charter was granted. *Cooley on Const. Lim.*, 279; *Binghamton Bridge Case*, 3 Wall., 51 (§§ 2093-98, *supra*); *State Bank of Ohio v. Knoop*, 16 How., 369 (§§ 2246-53, *infra*); *Vincennes University v. Indiana*, 14 How., 268; *Planters' Bank v. Sharp*, 6 id., 301 (§§ 2177-87, *infra*).

§ 2122. *Change of a charter, when the power to do so is reserved, does not impair the obligation of the contract; and such power may be reserved expressly or by implication.*

Apply those principles to the case under consideration and it is quite clear that the decision of the state court was correct, as the fifth section of the charter, by necessary implication, reserves to the state the power to alter, modify or amend the charter without any prescribed limitation. Provision is there made that the constitution of the college shall not be altered or alterable by any ordinance or law of the trustees, "nor in any other manner than by an act of the legislature of the commonwealth," which is in all respects equivalent to an express reservation to the state to make any alterations in the charter which the legislature in its wisdom may deem fit, just and expedient to enact, and the donors of the institution are as much bound by that provision as the trustees. *Railroad v. Dudley*, 14 N. Y., 354; *Plank Road v. Thatcher*, 1 Kern., 102.

§ 2123. *Merger not a dissolution.*

Suppose, however, the fact were otherwise, still the respondents must prevail, as it is admitted that the complainants accepted the act passed to unite the two colleges and to erect the same into one corporation, which supports to every intent the respondents' plea in bar, and utterly disproves the allegations of the complainants' replication denying that the complainant corporation was dissolved before their bill of complaint was filed. Doubts have often been expressed whether a private corporation can be dissolved by the surrender of its corporate franchise into the hands of the government, but the question presented in this case is not of that character, as the act of the legislature uniting the two colleges did not contemplate that either college as an institution of learning should cease to exist, or that the funds of either should be devoted to any other use than that described in the original charters. All that was contemplated by the act in question was that the two institutions should be united in one corporation, as requested by the friends and patrons of both, that they might secure greater patronage and be able to extend their usefulness and carry out more effectually the great end and aim of their creation. Authorized as the act of the legislature was by the reservation contained in the original charter, and sanctioned as the act was by having been adopted by the corporators, it is clear to a demonstration that the act uniting the two colleges was a valid

act, and that the two original corporations became merged in the one corporation created by the amendatory and enabling act passed for that purpose, and that neither of the original corporations is competent to sue for any cause of action subsequent in date to their acceptance of the new act of incorporation. *Revere v. Copper Co.*, 15 Pick., 351; *Attorney-General v. Clergy Society*, 10 Rich. Eq., 604.

§ 2124. *When a power to change charters is reserved, two corporations may be merged into one.*

II. Sufficient has already been remarked to show that the case of the dissenting trustees of the new corporation, which is the second case, is governed by the same principles as the preceding case. They admit that the act of the legislature uniting the two colleges in one corporation was duly accepted by the original corporators, and they also admit in effect that it is a valid law. Express provision was therein made that the two colleges should be united in one corporation by the name of Washington and Jefferson College, and that the new corporation should possess and enjoy all the capacities, powers, privileges, immunities and franchises which were possessed and enjoyed by the original institutions and the trustees thereof, "with such enlargements and subject to such changes therein as are made by this act." Accepted as that act was by the trustees of the original institutions, they not only ratified the reservation contained in the fifth section of the charter of Jefferson College, but they in express terms adopted the changes made in the amended charter uniting the two institutions in one corporation.

§ 2125. *By the adoption of the amendatory charter the reservation contained in the original charter was impliedly incorporated into the new one.*

Viewed in the light of these suggestions, the present case stands just as it would if the reservation contained in the original charter had been in terms incorporated into the new charter uniting the two institutions into one corporation, which the complainants in this case admit is a valid act of the legislature. Such an admission, however, is not necessary to establish that fact, as the act was passed by the assent of the two corporations and in pursuance of the reserved power to that effect contained in the original charter of the corporation to which the complaining corporators in the preceding case belonged. Grant that the power existed in the legislature to pass the act uniting the two institutions, and it follows that the supplementary act which was passed to render the first act practically available is also a rightful exercise of legislative authority, as it is clear that substantially the same reservation is contained in the act providing for the union of the two institutions as that contained in the original charter by virtue of which the act was passed uniting the two institutions in one corporation. *Bailey v. Hollister*, 26 N. Y., 112; *Sherman v. Smith*, 1 Black, 587. Tested by these considerations, the court here is of the opinion that the decision of the state court in the second case is also correct.

§ 2126. *Where the power to alter or amend a charter is reserved, any contracts, for scholarships, etc., are held to be subject to that power.*

III. Plans of various kinds were devised by the trustees of Jefferson College and put in operation for the endowment of the institution; and, among others, was the plan of establishing what was called the scholarships, whereby a contributor, on payment of \$25, became entitled to tuition for one person for a prescribed period, called a right to a single scholarship; or, on payment of \$50, to a family scholarship; or, on payment of \$100, to tuition for thirty years; or, on payment of \$400, to a perpetual scholarship, to be designated by what-

ever name the contributor might select. Contracts of the kind were outstanding at the respective times when each of the two acts of the legislature in question was passed, and the complainants in the third case are owners of such scholarships, and they bring their bill of complaint for themselves and such other persons owning such scholarships as may desire to unite in the bill for the relief therein prayed. They pray that both of the before-mentioned acts of the legislature may be declared null and void as repugnant both to the state and federal constitution; but it will be sufficient to remark, without entering into any further explanations, that the second question is the only one which can be re-examined in this court. What they claim is that the acts of the legislature in question impair the obligation of their contracts for scholarship as made with the trustees of Jefferson College before the two institutions were united in one corporation. Reference must be made to the charter creating the union as well as to the original charters in order to ascertain whether there is any foundation for the allegations of the bill of complaint.

By the first section of the act creating the union it is provided that the new corporation "shall possess and enjoy all the capacities, powers, privileges, immunities and franchises which were conferred upon and held by said colleges of Jefferson and Washington and the trustees thereof, with such enlargements and subject to such changes therein as are made by this act." Section 2 also provides that all the real and personal property held and possessed by or in trust for the said colleges, with all endowment funds, choses in action, stocks, bequests and devises, and all other rights whatever to them belonging, are thereby transferred to and vested in the new corporation; and the further provision is, that "all the several liabilities of said two colleges or corporations, by either of them suffered or created, including the scholarships heretofore granted by and obligatory upon each of them, are hereby imposed upon and declared to be assumed by the corporation hereby created, which shall discharge and perform the same without diminution or abatement."

Undoubtedly the corporate franchises of the two institutions were contracts of the description protected by that clause of the constitution which ordains that no state shall pass any law impairing the obligation of contracts; but the contract involved in such an act of incorporation is a contract between the state and the corporation, and as such the terms of the contract may, as a general rule, be altered, modified or amended by the assent of the corporation, even though the charter contains no such reservation and there was none such existing in any general law of the state at the time the charter was granted. Persons making contracts with a private corporation know that the legislature, even without the assent of the corporation, may amend, alter or modify their charters in all cases where the power to do so is reserved in the charter or in any antecedent general law in operation at the time the charter was granted, and they also know that such amendments, alterations and modifications may, as a general rule, be made by the legislature with the assent of the corporation, even in cases where the charter is unconditional in its terms and there is no general law of the state containing any such reservation. Such contracts made between individuals and the corporation do not vary or in any manner change or modify the relation between the state and the corporation in respect to the right of the state to alter, modify or amend such a charter, as the power to pass such laws depends upon the assent of the corporation or upon some reservation made at the time, as evidenced by some pre-existing general law or by an express provision incorporated into the charter. Cases arise undoubtedly

where a court of equity will enjoin a corporation not to proceed under an amendment to their charter passed by their assent, as where the effect would be to enable the corporation to violate their contracts with third persons; but no such question is here presented for the decision of this court, nor can it ever be under a writ of error to a state court. Questions of that kind are addressed very largely to the judicial discretion of the court, and create the necessity for inquiry into the facts of the case and for an examination into all the surrounding circumstances. *Hascall v. Madison University*, 8 Barb., 174. Beyond doubt such a question may be presented in the circuit court in the exercise of its jurisdiction, concurrent with the state courts; but it is clear that such a question can never be brought here for re-examination by a writ of error to a state court, as such a writ only removes into this court the questions, or some one of the questions, described in the twenty-fifth section of the judiciary act. *Ward v. The Society of Attorneys*, 1 Colly. Ch. Cas., 377. Considerations of that kind must, therefore, be dismissed, as the only question presented for decision is, whether the acts of the legislature mentioned in the bill of complaint impair the obligation of the contracts for scholarship made by the complainants with the trustees of Jefferson College.

Decided cases are referred to in which it is held that the trustees of such an institution, where the terms of the charter amount to a contract, and the charter contains no reservation of a right to alter, modify or amend it; cannot consent to any change in the charter made by the legislature, which contemplates a diversion of the funds of the institution to any other purpose than that described and declared in the original charter. All, or nearly all, of such decisions are based on a state of facts where an attempt was made to take the control of such an institution from one religious sect or denomination and to give the control of it to another and a different sect or denomination, in violation of the intent and purpose of the original donors of the institution. *State v. Adams*, 44 Mo., 570. Questions of that kind, however, are not involved in the present record, nor do the court intend to express any opinion in respect to such a controversy. Charters of the kind may certainly be altered, modified or amended in all cases where the power to pass such laws is reserved in the charter or in some antecedent general law; nor can it be doubted that the assent of the corporation is sufficient to render such legislation valid, unless it appears that the new legislation will have the effect to change the control of the institution or to divert the fund of the donors to some new use inconsistent with the intent and purpose for which the endowment was originally made. *Railroad v. Canal Co.*, 21 Penn. St., 22. Consent of the corporation, it is conceded, is sufficient to warrant alteration, modification and amendments in the charters of moneyed, business and commercial corporations, and it is not perceived that the question presented in this record stands upon any different footing from such as arise out of legislation of that character, as the principal objection to the legislation in question is that the removal of Jefferson College to the newly selected location exposes the complainants, as owners of the scholarships, to increased expense and to additional inconvenience. *Allen v. McKeen*, 1 Sumn., 299. They do not pretend that the effect of the new legislation will be to lessen the influence and usefulness of the college, or to divert the funds to a different purpose from that which was intended by the donors, nor that it will have the effect to change the character of the institution from the original purpose and design of its founders. Pretenses of the kind, if set up, could not be supported, as the whole record shows that the two acts of assembly were passed at the

earnest solicitation of the patrons of the two institutions as well as at the request of the respective boards of trustees.

Even suppose that the consent of the corporation is no answer to the objections of the complainants, still the decree of the state court must be affirmed, as it is clear that the reservation in the charter fully warranted the legislature in passing both the acts which are the subject of complaint. *People v. Manhattan Co.*, 9 Wend., 351; *Roxbury v. Railroad Co.*, 6 Cush., 424; *White v. Railroad*, 14 Barb., 559. Suggestion may be made that the reservation, even in the original charter, is not expressed in direct terms, but the terms are the same as those employed in the charter which was the subject of judicial examination in the case of *Commonwealth v. Bonsall*, 3 Whart., 566, which was decided more than thirty years ago by the supreme court of the state. Provision was made in the charter in that case that the constitution of a certain public school should not be altered or alterable by any law of the trustees, or in any other manner than by an act of the legislature of this state. When incorporated the charter of the school provided that the trustees should be chosen by such persons as had contributed or should contribute to the amount of forty shillings for the purposes of the corporation. Pursuant to the petition of the trustees the legislature passed an act which repealed that clause of the charter, and provided that all the citizens residing within the limits of the township should be entitled to vote at all such elections, and the supreme court of the state held unanimously that the act of assembly was a valid act, even though it was not accepted by the corporation. Reference is made to that case to show that the clause in the charter of Jefferson College, called the reservation, furnished complete authority to alter, modify or amend the charter, and certainly it must be conceded that that case is a decisive authority to that point. *State v. Miller*, 2 Vroom, 521; *Story v. Jersey City*, 1 C. E. Green (N. J.), 13. Controlled by these reasons, the court is of the opinion that the act uniting the two colleges in one corporation was a valid act even as against the complainants in the third case.

They complain also of the supplementary act, but they hardly contend that the legislature, in passing the act to unite the two institutions, parted with any power which was reserved in the original charter of Jefferson College to enact any proper law to alter, modify or amend the act providing for that union. Extended argument upon that topic does not seem to be necessary, as there is not a word in the act which favors such a construction or which gives such a theory the slightest support. Proper care was taken by the legislature to protect the rights of these complainants by incorporating into the act uniting the two colleges a provision that the new corporation should discharge and perform those liabilities without diminution or abatement. Such contracts were made with the trustees, and not with the state, and it is a mistake to suppose that the existence of such a contract between the corporation and an individual would inhibit the legislature from altering, modifying or amending the charter of the corporation by virtue of a right reserved to that effect, or with the assent of the corporation, if, in view of all the circumstances, the legislature should see fit to exercise that power.

Decree in each case affirmed.

MILLER v. THE STATE.

(15 Wallace, 478-499. 1872.)

ERROR to the Supreme Court of New York.

§ 2127. *Charters of private corporations are contracts, and cannot be altered except under a reserved power.*

Opinion by MR. JUSTICE CLIFFORD.

Corporate franchises granted to private corporations, if duly accepted by the corporators, partake of the nature of legal estates, and the grant, under such circumstances, if it be absolute in its terms and without any condition or reservation, importing a different intent, becomes a contract within the protection of that clause of the constitution which ordains that no state shall pass any law impairing the obligation of contracts. Charters of private corporations are regarded as executed contracts between the state and the corporators, and the rule is well settled that the legislature, if the charter does not contain any reservation or other provision modifying or limiting the nature of the contract, cannot repeal, impair or alter such a charter against the consent or without the default of the corporation, judicially ascertained and declared. Subsequent legislation, altering or modifying such a charter, where there is no such reservation, is plainly unauthorized, if it is prejudicial to the rights of the corporators, and was passed without their assent. Where such a provision is incorporated in the charter it is clear that it qualifies the grant, and that the subsequent exercise of that reserved power cannot be regarded as an act within the prohibition of the constitution. *Pennsylvania College Cases*, 13 Wall., 213 (§§ 2118-26, *supra*). Such power, also, that is, the power to alter, modify or repeal an act of incorporation, is frequently reserved to the state by a general law applicable to all acts of incorporation, or to certain classes of the same, as the case may be; in which case it is equally clear that the power may be exercised whenever it appears that the act of incorporation is one which falls within the reservation, and that the charter was granted subsequent to the passage of the general law, even though the charter contains no such condition, nor any allusion to such a reservation. *Fletcher v. Peck*, 6 Cranch, 136 (§§ 1805-12, *supra*); *Terrett v. Taylor*, 9 id., 51.

STATEMENT OF FACTS.—Matters of fact, though not in dispute, must be first ascertained in order that the questions involved in the case may be properly presented for decision. Briefly stated the material facts are as follows, as appears by the finding of the court of original jurisdiction, and from the concessions of the parties: That the railroad company is a corporation duly organized under the general railroad act of the state, passed on the 2d of April, 1850, and that the articles of association were, on the 10th of July of the succeeding year, filed in the office of the secretary of state; that the articles of association provided for the construction of a railroad from Rochester to Portage, a distance of fifty miles, with a capital of \$800,000, to be divided into shares each for \$100, as therein specified; that the stock subscribed for the corporation, paid and unpaid, amounted to nine thousand seven hundred and seventy-five shares, of which only five thousand five hundred and fifty-two shares were ever fully paid, and for which certificates have been issued. Authority was conferred upon the city of Rochester, by an act to amend the charter of the city, to subscribe for or purchase stock of that railroad company to the amount of \$300,000, and the provision was, that by virtue of that subscription or purchase the city should acquire all the rights and privileges, and be liable to the

same responsibilities, as other stockholders of said company, except in certain particulars not necessary to be mentioned. Session Acts 1851, p. 768. Pursuant to that authority the proper officers of the city subscribed for that amount of the stock of the railroad company, and it appears that the proper officers of the railroad company elected to receive the subscription, and that the full amount of the subscription was paid, and that the certificates of the shares were duly issued to the city, and that the city has ever since been the holder and owner of the whole number of said shares. Power was also conferred upon the city, in case the company "elected to receive their subscription," to nominate and appoint one director for every \$75,000 of capital stock held by the municipality at the time of each election of directors, but the further provision was that the city should have no voice in the election of the remaining directors; consequently the common council of the city, at the time of each annual election of directors, elected four—the number being limited by law to thirteen—and the other stockholders elected nine, without any interference from the city authorities. Complaints arose from the fact that \$452,300 of the stock, subscribed by parties other than the city, had never been paid in, nor had certificates ever been issued for any part of that unpaid subscription. On the contrary, the same was not in existence as stock, having long before been extinguished and forfeited for non-payment, in consequence of which the railroad company had abandoned the construction of their road south of Avon, and assigned all their right of way, property and franchises beyond that point to another corporation, so that their railroad as constructed and operated terminates at Avon, and is only eighteen and three-fourths miles in length. Control of the railroad by a change of circumstances not contemplated when the plan was organized, being in the hands of stockholders owning a minority of the stock, the legislature of the state, on the 9th of March, 1861, enacted that the common council of the city should "have the power to nominate and appoint one director of the company for every forty-two thousand eight hundred and fifty-five dollars and five-sevenths of a dollar of capital stock of the said railroad company held by the said city, at the time of each election of directors of said company." Sessions Acts 1867, p. 92. Thereafter the common council of the city, as the plaintiffs claim, became entitled at each annual election of directors to elect seven of the number allowed by law, and that the other stockholders were entitled to elect the remaining six only, as authorized by the apportionment prescribed by the amendatory act of the legislature. Accordingly the common council of the city, at the annual election held in June of the succeeding year, elected seven directors, but the other stockholders, denying the validity of the amendatory act, elected nine directors under the old law, and the persons so chosen immediately entered upon, used and exercised the said offices as directors of said corporation, and without any warrant or authority, as insisted by the plaintiffs. Deprived of their rights as defined by the amendatory act, the plaintiffs brought the present action, in the nature of a writ of *quo warranto*, in the supreme court of the state, alleging that the nine directors elected by the other stockholders have usurped the offices of directors of the railroad company. Service was made and the defendants appeared and filed an answer. Hearing was had, and the supreme court rendered judgment for the plaintiffs, and the defendants transferred the cause to the court of appeals, where the judgment was affirmed; thereupon the losing party sued out a writ of error and removed the record into this court. They seek to reverse the judgment of the state courts upon the ground that the act

of the state legislature, authorizing the common council of the city to elect seven of the thirteen directors in the railroad company, is unconstitutional and void as repugnant to their act of incorporation, and in support of that theory they submit the following propositions: (1) That the signers of the before-mentioned articles of association, when the articles were filed in the office of the secretary of state, became a corporation by the name specified in those articles, with all the powers and privileges granted by the general law of the state upon that subject. 3 Edm. Stats., 618, §§ 1-4. (2) That the powers and privileges thus conferred were granted by the state, and that the grant, as an act of incorporation, became and was an executed contract. (3) That the powers and privileges of the charter are prescribed and defined in the general railroad law of the state. (4) That the persons named as incorporators in a charter cannot be compelled to accept the act of incorporation, nor any modification or extension of the powers and privileges granted, whether conferred or modified or extended by a special act or by virtue of a general law. (5) That a contract created by an act of incorporation, when once complete, is unalterable by either party without the consent of the other.

§ 2128. *The powers and privileges of a railroad corporation organized under the general laws are the same as those of one incorporated by a special act.*

Undoubtedly the powers and privileges of the railroad company in this case are the same as they would have been if the company had been incorporated by a special act, and it may also be conceded that the charter, when the articles of association were filed in the office of the secretary of state, became an executed contract, subject to the restrictions ordained by the constitution of the state, and to the reservations contained in the general law of the state relating to corporations, and also in the general railroad act, which it is admitted prescribes and defines the powers and privileges of the railroad company.

§ 2129. *Pennsylvania corporation laws reviewed.*

Section 1 of article 8 of the constitution of the state ordains as follows: Corporations may be formed under general laws, but shall not be created by special act except in certain cases. All general laws and special acts passed pursuant to this section may be altered from time to time or repealed. Constitution of 1846, art. 8, § 1. Provision is also made by the eighth section of the act defining the powers, privileges and liabilities of corporations, that the charter of every corporation that shall hereafter be granted by the legislature shall be subject to alteration, suspension and repeal, in the discretion of the legislature. 1 R. S., 600.

Articles of association for the incorporation of railroad companies cannot be filed and recorded in the office of the secretary of state until at least \$1,000 of stock for every mile of railroad proposed to be made is subscribed thereto, nor without complying with the other conditions specified in the second section of the general railroad act; and the first section of the act provides that such corporation shall be subject to the provisions (except those enacted in the seventh section) contained in title 3 of chapter 18 of the first part of the Revised Statutes, which includes section 8, containing the reservation that the charter of every corporation that shall hereafter be granted shall be subject to alteration, suspension and repeal, in the discretion of the legislature. Session Acts 1850, 212, § 1. Such a reservation, therefore, is not only ordained by the constitution of the state, but it has been twice enacted by the legislature, and it is conceded that both of those statutes are in full force. Superadded to those reservations is the further one, contained in the forty-eighth section of

the general railroad act, which provides that the legislature may at any time annul or dissolve any corporation formed under this act, the effect of which, it is admitted by the defendants, is to incorporate into the grant a power of revocation, which seems to supersede all necessity for any further remark upon the subject. *Id.*, p. 234.

Much consideration was given to the question under consideration in the case of *Dartmouth College v. Woodward*, 4 Wheat., 675 (§§ 2099-2117, *supra*), in which the right of the state was denied to amend the charter granted to the college by the crown before the Revolution, and to modify and restrict the same without the consent of the trustees under the charter. Four propositions were decided by the court in that case, the opinion being given by the chief justice: (1) That the charter was a contract within the meaning of that clause of the constitution which ordains that no state shall pass any law impairing the obligation of contracts. (2) That the charter was not dissolved by the Revolution. (3) That the acts of the state legislature altering the charter, in a material respect, without the consent of the corporation, was an act impairing the obligation of the charter, and was unconstitutional and void. (4) That the college, under its charter, was a private and not a public corporation.

Concurring opinions were also given by two of the associate justices, and Judge Story, in enforcing his views, remarked that where a private corporation is thus created by the charter of the crown, it is subject to no other control on the part of the crown than what is expressly or impliedly reserved by the charter itself. Unless a power be reserved for this purpose the crown cannot, in virtue of its prerogative, alter or amend the charter or divest the corporation of any of its franchises, or add to them, or augment or diminish the number of trustees, or remove any of the members, or change or control the administration of the funds, or compel the corporators to receive a new charter.

Prior to that adjudication the supreme court of Massachusetts had decided that rights legally vested in a corporation cannot be controlled or destroyed by any subsequent statute, unless a power for that purpose be reserved to the legislature in the act of incorporation; and the learned judge, having referred to that case, remarked that the principles there laid down are so consonant with justice, sound policy and legal reasoning, that it is difficult to resist the impression of their perfect correctness, showing very plainly that such legislation would be valid if the power for that purpose is reserved in the act incorporating the company. *Dartmouth College v. Woodward*, 4 Wheat., 708 (§§ 2099-2117, *supra*); *Wales v. Stetson*, 2 Mass., 146. Conclusive evidence that such was the opinion of that learned judge is also derived from his subsequent remarks in that same case, in which he says that any act of a legislature which takes away any powers or franchises vested by its charter in a private corporation or its corporate officers, or which restrains or controls the legitimate exercise of them, or transfers them to other persons, *without its assent*, is a violation of the obligations of the charter, adding: "If the legislature mean to claim such an authority it must be reserved in the grant." *Dartmouth College v. Woodward*, 4 Wheat., 712; *Cooley's Const. Lim.*, 279.

§ 2130. *Where a provision is incorporated in the charter reserving the power of alteration or repeal, it qualifies the grant, and the subsequent exercise of that reserved power is not within the constitutional prohibition.*

Where such a provision is incorporated in the charter, it is clear that it qualifies the grant, and that the subsequent exercise of that reserved power cannot

be regarded as an act within the prohibition of the constitution. *Pennsylvania College Cases*, 13 Wall., 213 (§§ 2118–26, *supra*). Members of banking associations, it was enacted by the general banking law of New York, should not be individually liable for the debts of the association, unless it was so provided in the articles of organization; but this court held, in the case of *Sherman v. Smith*, 1 Black, 587 (§§ 2194–96, *infra*), that a subsequent statute imposing such a liability upon the shareholders of the association was a valid law, as the charter reserved to the legislature the power to alter or repeal the act of incorporation. Such a conclusion was earnestly resisted at the bar, as the conditional exemption from such liability was embodied in the articles of association, but the court overruled the defense upon the ground that the reservation in the charter of the right to alter or repeal the act was paramount and controlling.

Decisions of the state courts, in repeated instances, both before and since that time, have been made to the same effect. When that case was before the court of appeals, before the record was removed here for revision, the court of appeals decided that the provision reserving to the legislature the power to alter or repeal the general banking law became a part of the contract with every association formed under it, and that the state might modify it prospectively or retrospectively, without infringing the article of the federal constitution which ordains that no state shall pass any law impairing the obligation of contracts, and this court affirmed the judgment in that case. *Oliver Lee & Co.'s Bank*, 19 N. Y., 146.

Laws could not be enacted under the constitution in force when the general banking law was passed to create, alter, continue or renew any body politic or corporate without the assent of two-thirds of the members in each branch of the legislature. Consequently it was contended that the members of such associations, subsequently created, could not be affected by the statute declaring that shareholders should be liable individually for the debts of the association; but the court of appeals reaffirmed the decision in the preceding case, and determined that the statute imposing that liability was a valid exercise of the power reserved in that act, and that its effect was that the franchises and privileges granted were at all times subject to abrogation or change by the legislative power of the state; that the power reserved was one to be exercised at any time by the existing legislative authority, however constituted, and in any mode conforming to the organic law of the state for the time being. *Reciprocity Bank*, 22 N. Y., 14; *White v. Railroad Co.*, 14 Barb., 559.

Exactly the same principle was adopted in the case of *Railroad v. Dudley*, 14 N. Y., 348, where it was held that an alteration of the charter of the company, made by the legislature, in pursuance of the power reserved to alter or repeal the act by changing its name, increasing its capital, and *extending its road*, did not discharge a subscriber to the stock from liability for his subscription, whether such alteration was or was not beneficial to him, the alteration having been duly made and without fraud on the part of the company. See, also, *Plankroad v. Thatcher*, 11 N. Y., 110. Under such a reservation, it is also held by the same court that a member of the corporation holds his stock subject to such liability as may attach to him in consequence of an extension or renewal of the charter, made without his application or consent, and that the estate of an intestate succeeds to the individual liability imposed on the owner, in his life-time, as a stockholder, in a corporation whose charter would have expired if it had not been renewed, but was extended after his death; and that his administrator was liable for debts of the corporation con-

tracted after the death of the intestate. *Bailey v. Hollister*, 26 N. Y., 116; *Clarke v. City of Rochester*, 28 id., 631; *People v. Hills*, 35 id., 449.

§ 2131. *The reservation may exist in the constitution or in a prior general law.*

Even the defendants admit that the exact question presented for decision in this case was decided by the supreme court of the state in the case between these same parties or some of them, and which was subsequently transferred to the court of appeals, and was there reversed upon an exception involving a question of local law. *People v. Hills*, 46 Barb., 344. Nearly forty years earlier the same question substantially was decided in the same way by the chancellor of that state, in which he held that where a state legislature reserves to itself, in the very charter it grants to a private corporation, the right of altering, amending or repealing the act of incorporation, a subsequent repeal of the charter is valid and constitutional; that such a reservation in the charter of a corporation, upon common law principles, is not repugnant to the grant, but a constitutional limitation of the powers granted. *McLaren v. Pennington*, 1 Paige Ch., 102. Few or none, it is presumed, will question the correctness of that rule; but the court here is of the opinion that the reservation is equally valid and effectual if it exists in the constitution of the state, or in a prior general law. *Pennsylvania College Cases*, 13 Wall., 213 (§§ 2118-26, *supra*); *General Hospital v. Insurance Co.*, 4 Gray, 227; *Roxbury v. Railroad Co.*, 6 Cush., 424; *Suydam v. Moore*, 8 Barb., 363; *Angell & Ames on Corp.*, 9th ed., § 767. So where the legislature, in granting a charter to an insurance company, reserved the right to alter it, and they subsequently exercised that right by declaring that if the assets of such corporation should pass into the hands of a receiver he might make assessments upon the premium notes, it was held that this was a legitimate exercise of the reserved power, and that it fully authorized the receiver to make assessments whenever it became necessary to carry the intention of the legislature into effect. *Hyatt v. McMahon*, 25 Barb., 467.

§ 2132. *The reserved power cannot be used to destroy rights acquired under a charter.*

Power to legislate, founded upon such a reservation in a charter to a private corporation, is certainly not without limit, and it may well be admitted that it cannot be exercised to take away or destroy rights acquired by virtue of such a charter, and which, by a legitimate use of the powers granted, have become vested in the corporation; but it may be safely affirmed that the reserved power may be exercised, and to almost any extent, to carry into effect the original purposes of the grant or to secure the due administration of its affairs, so as to protect the rights of the stockholders and of creditors, and for the proper disposition of the assets. *Commonwealth v. Essex Co.*, 13 Gray, 253; *Miller v. Railroad Co.*, 21 Barb., 517. Such a reservation, it is held, will not warrant the legislature in passing laws to change the control of an institution from one religious sect to another, or to divert the fund of the donors to any new use inconsistent with the intent and purpose of the charter, or to compel subscribers to the stock, whose subscription is conditional, to waive any of the conditions of their contract. *State v. Adams*, 44 Mo., 570; *Zabriskie v. Railroad Co.*, 3 C. E. Green, 180; *Railroad Co. v. Veazie*, 39 Me., 581; *Sage v. Dillard*, 15 B. Mon., 357.

Attempt is made in this case to show that the right to elect all of the directors except four had become vested in the stockholders owning a minority of

the shares, and that the amendatory act giving to the city the power to elect seven impairs that vested right; but the court is entirely of a different opinion, as the legislature, in conceding that right, made the concession subject to the reserved power to alter or repeal the charter as ordained in the constitution of the state, and also in the several statutes mentioned, which clearly give to the legislature the power to augment or diminish the number, or to change the apportionment, as the ends of justice or the best interest of all concerned may require.

All parties supposed, when the charter was formed, and when the subscriptions to the stock were paid, that the capital stock would be \$800,000, and that the right conceded to the city to elect four out of the thirteen directors would give the city a fair proportion of the whole number, but circumstances have changed in consequence of the failure of a large class of the subscribers to the stock to make good their subscriptions. Payments being refused, the corporation found it necessary to reduce the capital stock, and to shorten the route as before explained.

These changes from the original design made new legislation necessary to the ends of justice, and the amendatory act was passed to effect that object, and the court is of the opinion that the amendatory act is a valid law and that the judgment should be affirmed.

JUSTICES BRADLEY and FIELD dissenting: That the agreement with respect to the number of directors which the city should elect was outside of and collateral to the charter; that the legislature cannot reserve the power to invalidate contracts between third parties.

PEIK v. CHICAGO & NORTHWESTERN RAILWAY COMPANY.

(4 Otto, 164-178. 1876.)

APPEALS from U. S. Circuit Court, Western District of Wisconsin.

Opinion by WAITE, C. J.

STATEMENT OF FACTS.—These suits present the single question of the power of the legislature of Wisconsin to provide by law for a maximum of charge to be made by the Chicago & Northwestern Railway Company for fare and freight upon the transportation of persons and property carried within the state, or taken up outside the state and brought within it, or taken up inside and carried without. That company was by its charter authorized "to demand and receive such sum or sums of money for the transportation of persons and property, and for storage of property, as it shall deem reasonable." Charter of the Wisconsin & Superior Railroad Co., sec. 6. Other forms of expression are used in charters granted by Wisconsin to other companies, which by consolidation have become merged in the present corporation; but they are all the same in effect. None go beyond this.

§ 2133. *Effect of a reservation in the constitution on the power to regulate charges on railroads.*

The constitution of the state in force when each of the several acts of incorporation was passed provides that all acts for the creation of corporations within the state "may be altered or repealed by the legislature at any time after their passage." Article 11, section 1. It was conceded upon the argument that this reserved power of the constitution gave the legislature "the same power over the business and property of corporations that it has over in-

dividuals," or, as it is expressed by one of the counsel, "nothing more could have been intended than to leave the stockholders in corporations in such a position that the legislature could place them on the same footing with natural persons before the law, and disable them from permanently evading the burdens on all others engaged in similar vocations by appealing to the letter of their charter. Their object was not to open the door to oppression, but to secure simple equality between citizens of the state, whether working singly or in corporate associations." And, in another place, the same learned counsel says: "The privilege, then, of charging whatever rates it may deem proper is a franchise, which may be taken away under the reserved power, but the right to charge a reasonable compensation would remain as a right under the general law governing natural persons, and not as a special franchise or privilege."

Without stopping to inquire whether this is the extent of the operation of this important constitutional reservation, it is sufficient to say that it does, without any doubt, have that effect. In *Munn v. Illinois*, 4 Otto, 113 (§§ 1349-67, *supra*), and *Chicago, Burlington & Quincy Railroad Co. v. Iowa*, 4 Otto, 155 (§§ 2138-42, *infra*), we decided that the state may limit the amount of charges by railroad companies for fares and freights, unless restrained by some contract in the charter, even though their income may have been pledged as security for the payment of obligations incurred upon the faith of the charter. So far this case is disposed of by those decisions.

§ 2134. *The reserved power over a corporation remains after consolidation with a company of another state, where the act authorizing the consolidation provides that the consolidated company shall be subject to the laws of the state.*

It remains only to consider a few questions raised here which were not involved in the cases that have already been decided.

1. As to the consolidation of the Wisconsin corporations with those of Illinois. For the purpose of promoting this consolidation, the legislature of Wisconsin passed an enabling act, and, in so doing, provided that if such consolidation was perfected, "the consolidated company shall be and remain subject to the laws of the state of Wisconsin and the state of Illinois, respectively, and shall have in all respects the same privileges as though this consolidation had not taken place; provided that the laws of Illinois shall have no force and effect in the state of Wisconsin." Wisconsin Consolidation Act, March 10, 1855, sec. 8. The second section of the same act also provided that the consolidated company should "have all the rights, privileges and franchises conferred on the said companies [those in Illinois as well as those in Wisconsin] by the laws of the states of Illinois and Wisconsin, respectively, the same, and not otherwise, as though the said consolidation had not taken place." In this way, Wisconsin in effect said to the Illinois companies, "You may consolidate your interest with those of the named companies in this state, and form one corporation in the two states; but in so doing, you must, in Wisconsin, be subject to our laws. In Wisconsin all corporations are liable to have their charters altered or repealed at the will of the legislature. If you are willing to take this risk, we will care for you, within our jurisdiction, precisely as we do for our own corporations."

Upon these terms the consolidation was finally perfected, and the consolidated company now exists under the two jurisdictions, but subject to the same legislative control as to its business in Wisconsin as private persons. The Illinois companies might have stayed out. But they chose to come in, and must now abide the consequences. Thus Wisconsin is permitted to legislate for the

consolidated company in that state precisely the same as it would for its own original companies, if no consolidation had taken place. This is the contract by which the Illinois stockholders must abide. Having availed themselves of what they supposed to be the advantages of the consolidation, they cannot repudiate their corresponding obligations. There is nothing, therefore, in this objection.

2. The obligations of the consolidated company, under the land grant to the Wisconsin & Superior Railroad Company, to keep that part of its road which formerly belonged to that company open as a public highway for the use of the government of the United States, free from toll or other charges upon the transportation of property or troops of the United States, and to transport the mails at such prices as congress may by law direct. The United States do not complain. It will be time enough for us to consider this objection when they do.

§ 2135. *Power of a state to regulate domestic commerce.*

3. As to the effect of the statute as a regulation of interstate commerce. The law is confined to state commerce, or such interstate commerce as directly affects the people of Wisconsin. Until congress acts in reference to the relations of this company to interstate commerce, it is certainly within the power of Wisconsin to regulate its fares, etc., so far as they are of domestic concern. With the people of Wisconsin this company has domestic relations. Incidentally, these may reach beyond the state. But certainly, until congress undertakes to legislate for those who are without the state, Wisconsin may provide for those within, even though it may indirectly affect those without.

§ 2136. *Decision of a state court that an act is not repealed is binding.*

4. As to the repeal of this act by that of March 12, 1874. The supreme court of Wisconsin has decided that there is no such repeal as is claimed. *Attorney-General v. Railroad Cos.*, 35 Wis., 427. This is binding on us.

§ 2137. *The legislature may decide as to what is a reasonable charge by a railroad.*

5. As to the claim that the courts must decide what is reasonable, and not the legislature. This is not new to this case. It has been fully considered in *Munn v. Illinois*. Where property has been clothed with a public interest, the legislature may fix a limit to that which shall in law be reasonable for its use. This limit binds the courts as well as the people. If it has been improperly fixed, the legislature, not the courts, must be appealed to for the change.

6. The sale of the Chicago, St. Paul & Fond du Lac Railroad Company. The charter of the company whose road was sold does not confer any right which has been impaired by this legislation. That company, like other railroad companies in Wisconsin, was subject to regulation as to its fares, etc. It is, therefore, unnecessary to consider what might, under other circumstances, have been the effect of such a sale.

This disposes of the case. No other questions need be considered. If the question ever arises whether the company can be compelled to continue its business at the prices fixed, it will be time enough for us to pass upon it when it reaches here in due course of proceeding. It is not here now.

Decrees affirmed.

JUSTICES FIELD and STRONG dissented.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY v. IOWA.

(4 Otto, 155-164. 1876.)

APPEAL from U. S. Circuit Court, District of Iowa.

STATEMENT OF FACTS.—The Chicago, Burlington & Quincy Railroad Company, with its leased line, the Burlington & Missouri River Railroad, had a continuous line from Chicago to Plattsmouth, Iowa. The bill in this case was filed to enjoin the attorney-general of the state of Iowa from enforcing the provisions of an act fixing maximum rates of charges, the complainant contending that at the time the leased railroad was built, and when the money was borrowed to build and equip the road, and the mortgages were executed, the company had the right to establish its rates of charges for transportation of freight and passengers.

Opinion by WAITE, C. J.

Railroad companies are carriers for hire. They are incorporated as such, and given extraordinary powers, in order that they may the better serve the public in that capacity. They are, therefore, engaged in a public employment affecting the public interest, and, under the decision in *Munn v. Illinois*, 4 Otto, 113 (§§ 1349-67, *supra*), subject to legislative control as to their rates of fare and freight, unless protected by their charters.

§ 2138. *The charter of a corporation is a contract, protected by the constitution.*

The Burlington & Missouri River Railroad Company, the benefit of whose charter the Chicago, Burlington & Quincy Railroad Company now claims, was organized under the general corporation law of Iowa, with power to contract, in reference to its business, the same as private individuals, and to establish by-laws and make all rules and regulations deemed expedient in relation to its affairs, but being subject, nevertheless, at all times to such rules and regulations as the general assembly of Iowa might from time to time enact and provide. This is, in substance, its charter, and to that extent it is protected as by a contract; for it is now too late to contend that the charter of a corporation is not a contract within the meaning of that clause in the constitution of the United States which prohibits a state from passing any law impairing the obligation of a contract. Whatever is granted is secured subject only to the limitations and reservations in the charter or in the laws or constitutions which govern it. This company, in the transactions of its business, has the same rights, and is subject to the same control, as private individuals under the same circumstances. It must carry when called upon to do so, and can charge only a reasonable sum for the carriage. In the absence of any legislative regulation upon the subject, the courts must decide for it, as they do for private persons, when controversies arise, what is reasonable. But when the legislature steps in and prescribes a maximum of charge, it operates upon this corporation the same as it does upon individuals engaged in a similar business. It was within the power of the company to call upon the legislature to fix permanently this limit, and make it a part of the charter; and, if it was refused, to abstain from building the road and establishing the contemplated business. If that had been done, the charter might have presented a contract against future legislative interference. But it was not; and the company invested its capital, relying upon the good faith of the people and the wisdom and impartiality of legislators for protection against wrong under the form of legislative regulation.

§ 2139. *A power of government which actually exists is not lost by non-user.*

It is a matter of no importance that the power of regulation now under consideration was not exercised for more than twenty years after this company was organized. A power of government which actually exists is not lost by non-user. A good government never puts forth its extraordinary powers, except under circumstances which require it. That government is the best which, while performing all its duties, interferes the least with the lawful pursuits of its people. In 1691, during the third year of the reign of William and Mary, parliament provided for the regulation of the rates of charges by common carriers. This statute remained in force, with some amendment, until 1827, when it was repealed, and it has never been re-enacted. No one supposes that the power to restore its provisions has been lost. A change of circumstances seemed to render such a regulation no longer necessary, and it was abandoned for the time. The power was not surrendered. That remains for future exercise, when required. So here, the power of regulation existed from the beginning, but it was not exercised until in the judgment of the body politic the condition of things was such as to render it necessary for the common good.

§ 2140. *The power of a state of regulating the rates of a railroad company is not affected by a pledge of its income, or lease of its road, before the power is exercised.*

Neither does it affect the case that before the power was exercised the company had pledged its income as security for the payment of debts incurred, and had leased its road to a tenant that relied upon the earnings for the means of paying the agreed rent. The company could not grant or pledge more than it had to give. After the pledge and after the lease the property remained within the jurisdiction of the state, and continued subject to the same governmental powers that existed before.

§ 2141. *Regulation of interstate commerce.*

The objection that the statute complained of is void because it amounts to a regulation of commerce among the states, has been sufficiently considered in the case of *Munn v. Illinois*. This road, like the warehouse in that case, is situated within the limits of a single state. Its business is carried on there, and its regulation is a matter of domestic concern. It is employed in state as well as in interstate commerce, and, until congress acts, the state must be permitted to adopt such rules and regulations as may be necessary for the promotion of the general welfare of the people within its own jurisdiction, even though in so doing those without may be indirectly affected.

§ 2142. *A state law dividing railroads into classes, and fixing maximum rates of charges, is not void for want of uniformity.*

It remains only to consider whether the statute is in conflict with section 4, article 1, of the constitution of Iowa, which provides that "all laws of a general nature shall have a uniform operation," and that "the general assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens." The statute divides the railroads of the state into classes, according to business, and establishes a maximum of rates for each of the classes. It operates uniformly on each class, and this is all the constitution requires. The supreme court of the state, in the case of *McAunien v. M. & M. Railroad Co.*, 20 Ia., 343, in speaking of legislation as to classes, said, "These laws are general and uniform, not

because they operate upon every person in the state, for they do not, but because every person who is brought within the relation and circumstances provided for is affected by the law. They are general and uniform in their operation upon all persons in the like situation, and the fact of their being general and uniform is not affected by the number of persons within the scope of their operation." This act does not grant to any railroad company privileges or immunities which, upon the same terms, do not equally belong to every other railroad company. Whenever a company comes into any class, it has all the "privileges and immunities" that have been granted by the statute to any other company in that class.

It is very clear that a uniform rate of charges for all railroad companies in the state might operate unjustly upon some. It was proper, therefore, to provide in some way for an adaptation of the rates to the circumstances of the different roads; and the general assembly, in the exercise of its legislative discretion, has seen fit to do this by a system of classification. Whether this was the best that could have been done is not for us to decide. Our province is ~~only to determine~~ whether it could be done at all, and ~~under any circumstances~~. If it could, the legislature ~~must decide for itself, subject to no control from us~~, whether the common good requires that it should be done.

Decree affirmed.

JUSTICES FIELD and STRONG dissented.

TILLEY v. SAVANNAH, FLORIDA & WESTERN RAILROAD COMPANY.

(Circuit Court for Georgia: 5 Federal Reporter, 641-665. 1881.)

Bill in equity and motion for an injunction, by a stockholder in the Savannah, Florida & Western Railroad Company, praying that the company be enjoined from doing any act which would be an acceptance of an act of the Georgia legislature of October 14, 1879, or from carrying out the provisions of the act, etc.; also, that the commissioners might be enjoined from prescribing rates of fare and freight over the road, or in any manner enforcing the provisions of the act. The facts and the provisions of the law are stated in the opinion.

Opinion by Woods, J.

The question for solution is whether the case made by this bill and amendment, and the affidavits in support of it, entitles the complainant to the writ of injunction as prayed for in his bill. The first inquiry that arises is, what are the rights of the Savannah, Florida & Western Railroad Company under the law of its organization? On behalf of the complainant it is averred that the railroad company has the right, within the limits prescribed by the charter of the Atlantic & Gulf Railroad Company, to fix its own schedule of freight and passenger fares, and that this right is not subject to legislative control.

§ 2143. *Control over railroads.*

It is settled that railroad companies are subject to legislative control as to their rates of fare and freight, unless protected by their charters. *Munn v. Illinois*, 94 U. S., 113 (§§ 1349-67, *supra*); *Chicago, etc., R. Co. v. Iowa*, 94 U. S., 161 (§§ 2138-42, *supra*). When the charter of a railroad company allows it to charge maximum rates of fares and freight, but the right is reserved to the legislature to repeal or amend the charter, it may change the rates prescribed by the charter by establishing a maximum limit beyond which they shall not go. *Peik v. Chicago, etc., R'y Co.*, 94 U. S., 164 (§§ 2133-37, *supra*).

§ 2144. *A company succeeding to the rights of another is subject to the same control in the matter of charges.*

By the act of the legislature of Georgia of February 29, 1876, entitled "An act to enable the purchasers of railroads to form corporations, and to exercise corporate powers and privileges," under which the Savannah, Florida & Western Railroad Company was organized, it was clothed with all the rights, privileges and immunities of the Atlantic & Gulf Railroad Company. It is necessary, therefore, to inquire what were the charter rights of the latter company. It was organized by the consolidation of the Savannah, Albany & Gulf Railroad Company and the Atlantic & Gulf Railroad Company, by authority of an act of the legislature of Georgia, approved April 18, 1863. When this act was passed, sections 1651 and 1652 of the code of 1863, which took effect January 1, 1863, were in force. The first of these sections declared: "Persons are either natural or artificial. The latter are the creatures of law, and, except so far as the law forbids, are subject to be changed, modified or destroyed at the will of their creator; they are called corporations." The second declared: "In all cases of private charters, hereafter granted, the state reserves the right to withdraw the franchise unless such right is expressly negatived in the charter." From these sections of the code it is apparent that the rights, privileges and franchises of the Atlantic & Gulf Railroad Company were subject to alteration, amendment or withdrawal at the will of the legislature. This point has been expressly decided by the supreme court of the United States in the case of Railroad Co. v. Georgia, 98 U. S., 359 (§§ 2317-20, *infra*). In that case it was held that by the consolidation under the act of April 18, 1863, of the Savannah, Albany & Gulf Railroad Company and the Atlantic & Gulf Railroad Company, said companies were dissolved and a new corporation (to wit, the Atlantic & Gulf Railroad Company) was created, and that this new company became subject to the provisions of the code of Georgia above recited.

And it has been expressly decided by the supreme court of Georgia that all charters granted by the state since the adoption of the code of 1863 are subject to the provisions of section 1682 above quoted. *West End Co. v. Atlanta*, 49 Ga., 151. It must, therefore, be considered as conclusively settled that the right of the Atlantic & Gulf Railroad Company to establish its own schedule of freight and fares within certain limits was subject to legislative modification and control. The Savannah, Florida & Western Railroad Company, having succeeded to the rights and franchises of the Atlantic & Gulf Company, is subject to the same revisory power.

§ 2145. *When, at the time of the grant of a charter, corporations were subject to have their transportation rates regulated, an act compelling them to confine them to reasonable charges works no injustice to the corporators.*

But, so far as the Savannah, Florida & Western Railroad Company is concerned, the right of legislative control over its franchises has been placed beyond all dispute, if any remained, by section 8 of the act under which the company was organized. That section declares "that nothing in this act shall operate to vest in any purchaser of any railroad and its franchises any exemption from taxation existing or claiming to exist in the corporation which shall have been the owner of said railroad and its franchises, or to limit the powers of the legislature to alter, modify or withdraw the charter and franchises herein provided."

Complainant says, however, that if the power of the legislature, under the charter of the company, to modify or withdraw its franchises, be conceded,

yet this power is now restrained by that paragraph in the bill of rights of the constitution of 1877 which declares "no grant of special privilege or immunities shall be revoked, except in such manner as to work no injustice to corporators or creditors of the incorporation." Paragraph 3, § 3, art. 1, Constitution 1877. This presents the question whether the act of October 14, 1879, under which the railroad commissioners assume to act, revokes any of the privileges and immunities of the defendant railroad company in such manner as to work injustice to the corporators or creditors of the corporation. That act forbids the railroad corporations of the state, including the defendant railroad company, from charging unfair and unreasonable rates of freight and fare, or making unjust discriminations for the transportation of passengers and freights; and provides for the appointment of a commission to prescribe reasonable and just rates of freight and passenger tariffs, to be observed by all the companies doing business in this state on the railroads thereof. There is certainly nothing in this act hostile to the paragraph in the bill of rights just referred to. The franchise of the defendant company is to fix its own rates of freights and fares within certain limits, subject to the revisory powers of the legislature. It has never had absolute right to establish its own schedule of freights and fares. The right to fix its rates of charges has always been subordinate to legislative control. How, then, can an attempt on the part of the legislature to regulate the charges of the defendant company be considered as an attempt to revoke the special privileges and immunities of the company? But this clause in the bill of rights must be read in connection with paragraph 1 of section 2 of article 4 of the constitution, which confers upon the legislature the power and authority of regulating railroad freights and tariffs, and makes it the duty of the legislature to prohibit railroads from charging other than just and reasonable rates. The legislature, in the act of October 14, 1879, *supra*, has merely forbidden the railroad companies from exacting more than fair and reasonable rates for the transportation of freights and passengers, and has attempted, through a commission, to prescribe what are just and reasonable rates. Upon its face there can be no constitutional objection to this legislation, excepting on the assumption that it is one of the special privileges and immunities of the railroad companies to charge unjust and unreasonable freight rates and fare.

§ 2146. *Where the constitution reserves the power in the legislature to prescribe reasonable rates, the question as to what is reasonable is a legislative question.*

But it is urged by complainant that the rates prescribed by the commissioners under authority of the legislature are not just and reasonable, but are oppressive, and destructive of the value of the property of the railroad companies. Assuming for the present that the legislature had the constitutional right to delegate the power of prescribing rates to a commission, and that the schedule established by it is the schedule of the legislature, the question is then presented: Where does the power reside to declare what are just and reasonable rates? Is it a judicial or legislative question? It seems to me that section 2 of article 4 of the constitution, by its very terms, confers that power on the legislature. It declares — *First*, "the power and authority of regulating railroad freights and passenger tariffs, preventing unjust discriminations, and requiring reasonable and just rates of freight and passenger tariffs, are hereby conferred on the general assembly, whose duty it shall be to pass laws to regulate freight and passenger tariffs, to prohibit unjust discrimination, and to prohibit said roads from charging other than just and reasonable rates." How a delegation of power to declare what is just and reasonable could be more plain

and explicit, it is difficult to see. It is not conferred on the courts; the railroad companies have no part or lot in the decision of the question; but the constitution declares "it is hereby conferred on the general assembly." But even when there is no such constitutional provision as exists in this state, it has been held that "where property has been clothed with a public interest, the legislature may fix a limit to that which shall in law be reasonable for its use. This limit binds the courts as well as the people. If it has been improperly fixed, the legislature, not the courts, must be appealed to for the change." *Peik v. Chicago, etc., R'y Co.*, 94 U. S., 164 (§§ 2133-37, *supra*); *Munn v. Illinois*, 94 U. S., 113 (§§ 1349-67, *supra*).

§ 2147. — *nor is such regulation any revocation of any special privileges or immunities.*

Looking, therefore, at the several clauses of the constitution which bear upon the subject, it cannot be said by the railroad companies that an attempt by the legislature to prescribe reasonable rates for the transportation of freights and fares is a revocation of any of their special privileges or immunities. In my judgment the clause of the constitution now under consideration was not meant to limit the power of the legislature over the subject of freights and fares, which is fully treated in section 11, article 14, but was intended to protect the incorporators and creditors of the corporation from the results which at common law followed the revocation of the charter of an incorporated company, which were that its realty reverted to the grantors and its personalty escheated to the state.

§ 2148. *A state, by voting upon her shares in a corporation upon a proposition to issue bonds, is not estopped to regulate the transportation rates of such company.*

The complainant alleges that when the bonds and the mortgage to secure the same, subject to which the defendant company bought the railroad and other property of the Atlantic & Gulf Company, were executed, the state of Georgia was the owner of ten thousand shares of the stock of the latter company, and this stock voted in favor of the issue of the bonds and the execution of the mortgage; that the bonds bore seven per cent. annually, and are to fall due July 1, 1877; that the property was conveyed by the mortgage or trust deed to a trustee, with the power upon default of the payment of interest to take possession and operate the road and pay first expenses; *second*, prior liens; *third*, interest and principal of the bonds; and, *fourth*, the residue to the corporation; but until default, the company was to manage the property instead of the trustees. And he claims that the reserved right of modification or repeal does not apply when such modification will impair a contract like this made by the state herself. To this there are two answers. In the first place, the state made no contract when the Atlantic & Gulf Railroad Company issued its bonds and executed its mortgage to secure this. The bonds and mortgage were the contracts of the company and not of its stockholders. *Secondly*, the purchasers of the bonds took them subject to the power of the state to regulate the rates of freight and fares. The state never, either by express or implied contract, agreed that this power should not be exercised. The purchasers of bonds took the risk of the validity of the company to do business enough under the provisions and restrictions of its charter, and subject to the right of the legislative revision to pay the principal and interest on the bonds.

§ 2149. *The appointment of a commission to fix maximum rates is not a delegation of legislative authority.*

The complainant next insists that paragraph 1, section 2, article 4, of the con-

stitution of Georgia, requires the general assembly itself to regulate railroad freights and passenger tariffs, and prohibit unjust discriminations on the railroads of the state, and prohibit them from charging other than just and reasonable rates, and that the delegation of this duty to these railroad commissioners is not warranted by the constitution. The argument is that the act of October 14, 1879, delegates to the railroad commission legislative power which by the constitution is conferred exclusively upon the legislature. The paragraph of the constitution which authorizes and requires the action of the general assembly on this subject does not, in terms, require that body to prescribe the rates of freights and fares. It is required "to pass laws to regulate freight and passenger tariffs." It has, in performance of this duty, declared that the rates charged by the railroad companies should be just and reasonable, and appointed a commission to fix the maximum of just and reasonable rates, beyond which the railroad companies shall not go. This action seems to fall strictly within the terms of the authority on which it is based. If, however, the power conferred on the commissioners can only be exercised under the constitution by the legislature, the act conferring such powers must be declared void. A somewhat careful consideration of this point satisfies me clearly that the duties imposed by the act upon the commissioners are not legislative, and are not necessarily to be performed by the legislature. If the act had declared that no railroad company should charge other than just and reasonable rates, and that the board of directors of every railroad company in the state should prescribe maximum charges, which should be posted at each station, and beyond which the ticket and freight agents of the companies should not go, it could not reasonably be claimed that the directors were clothed with legislative power. Is the case altered when the general assembly, instead of making the board of directors the body to fix maximum rates, appoints an independent, and, it is fair to presume, a more impartial, body for that purpose? The nature of the duty discharged is not changed by a change in the person or persons on whom the duty is imposed.

§ 2150. — *grant of legislative power confers all power to accomplish the end.*

It is a familiar rule of constitutional construction that a grant of legislative power to do a certain thing carries with it the power to use all proper and necessary means to accomplish the end. *McCulloch v. State of Maryland*, 4 Wheat., 316 (§§ 380-398, *supra*). The general assembly of Georgia is expressly required by paragraph 1, section 2, article 4, to pass laws from time to time to regulate freight and passenger tariffs, and to prohibit unjust discrimination, and the charging of unjust and unreasonable rates by the railroad companies of the state. The fixing of just and reasonable maximum rates for all the railroads in the state is clearly a duty which cannot be performed by the legislature unless it remains in perpetual session, and devotes a large portion of its time to its performance. The question, what are just and reasonable rates? is one which presents different phases from month to month, upon every road in the state, and in reference to all the innumerable articles and products that are the subjects of transportation. This question can only be satisfactorily solved by a board which is in perpetual session, and whose time is exclusively given to the consideration of the subject.

It is obvious that, to require the duty of prescribing rates for the railroads of the state to be performed by the general assembly, consisting of a senate, with forty-four members, and a house of representatives, with one hundred and seventy-five, and which meets in regular session only once in two years,

and then only for a period of forty days, would result in the most ill-advised and haphazard schedules, and be productive of the greatest inconvenience and injustice, in some cases to the railroad companies, and in others to the people of the state. It is impracticable for such a body to prescribe just and reasonable rates. To insist that this duty must be performed by the general assembly itself is to defeat the purpose of that clause of the constitution under consideration.

The view taken by complainant would preclude the legislature from the use of the necessary means and agencies to accomplish what it is required by the constitution to do. The constitution of the United States gives to congress the power to levy and collect taxes; but this does not require congress itself to assess the property of the tax-payer, and collect the tax. The constitution of Georgia clothes the general assembly with the power of taxation over the whole state, and requires taxes to be assessed upon all property *ad valorem*. But this does not require the legislature to investigate, through its committees or otherwise, and declare, by an act, the value of every piece of property in the state subject to taxation.

A familiar instance of the use of agencies by the legislature for the exercise of the power vested in it by the constitution is found in the creation of municipal corporations, and of the powers of legislation which are commonly bestowed upon them. The bestowal of such powers is not to be considered as trenching upon the maxim that legislative power is not to be delegated, since that maxim is to be understood in the light of the immemorial practice of this country and England, which has always recognized the propriety of vesting in municipal corporations certain powers of local regulation in respect to which the parties immediately interested may fairly be supposed more competent to judge of their needs than any central authority. *Cooley on Constitutional Limitations*, 143; *City of Patterson v. Society, etc.*, 24 N. J., 385; *Cheany v. Hooser*, 9 B. Mon., 330; *Berlin v. Gorham*, 34 N. H., 266.

Even so grave a matter as taxation has always, in the state of Georgia, even without special constitutional provision, been delegated to cities, towns and county organizations. *Brunswick v. Finney*, 54 Ga., 317; *Powers v. Dougherty Co.*, 23 Ga., 65. The rule applicable to the delegation of power by a legislature is laid down with great clearness in the case of the *Cincinnati, etc., R. Co. v. Clinton Co.*, 1 Ohio St., 77. The true distinction, therefore, is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.

The constitution of the state of Illinois, article 4, section 1, declares that "the legislative power should be vested in a general assembly, which shall consist of a senate and house of representatives," etc. Article 13, section 7, of the same constitution, declared that "the general assembly shall pass laws for the inspection of grain for the protection of producers, shippers and receivers of grain." The legislature of Illinois, with this constitutional provision in force, passed an act to establish a board of railroad and warehouse commissioners. This board was empowered to fix the rate of charges for the inspection of grain, and the manner in which the same should be collected, and to fix the amount of compensation to be paid the chief inspector and other officers, etc. It was objected that this was an unwarrantable delegation of legislative power. But the supreme court of that state held that the right to pass inspection laws

belonged to the police powers of the government, and the legislature had the authority to arrange the distribution of said powers as the public exigencies might require, apportioning them to local jurisdictions as the law-making power deemed appropriate, and committing the exercise of the residue to officers appointed as it might see fit to order, and that it was important for the general assembly to delegate to a commission the power to control the subject of the inspection of grain, and to prescribe what fees should be charged for the inspection of grain, and regulate them from time to time as circumstances might require.

The court says: "The principles repeatedly recognized by this and other courts of last resort, that the general assembly may authorize others to do things which it might properly yet cannot understandingly or advantageously do itself, seems to apply with peculiar force to the fixing of the amount of inspection fees so as to adjust them properly with reference to the expenses of inspection." See, also, *Police Commissioners v. Louisville*, 3 Bush, 597; *The People v. Shepperd*, 36 N. Y., 285; *The People v. Pinckney*, 32 N. Y., 377; *Bush v. Shipman*, 4 Scam., 186; *Trustees v. Tatman*, 13 Ill., 27; *County of Richland v. County of Lawrence*, 12 Ill., 1; *Commonwealth v. Duquet*, 2 Yates, 493. By the authority cited it is held that even if the power conferred on municipal corporations or special commissions be legislative or *quasi*-legislative, still it is within the discretion of the legislature to confer it. My conclusion upon this point is, therefore, that the act of October 19, 1879, is not unconstitutional by reason of a delegation to the railroad commissioners of legislative power.

§ 2151. *A legislative provision, declaring that the schedule of rates fixed by the railroad commissioners for transportation shall be held to be conclusive evidence of their reasonableness, does not deprive the corporation of any right of trial by jury.*

It is claimed that the law is unconstitutional, because, by declaring that the schedule of rates established by the commissioners shall be held and taken in all the courts as sufficient evidence that the rates therein fixed are just and reasonable, it deprives the railroad companies of their constitutional right to a trial by jury. In this provision the legislature has exercised the power exercised by all the legislatures, both federal and state, of prescribing the effect of evidence, and it has done nothing more. Even in criminal cases congress has declared that certain facts proven shall be evidence of guilt. For instance, in section 3082 of the United States Revised Statutes, it is provided that whenever, on an indictment for smuggling, the defendant is shown to be in possession of smuggled goods, "such possession shall be deemed evidence sufficient to authorize a conviction, unless the defendant shall explain the possession to the satisfaction of the jury." The statute books are full of such acts, but it has never been considered that this impairs the right of trial by jury.

§ 2152. *Valid part of statute upheld.*

But, even if this provision of the act under consideration were unconstitutional, it would not render inoperative the other sections of the statute, from which this provision can be easily removed, and yet leave the main object and purpose of the law unimpaired. *Packet Co. v. Keokuk*, 95 U. S., 80 (§§ 1420-23, *supra*).

§ 2153. *Regulation of railroad rates is not a taking of private property for public use.*

It is next insisted that the railroad commissioners' act is unconstitutional, be-

cause it violates that declaration of the bill of rights, paragraph 1, section 3, which declares "private property shall not be taken or damaged for public uses without just and adequate compensation being first paid." This clause is a regulation of the exercise of the state's right of eminent domain. An act attempting to fix just and reasonable rates of freight and fares upon the railroads of the state can hardly be considered as taking or damaging the property of the railroad for public use. The object of the law is to regulate the charges which the corporation may make in the use of its own property for its own purposes. It does not take it or damage it for public use. The act was passed because its passage was expressly enjoined by the constitution. It does not become obnoxious to the constitutional provision under consideration, and become a taking or damaging of private property for public use, because all the rates fixed are not just and reasonable, or because they are thought so by the railroad companies.

§ 2154. — *nor is it a denial of impartial justice, or a deprivation of property without due process of law.*

Again, the act under consideration is alleged to be unconstitutional because obnoxious to paragraph 11, section 1, article 1, of the constitution, which declares, "Protection to person and property is the paramount duty of the government, and shall be impartial and complete;" and of paragraph 3, section 1, article 1, which declares that "no person shall be deprived of life, liberty or property without due process of law." When it is remembered that these paragraphs are referred to a law, the only purpose of which is the performance by the legislature of its constitutional duty to prohibit unjust discriminations and unjust and unreasonable charges by the railroads of the state, it is difficult to see how they are pertinent to the matter. In *Munn v. Illinois*, 94 U. S., 113 (§§ 1349-67, *supra*), it was held that the limitation by legislative enactment of charge for services rendered in public employment, or for the use of property in which the public has an interest, does not deprive the owner of his property without due process of law. Neither can it be said that it is a denial of impartial and complete protection to property.

§ 2155. *A law regulating railroad rates is not lacking in uniformity because it does not prescribe the same rates for all roads.*

It is next insisted that the law is one of "a general nature," but that it does not have a uniform operation throughout the state, as required by paragraph 1, section 4, article 1, of the constitution of the state. The act assailed is an act affecting railroad companies only, and it is designed to have uniform operation on them throughout the state. Its purpose is to require all such companies in the state to charge just and reasonable rates, and to prohibit unjust discrimination by them. To give the law a uniform operation it is not necessary that it should prescribe the same rates for all the railroad companies. It might as well be claimed that the legislature, in framing an act to regulate toll-bridges, must prescribe the same rate of toll for every bridge in the state; otherwise the act would not have a uniform operation. The ingenuity of counsel has brought into the case these various paragraphs of the constitution in the hope that the railroad commissioners' act might be impaled on some one of them. I have considered them all. Most of them have but a very remote application to the law; some of them have already been considered by the supreme court of the United States in *Munn v. Illinois*, and *Peik v. Chicago*, etc., R'y Co., 94 U. S., *supra*, and decided to have no control over similar legislation.

§ 2156. *Courts have nothing to do with the injustice or hardship of a constitutional act.*

The act of the legislature, if constitutional, may be considered unwise or even oppressive; but even if it is the remedy is not with the court, but with the legislature. If the general assembly in its passage were acting within the scope of its constitutional power, no matter how cruel and unjust the law may be, the court cannot apply the remedy. There is nothing in the act complained of which indicates a disposition on the part of the legislature to oppress the railroad companies. It appears to be rather an attempt in good faith to discharge a duty imperatively demanded of the legislature by the state constitution. The complaint is not so much against the legislature as against the railroad commissioners. Their administration of the law is charged to be oppressive and unjust to the railroad company, in which the complainant is a stockholder. It is alleged that the schedule of rates fixed by the commissioners for said railroad is, if adhered to, destructive to the railroad property and ruinous to its creditors and stockholders. The evidence submitted upon this point by the complainant, consisting of the affidavits of Mr. Haines, the general manager of the defendant railroad company, and others on the one side, and the affidavit, and reports, and circulars of the railroad commissioners on the other, is very conflicting and irreconcilable. It is not so much a conflict as to the facts, as it is in matters of judgment and inferences from facts. One thing is made clear to my mind by the evidence. It is that there has been an honest and painstaking effort on the part of the commissioners to perform their duty under the law firmly and justly. The difference between the railroad commissioners and the officers of the Savannah, Florida & Western Railroad Company is an honest difference of judgment. The company put the present investment in its road at \$4,710,000, and claimed that a profit of ten per cent. per annum would be just and reasonable. The commissioners placed the value of the investment at \$4,000,000, and a just and reasonable profit thereon at eight per cent. The railroad company estimated its annual expenditure for maintaining and operating the road at \$700,000. The commissioners were of opinion that \$550,000 would suffice, with good management and proper economy. The officers of the railroad company declare that the rates fixed by the commission will so reduce its income that it will not suffice to pay the running expenses of the road and the interest on its bonded debt, leaving nothing for dividends to its stockholders. The railroad commissioners assert that their schedule was framed to produce eight per cent. income on the value of the road after paying cost of maintenance and running expenses. Which view is the correct one, it is impossible to decide from the evidence submitted. There is, however, a conclusive way, and it seems to me it is the only one, by which this controversy can be settled, and that is by experiment. A reduction of railroad charges is not always followed by a reduction of either gross or net income. It can soon be settled which is right — the railroad company's officers or the railroad commission — in their view of the effect of the commission's tariff of rates, by allowing the tariff to go into operation. If it turns out that the views of the railroad company are correct, and that the schedule fixed by the commission is too low to afford a fair return upon the value of the road, the remedy is plain; for the law makes it the duty of the commissioners "from time to time, and as often as circumstances may require, to change and revise said schedules."

This duty the commissioners stand ready to perform, as they testify by their

affidavit on file in this case. In short, they constitute a permanent tribunal, where the complaints of the railroad companies of any action of the commissioners can be made and heard, and any wrong suffered thereby corrected. In their affidavit on file the commissioners say that they "accompanied their action by circulars indicating their readiness to review their action upon the presentation of sufficient *data*. The commission may have erred in its judgment. There was room for honest error. There was a difference of view in the commission itself as to the proper percentage to be added on the standard tariff rates. But there was no intention to wrong any interest, nor to adhere to any error when shown to be such. . . . The circulars modifying rates on the showing of the railroads illustrates the desire of the commission to conform by closer and yet closer approximation to improved information."

The railroad company, after testing the results of the schedule of rates fixed by the commissioners, and finding it to be unjust and unreasonable, can apply to the commissioners for redress. If redress is denied them there, they can apply to the legislature for relief. Believing the law under which the commissioners are appointed to be within the constitutional power of the legislature, the redress must come either from the commissioners or the general assembly; it is not in the power of this court to give relief. As remarked by Mr. Justice Swayne, in *Gilman v. Philadelphia*, 3 Wall., 713 (§§ 1164-70, *supra*): "Many abuses may arise in the legislation of the states which are wholly beyond the reach of the government of the nation. The safeguard and remedy are to be found in the virtue and intelligence of the people. They can make and unmake constitutions and laws, and from that tribunal there is no appeal. If a state exercise unwisely the power here in question, the evil consequences will fall chiefly on her own citizens. They have more at stake than the citizens of any other state."

It has been the policy of Georgia, at least since January 1, 1863, to grant no charter which should not be subject to revision or appeal by the general assembly. Whether wise or unwise, this policy has been embodied in the constitution of 1877. It was clearly the purpose of the people, in the adoption of that revision of the organic law, to keep the charges of the railroad companies of the state within legislative control. They were not satisfied with the rules of the common law on this subject. The act of October 14, 1879, is but the practical expression of the will of the people of the state as embodied in their organic law. It is the exercise of a right which they have been careful to reserve, and subject to which the defendant company were allowed to exist as a corporation.

§ 2157. *The act of Georgia legislature of October 14, 1879, regulating railroad tariffs, is constitutional.*

My conclusion is that the act of the legislature of Georgia, approved October 14, 1879, entitled "An act to provide for the regulation of railroad freight and passenger tariffs in this state," etc., etc., is not in violation of either the constitution of the United States or of the state of Georgia; that under the constitution of Georgia power and authority is conferred on the legislature to pass laws to regulate freight and passenger tariffs on railroads, and require reasonable and just rates, and it is its duty to pass such laws, that it may prescribe such rates, either directly or through the intervention of a commission, and that the question whether the rates prescribed by the legislature, either directly or indirectly, are just and reasonable, is a question which, under the constitution, the legislature may determine for itself.

It results from these conclusions that the motion for injunction *pendente lite* must be denied, and the restraining order heretofore allowed must be dissolved; and it will be so ordered.

RAILROAD COMPANY v. RICHMOND.

(6 Otto, 521-529. 1877.)

ERROR to the Supreme Court of Appeals of Virginia.

STATEMENT OF FACTS.—The company was chartered with the privilege of building its road from some point within the corporation of Richmond, to be approved by the common council, etc. The point was selected by the company and approved by the common council, with a reservation of all powers not necessary to the company for constructing the railroad and connecting it with the depot, etc. In 1870 the city of Richmond was authorized by its amended charter to regulate railroads operating within its limits, and in 1873, after the main line of the railroad in question had been changed, and an effort had been made to sell the depot property to the city, the council forbade any locomotives to be run on Broad street, the locality in question, and the violation of this order was the cause of action in this case. Further facts appear in the opinion of the court. Judgment in favor of the city for the penalty.

Opinion by WAITE, C. J.

The questions for determination in this case are: 1. Does the municipal legislation complained of impair the vested rights of the company under its charter?

In answering this question, it becomes necessary to determine at the outset what the rights of the company, secured by its charter and affected by the ordinance in dispute, actually are. The right is granted the company to construct a railroad "from some point within the corporation of Richmond, to be approved by the common council." No definite point is fixed by the charter. That is left to the discretion of the company, subject only to the approval of the city. The power to approve certainly implies the power to reject one location and accept another; and this necessarily carries with it the further power to reserve such governmental control over the company in respect to the road, when built within the city to the point approved, as may seem to be necessary. The absolute grant of the charter is satisfied if the road is built within the city for any distance, by any route or to any point. The company, however, desired to pass through Broad street, and, for the present, to terminate the road upon the lots purchased for shops and warehouses, and requested the city to approve that location. This the city was willing to do, upon condition that it should not be considered as thereby parting with any power or chartered privilege not necessary to the company for constructing its road or connecting it with the depot. These terms were proposed to the company and accepted. At that time the city was invested with all the powers "necessary for the good ordering and government" of persons and property within its jurisdiction. By the conditions imposed, these powers were all reserved, except to the extent of permitting the company to construct its road upon the route designated, and connect it with the depot. All the usual and ordinary powers of city governments over the road when constructed, and over the company in respect to its use, were expressly retained. The company, therefore, occupied Broad street upon the same terms and conditions it would if the charter had located

the route of the road within the city, but, in terms, subjected the company to the government of the city in respect to the use of the road when constructed.

Nothing has been done since to change the rights of the parties. It is true that an attempt was made by the residents on Shockhoe Hill to induce the council to prohibit the use of locomotives within the city, and to require the company to so construct the road within Broad street as to facilitate the crossing of the track; but all parties seemed to be satisfied then with the proposition of the company to run its engines slowly and with care in the city, and its liberal contribution towards the expense of paving the street. There is nowhere in the proceedings an indication of a relinquishment by the city of its governmental control over the company or its property. The "compromise of interests" proposed related alone to the plan of the pavement.

§ 2158. *A city has a right, under its police power, to control or, if necessary, prohibit the use of locomotives on its streets, no vested rights intervening.*

It remains only to consider whether the ordinance complained of is a legitimate exercise of the power of a city government. It certainly comes within the express authority conferred by the amendment to the city charter adopted in 1870; and that, in our opinion, is no more than existed by implication before. The power to govern implies the power to ordain and establish suitable police regulations, and that, it has often been decided, authorizes municipal corporations to prohibit the use of locomotives in the public streets, when such action does not interfere with vested rights. *Donnager v. The State*, 8 Smedes & M. (Miss.), 649; *Whitson v. City of Franklin*, 34 Ind., 392. Such prohibitions clearly rest upon the maxim *sic utere tuo ut alienum non lædas*, which lies at the foundation of the police power; and it was not seriously contended upon the argument that they did not come within the legislative scope of municipal government in the absence of legislative restriction upon the powers of the municipality to that effect. It is not for us to determine in this case whether the power has been judiciously exercised. Our duty is at an end if we find that it exists. The judgment of the court below is final as to the reasonableness of the action of the council. We conclude, therefore, that the ordinance does not impair any vested right conferred upon the company by its charter.

§ 2159. *Regulation of the use of property is not taking it without due process.*

2. Does it deprive the company of its property without due process of law? This question is substantially disposed of by what has already been said, as the claim of the company is based entirely upon the assumption of a vested right, under its charter, to operate its road by steam, both within and without the city, which we have endeavored to show is not true. All property within the city is subject to the legitimate control of the government, unless protected by "contract rights," which is not the case here. Appropriate regulation of the use of property is not "taking" property, within the meaning of the constitutional prohibition.

§ 2160. *An ordinance regulating the operation of the railroad of one corporation, in a city where there are others, is not a denial of "equal protection of the laws."*

3. Does it deny the company the equal protection of the laws? This claim is that, as this company is alone named in the ordinance, the operation of the ordinance is special only, and, therefore, invalid. No other person or corporation has the right to run locomotives in Broad street. Consequently, no other person or corporation is, or can be, in like situation, except with the consent of the city. On this account, the ordinance, while apparently limited in its oper-

ation, is, in effect, general, as it applies to all who can do what is prohibited. Other railroad companies may occupy other streets and use locomotives there; but other streets may not be situated like Broad street; neither may there be the same reasons why steam transportation should be excluded from them. All laws should be general in their operation, but all places within the same city do not necessarily require the same local regulation. While locomotives may, with very great propriety, be excluded from one street, or even from one part of a street, it would be sometimes unreasonable to exclude them from all. It is the special duty of the city authorities to make the necessary discriminations in this particular.

On the whole, we see no error in the record, and the judgment is affirmed.

MR. JUSTICE STRONG dissented.

STONE v. MISSISSIPPI.

(11 Otto, 814-821. 1879.)

ERROR to the Supreme Court of Mississippi.

STATEMENT OF FACTS.—The legislature of Mississippi, in 1867, by an act incorporating the Mississippi Agricultural and Manufacturing Aid Society, authorized said society to maintain a lottery for twenty-five years. In 1868 the state adopted a constitution which forbade all lottery enterprises. In 1870 an act was passed to enforce the constitutional provision, and in 1874 information was filed against Stone and others, alleging a violation of the law.

§ 2161. *A charter of a private corporation is a contract.*

Opinion by WAITE, C. J.

It is now too late to contend that any contract which a state actually enters into when granting a charter to a private corporation is not within the protection of the clause in the constitution of the United States that prohibits states from passing laws impairing the obligation of contracts. Art. 1, sec. 10. The doctrines of *Dartmouth College v. Woodward*, 4 Wheat., 518 (§§ 2099-2117, *supra*), announced by this court more than sixty years ago, have become so imbedded in the jurisprudence of the United States as to make them, to all intents and purposes, a part of the constitution itself. In this connection, however, it is to be kept in mind that it is not the charter which is protected, but only any contract the charter may contain. If there is no contract, there is nothing in the grant on which the constitution can act. Consequently, the first inquiry in this class of cases always is whether a contract has in fact been entered into, and if so, what its obligations are.

§ 2162. *The legislature of a state cannot bargain away its police power.*

In the present case the question is whether the state of Mississippi, in its sovereign capacity, did by the charter now under consideration bind itself irrevocably by a contract to permit "the Mississippi Agricultural, Educational and Manufacturing Aid Society," for twenty-five years, "to receive subscriptions and sell and dispose of certificates of subscription which shall entitle the holders thereof to" "any lands, books, paintings, antiques, scientific instruments or apparatus, or any other property or thing that may be ornamental, valuable or useful," "awarded to them" "by the casting of lots, or by lot, chance or otherwise." There can be no dispute but that under this form of words the legislature of the state chartered a lottery company, having all the powers incident to such a corporation for twenty-five years, and that in con-

sideration thereof the company paid into the state treasury \$5,000 for the use of a university, and agreed to pay, and until the commencement of this suit did pay, an annual tax of \$1,000 and "one-half of one per cent. on the amount of receipts derived from the sale of certificates or tickets." If the legislature that granted this charter had the power to bind the people of the state and all succeeding legislatures to allow the corporation to continue its corporate business during the whole term of its authorized existence, there is no doubt about the sufficiency of the language employed to effect that object, although there was an evident purpose to conceal the vice of the transaction by the phrases that were used. Whether the alleged contract exists, therefore, or not, depends on the authority of the legislature to bind the state and the people of the state in that way.

All agree that the legislature cannot bargain away the police power of a state. "Irrevocable grants of property and franchises may be made if they do not impair the supreme authority to make laws for the right government of the state; but no legislature can curtail the power of its successors to make such laws as they may deem proper in matters of police." *Metropolitan Board of Excise v. Barrie*, 34 N. Y., 657; *Boyd v. Alabama*, 94 U. S., 645. Many attempts have been made in this court and elsewhere to define the police power, but never with entire success. It is always easier to determine whether a particular case comes within the general scope of the power, than to give an abstract definition of the power itself which will be in all respects accurate. No one denies, however, that it extends to all matters affecting the public health or the public morals. *Beer Co. v. Massachusetts*, 97 id., 25 (§§ 2165-69, *infra*); *Patterson v. Kentucky*, id., 501. Neither can it be denied that lotteries are proper subjects for the exercise of this power. We are aware that formerly, when the sources of public revenue were fewer than now, they were used in some or all of the states, and even in the District of Columbia, to raise money for the erection of public buildings, making public improvements, and not unfrequently for educational and religious purposes; but this court said, more than thirty years ago, speaking through Mr. Justice Grier, in *Phalen v. Virginia*, 8 How., 163, 168 (§§ 1852-53, *supra*), that "experience has shown that the common forms of gambling are comparatively innocuous when placed in contrast with the wide-spread pestilence of lotteries. The former are confined to a few persons and places, but the latter infests the whole community; it enters every dwelling; it reaches every class; it preys upon the hard earnings of the poor; and it plunders the ignorant and simple." Happily, under the influence of restrictive legislation, the evils are not so apparent now; but we very much fear that with the same opportunities of indulgence the same results would be manifested.

If lotteries are to be tolerated at all, it is no doubt better that they should be regulated by law, so that the people may be protected as far as possible against the inherent vices of the system; but that they are demoralizing in their effects, no matter how carefully regulated, cannot admit of a doubt. When the government is untrammelled by any claim of vested rights or chartered privileges, no one has ever supposed that lotteries could not lawfully be suppressed, and those who manage them punished severely as violators of the rules of social morality. From 1822 to 1867, without any constitutional requirement, they were prohibited by law in Mississippi, and those who conducted them punished as a kind of gamblers. During the provisional government of that state, in 1867, at the close of the late civil war, the present act of incorporation, with more

of like character, was passed. The next year, 1868, the people in adopting a new constitution, with a view to the resumption of their political rights as one of the United States, provided that "the legislature shall never authorize any lottery, nor shall the sale of lottery tickets be allowed, nor shall any lottery heretofore authorized be permitted to be drawn, or tickets therein to be sold." Art. 12, sec. 15. There is now scarcely a state in the Union where lotteries are tolerated, and congress has enacted a special statute, the object of which is to close the mails against them. R. S., sec. 3894; 19 Stat., 90, sec. 2.

The question is, therefore, directly presented whether, in view of these facts, the legislature of a state can, by the charter of a lottery company, defeat the will of the people, authoritatively expressed, in relation to the further continuance of such business in their midst. We think it cannot. No legislature can bargain away the public health or the public morals. The people themselves cannot do it, much less their servants. The supervision of both these subjects of governmental power is continuing in its nature, and they are to be dealt with as the special exigencies of the moment may require. Government is organized with a view to their preservation, and cannot divest itself of the power to provide for them. For this purpose the largest legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself. *Beer Co. v. Massachusetts, supra.*

§ 2163. *The constitution of the United States in the contract clause does not interfere with the control over civil institutions of a state.*

In *Dartmouth College v. Woodward*, 4 Wheat., 518 (§§ 2099-2117, *supra*), it was argued that the contract clause of the constitution, if given the effect contended for in respect to corporate franchises, "would be an unprofitable and vexatious interference with the internal concerns of a state, would unnecessarily and unwisely embarrass its legislation, and render immutable those civil institutions which are established for the purpose of internal government, and which, to subserve those purposes, ought to vary with varying circumstances" (p. 628); but Mr. Chief Justice Marshall, when he announced the opinion of the court, was careful to say (p. 629), "that the framers of the constitution did not intend to restrain states in the regulation of their civil institutions, adopted for internal government, and that the instrument they have given us is not to be so construed." The present case, we think, comes within this limitation. We have held, not, however, without strong opposition at times, that this clause protected a corporation in its charter exemptions from taxation. While taxation is in general necessary for the support of government, it is not part of the government itself. Government was not organized for the purposes of taxation, but taxation may be necessary for the purposes of government. As such, taxation becomes an incident to the exercise of the legitimate functions of government, but nothing more. No government dependent on taxation for support can bargain away its whole power of taxation, for that would be substantially abdication. All that has been determined thus far is, that for a consideration it may, in the exercise of a reasonable discretion, and for the public good, surrender a part of its powers in this particular.

But the power of governing is a trust committed by the people to the government, no part of which can be granted away. The people, in their sovereign capacity, have established their agencies for the preservation of the public health and the public morals, and the protection of public and private rights. These several agencies can govern according to their discretion, if within the scope of their general authority, while in power; but they cannot give away

nor sell the discretion of those that are to come after them, in respect to matters, the government of which, from the very nature of things, must "vary with varying circumstances." They may create corporations, and give them, so to speak, a limited citizenship; but as citizens, limited in their privileges, or otherwise, these creatures of the government creation are subject to such rules and regulations as may from time to time be ordained and established for the preservation of health and morality.

§ 2164. *The charter of a lottery company is a mere license, revocable at the will of the legislature.*

The contracts which the constitution protects are those that relate to property rights, not governmental. It is not always easy to tell on which side of the line which separates governmental from property rights a particular case is to be put; but in respect to lotteries there can be no difficulty. They are not, in the legal acceptance of the term, *mala in se*, but, as we have just seen, may properly be made *mala prohibita*. They are a species of gambling, and wrong in their influences. They disturb the checks and balances of a well-ordered community. Society built on such a foundation would almost of necessity bring forth a population of speculators and gamblers, living on the expectation of what, "by the casting of lots, or by lot, chance or otherwise," might be "awarded" to them from the accumulations of others. Certainly, the right to suppress them is governmental, to be exercised at all times by those in power, at their discretion. Any one, therefore, who accepts a lottery charter, does so with the implied understanding that the people, in their sovereign capacity, and through their properly constituted agencies, may resume it at any time when the public good shall require, whether it be paid for or not. All that one can get by such a charter is a suspension of certain governmental rights in his favor, subject to withdrawal at will. He has in legal effect nothing more than a license to enjoy the privilege on the terms named for the specified time, unless it be sooner abrogated by the sovereign power of the state. It is a permit, good as against existing laws, but subject to future legislative and constitutional control or withdrawal. On the whole, we find no error in the record.

Judgment affirmed.

BEER COMPANY v. MASSACHUSETTS.

(7 Otto, 25-34. 1877.)

ERROR to the Superior Court of Massachusetts.

STATEMENT OF FACTS.—Proceeding to forfeit certain malt liquors of the Boston Beer Company, pursuant to the provisions of the prohibitory liquor law of 1869. The provisions of the laws under which the company claimed the right to manufacture and sell liquors are stated in the opinion.

Opinion by MR. JUSTICE BRADLEY.

The question raised in this case is, whether the charter of the plaintiff, which was granted in 1828, contains any contract the obligation of which was impaired by the prohibitory liquor law of Massachusetts, passed in 1869, as applied to the liquor in question in this suit.

§ 2165. *When the highest court of a state decides that a law does not impair the obligation of a contract, this court has jurisdiction.*

Some question is made by the defendant in error whether the point was properly raised in the state courts, so as to be the subject of decision by the highest

court of the state. It is contended that, although it was raised by plea, in the municipal court, yet, that plea being demurred to, and the demurrer being sustained, the defense was abandoned, and the only issue on which the parties went to trial was the general denial of the truth of the complaint. But whatever may be the correct course of proceeding in the practice of courts of Massachusetts—a matter which it is not our province to investigate—it is apparent from the record that the very point now sought to be argued was made on the trial of the cause in the superior court, and was passed upon and made decisive of the controversy, and was afterwards carried by bill of exceptions to the supreme judicial court, and was decided there adverse to the plaintiff in error on the very ground on which it seeks a reversal.

The supreme court, in its rescript, expressly decides as follows: "Exceptions overruled for the reasons following: The act of 1869, ch. 415, does not impair the obligations of the contract contained in the charter of the claimant, so far as it relates to the sale of malt liquors, but is binding on the claimant to the same extent as on individuals. The act is in the nature of a police regulation in regard to the sale of a certain article of property, and is applicable to the sale of such property by individuals and corporations, even where the charter of the corporation cannot be altered or repealed by the legislature."

The judgment of the superior criminal court was entered in conformity to this rescript, declaring the liquors forfeited to the commonwealth, and that a warrant issue for the disposal of the same. This is sufficient for our jurisdiction, and we are bound to consider the question which is thus raised.

As before stated, the charter of the plaintiff in error was granted in 1828, by an act of the legislature passed on the 1st of February in that year, entitled "An act to incorporate the Boston Beer Company." This act consisted of two sections. By the first, it was enacted that certain persons (named), their successors and assigns, "be, and they hereby are, made a corporation, by the name of The Boston Beer Company, for the purpose of manufacturing malt liquors in all their varieties, in the city of Boston, and for that purpose shall have all the powers and privileges, and be subject to all the duties and requirements, contained in an act passed on the 3d day of March, A. D. 1809, entitled 'An act defining the general powers and duties of manufacturing corporations,' and the several acts in addition thereto." The second section gave the company power to hold such real and personal property, to certain amounts, as might be found necessary and convenient for carrying on the manufacture of malt liquors in the city of Boston.

§ 2166. *A charter is a contract; but if in it is a reservation to the state of a right to repeal or amend, that also is a part of the contract.*

The general manufacturing act of 1809, referred to in the charter, had this clause, as a proviso of the seventh section thereof: "*Provided, always,* that the legislature may from time to time, upon due notice to any corporation, make further provisions and regulations for the management of the business of the corporation and for the government thereof, or wholly to repeal any act or part thereof, establishing any corporation, as shall be deemed expedient." A substitute for this act was passed in 1829, which repealed the act of 1809 and all acts in addition thereto, with this qualification: "But this repeal shall not affect the existing rights of any person, or the existing or future liabilities of any corporation, or any members of any corporation now established, until such corporation shall have adopted this act, and complied with the provisions herein

contained." It thus appears that the charter of the company, by adopting the provisions of the act of 1809, became subject to a reserved power of the legislature to make further provisions and regulations for the management of the business of the corporation and for the government thereof, or wholly to repeal the act, or any part thereof, establishing the corporation. This reservation of the power was a part of the contract.

But it is contended by the company that the repeal of the act of 1809 by the act of 1829 was a revocation or surrender of this reserved power. We cannot so regard it. The charter of the company adopted the provisions of the act of 1809 as a portion of itself; and those provisions remained a part of the charter, notwithstanding the subsequent repeal of the act. The act of 1829 reserved a similar power to amend or repeal that act, at the pleasure of the legislature, and declared that all corporations established under it should cease and expire at the same time when the act should be repealed. It can hardly be supposed that the legislature, when it reserved such plenary powers over the corporations to be organized under the new act, intended to relinquish all its powers over the corporations organized under or subject to the provisions of the former act. The qualification of the repeal of the act of 1809, before referred to, seems to be intended not only to continue the existence of the corporations subject to it in the enjoyment of all their privileges, but subject to all their liabilities, of which the reserved legislative control was one. If this view is correct, the legislature of Massachusetts had reserved complete power to pass any law it saw fit, which might affect the powers of the plaintiff in error.

§ 2167. *All rights by charter or otherwise granted are subject to the police powers of the state, when exercised on behalf of the public health or morals.*

But there is another question in the case, which, as it seems to us, is equally decisive. The plaintiff in error was incorporated "for the purpose of manufacturing malt liquors in all their varieties," it is true; and the right to manufacture, undoubtedly, as the plaintiff's counsel contends, included the incidental right to dispose of the liquors manufactured. But although this right or capacity was thus granted in the most unqualified form, it cannot be construed as conferring any greater or more sacred right than any citizen had to manufacture malt liquor; nor as exempting the corporation from any control therein to which a citizen would be subject, if the interests of the community should require it. If the public safety or the public morals require the discontinuance of any manufacture or traffic, the hand of the legislature cannot be stayed from providing for its discontinuance, by any incidental inconvenience which individuals or corporations may suffer. All rights are held subject to the police power of the state.

§ 2168. *The burden lies upon the party asserting an act in his favor to show that its repeal affects vested rights.*

We do not mean to say that property actually in existence, and in which the right of the owner has become vested, may be taken for the public good without due compensation. But we infer that the liquor in this case, as in the case of *Bartemeyer v. Iowa*, 18 Wall., 129 (§§ 802-805, *supra*), was not in existence when the liquor law of Massachusetts was passed. Had the plaintiff in error relied on the existence of the property prior to the law, it behooved it to show that fact. But no such fact is shown, and no such point is taken. The plaintiff in error boldly takes the ground that, being a corporation, it has a right, by contract, to manufacture and sell beer forever, notwithstanding and in spite of any exigencies which may occur in the morals or the health of the community,

requiring such manufacture to cease. We do not so understand the rights of the plaintiff. The legislature had no power to confer any such rights.

§ 2169. *As a measure of police regulation a prohibitory liquor law is not repugnant to the constitution of the United States.*

Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health and property of the citizens, and to the preservation of good order and the public morals. The legislature cannot, by any contract, divest itself of the power to provide for these objects. They belong emphatically to that class of objects which demand the application of the maxim, *salus populi suprema lex*; and they are to be attained and provided for by such appropriate means as the legislative discretion may devise. That discretion can no more be bargained away than the power itself. *Boyd v. Alabama*, 94 U. S., 645.

Since we have already held, in the case of *Bartemeyer v. Iowa*, that as a measure of police regulation looking to the preservation of public morals, a state law prohibiting the manufacture and sale of intoxicating liquors is not repugnant to any clause of the constitution of the United States, we see nothing in the present case that can afford any sufficient ground for disturbing the decision of the supreme court of Massachusetts. Of course, we do not mean to lay down any rule at variance with what this court has decided with regard to the paramount authority of the constitution and laws of the United States, relating to the regulation of commerce with foreign nations and among the several states, or otherwise. *Brown v. State of Maryland*, 12 Wheat., 419 (§§ 1466-70, *supra*); *License Cases*, 5 How., 504 (§§ 1481-1518, *supra*); *Passenger Cases*, 7 id., 283 (§§ 1284-1335, *supra*); *Henderson v. Mayor of New York*, 92 U. S., 259 (§§ 1336-42, *supra*); *Chy Lung v. Freeman*, id., 275 (§§ 1343-44, *supra*); *Railroad Co. v. Husen*, 95 id., 465 (§§ 1062-65, *supra*). That question does not arise in this case.

Judgment affirmed.

HOLYOKE COMPANY v. LYMAN.

(15 Wallace, 500-528. 1872.)

ERROR to the Supreme Judicial Court of Massachusetts.

§ 2170. *Water privileges and rights of fishery discussed.*

Opinion by MR. JUSTICE CLIFFORD.

Rivers, though not navigable even for boats or rafts, and even smaller streams of water, may be and often are regarded as public rights, subject to legislative control, as the means for creating power for operating mills and machinery, or as the source for furnishing a valuable supply of fish, suitable for food and sustenance. Such water-power is everywhere regarded as a public right, and fisheries of the kind, even in waters not navigable, are also so far public rights that the legislature of the state may ordain and establish regulations to prevent obstructions to the passage of the fish, and to promote the usual and uninterrupted enjoyment of the right by the riparian owners. Proprietors of the kind, if they own both banks of the water-course and the whole soil over which the water of the stream flows, may erect dams extending from bank to bank to create power to operate mills and machinery, subject to certain limitations and conditions, and may also claim the exclusive right of fishery within their terri-

torial limits, subject to such regulations as the legislature may, from time to time, ordain and establish. Persons owning the whole of the soil constituting the bed and banks of the stream are entitled to the whole use and profits of the water opposite their land, whether the water is used as power to operate mills and machinery or as a fishery, subject to the implied condition that they shall so use their own right as not to injure the concomitant right of another riparian owner, and to such regulations as the legislature of the state shall prescribe. Where such a proprietor owns the land on one side only of the stream, his right to the land and to the use of the water, whether used as power to operate mills and machinery, or merely as a fishery, extends only to the middle thread of the stream, as at common law, and is subject to the same conditions and regulations as when the ownership includes the whole soil over which the water of the stream flows. Authority to erect dams across such streams for mill purposes results from the ownership of the bed and the banks of the stream, or the right to construct the same may be acquired by legislative grant, in cases where the legislature is of the opinion that the benefit to the public will be of sufficient importance to render it expedient for them to exercise the right of eminent domain, and to authorize such an interference with private rights for that purpose. Lands belonging to individuals have often been condemned for such purposes in the exercise of the right of eminent domain, in cases where, from the nature of the country, mill-sites sufficient in number could not otherwise be obtained, and that right is even more frequently exercised to enable mill-owners to flow the water back beyond their own limits, in order to create sufficient power or head and fall to operate their mills. Concomitant with the authority to erect such dams for such purposes over the beds of water-courses, as resulting from the title to the banks and bed of the stream, is also the exclusive right of fishery, which also has its source in the same ownership of the soil, and the better opinion is that it is not divested or extinguished by any legislative act condemning the land to the use of another for mill purposes, unless the words of the grant conferring the authority to construct the dam plainly indicate that such was the intention of the legislature. Water rights of the kind, whether the streams are used for mill purposes or merely as fisheries, are justly entitled to public protection, as they are in many cases of great value to the community where they exist; but they are the source of many conflicting interests, which the state legislatures as well as the courts have found it difficult to adjust, as appears from the countless efforts which have been made in that behalf without complete success.

STATEMENT OF FACTS.—Certain persons, their associates and successors, on the 28th of April, 1848, were incorporated by the name of the Hadley Falls Company, for the purpose of constructing a dam across the Connecticut river, and one or more locks and canals, in connection with the said dam, to create a water-power to be used for manufacturing and mechanical purposes, and also for the purpose of navigation, with all the powers and privileges, and subject to all the duties, liabilities and restrictions, set forth in the thirty-eighth and forty-fourth chapters of the Revised Statutes of the state. 8 Special Laws, 949; R. S., 328-366. Power and authority are given to said corporation to construct and maintain a dam across said river at South Hadley, at any point between the present dam of the proprietors of the locks and canals, and the lower locks of the said proprietors, of a height sufficient to raise the water to a point not exceeding the present level of the water above the dam of the said proprietors; and the farther provision is that the corporation shall pay such

damages to the owners of the present fish rights above the dam to be erected as shall be awarded by the county commissioner. Pursuant to the act of incorporation, the stockholders accepted the charter, constructed the dam, paid certain damages to the owners of fish rights above the dam as constructed, and expended, as the respondents allege, more than \$2,000,000, including the cost of the dam and the damages paid to parties adversely interested, in constructing their improvements, and failed in business. New parties acquired the title to the dam and the other improvements, and on the 31st of January, 1859, the respondents in this case, as such new proprietors, their associates and successors, were incorporated by the name of the Holyoke Water-power Company, and they were empowered to uphold and maintain the dam and other improvements constructed by the prior company, and to erect and maintain a water-power to be used for the same purposes as those described in the prior charter, with the same powers and privileges, and subject to the same liabilities and restrictions. Private Acts, 1859, 225. Special power was conferred upon the governor, by and with the advice and consent of the council, by the act of the 15th of May, 1866, to appoint commissioners of fisheries in the said river and one other river, to hold their offices for five years unless sooner removed, and it was made their duty by the same act forthwith to examine the several dams on said rivers in said state, and, after notice to the owners of the dams, to determine and define the mode and plan by which fishways shall be constructed, suitable and sufficient to secure the free passage of salmon and shad up said rivers during their accustomed seasons. Said commissioners are also authorized to agree with the proprietors of such dams to construct at their own expense said fishways according to the plans adopted, if the proprietors consent so to do, and if they fulfil the agreement, and the fact is duly certified to the secretary of state, the provision is that the same, for the period of five years, shall be taken and deemed as in lieu of the fishways which such a proprietor is now required by law to keep and maintain for that purpose. Unless the proprietor of such a dam shall agree with the commissioners within thirty days from the time he is so furnished with the plan to build such fishway in the manner prescribed, the commissioners are authorized to construct the same in behalf of the state, and in that event the provision is that the expense shall be a charge against the owner of such dam, and the same may be recovered of the proprietor in an action of contract in the name of the state, or the commissioners may enforce the construction of such a fishway, by a bill in equity, to compel a specific performance. Sessions Acts, 1866, 231; id., 1867, 741; id., 1869, 677-741. Due notice having been given by the complainants, as such commissioners, to the respondents as the owners of said dam, of their intention to examine the dam pursuant to the provisions of the aforesaid acts of the legislature, they proceeded to perform that duty, and determined and defined the mode and plan in which the fishway should be constructed therein, suitable and sufficient to secure the free passage of salmon and shad over the dam and up the river during their accustomed seasons. They also furnished the respondents with the plan and specifications of such fishway, and filed a copy of the same in the office of the secretary of state, and requested the respondents to construct such a fishway or to agree with them as such commissioners to comply with that requirement; but it appears that the respondents refused and neglected so to do, insisting that the state had no power or right to require them to build such a fishway. Entirely different views were entertained by the complainants, and they instituted the present suit to compel the corporation respondents to

comply with that requirement, and the state court entered a decree for the complainants. *Commissioners on Inland Fisheries v. Holyoke Water-power Co.*, 104 Mass., 451; *Weston v. Sampson*, 8 Cush., 347. Dissatisfied with that decree the respondents sued out the present writ of error and removed the cause into this court.

Ample power was vested in the first company to hold real estate, not exceeding \$500,000 in value, but their act of incorporation did not give the company any authority to condemn the real estate of another to any extent or for any purpose. They were required to "pay such damages to the owners of present fish rights existing above the dam" as should be awarded by the county commissioners of the counties in which said rights existed, and they might at any time apply to said commissioners to proceed, ascertain and determine the damages to said fish rights, subject, however, to an appeal to a jury from such assessment, as in cases of assessment of damages for land taken for highways. Damages for injuries to fish rights above the dam were to be ascertained and assessed, but no authority was conferred to condemn the land of another for the site of the dam or for any other purpose, nor was any provision made to ascertain and assess the damages to fish rights below the dam, nor does either charter contain a provision exempting the builders and owners of the dam from the obligation to construct suitable and sufficient fishways for the free passage of fish up the river during their accustomed seasons. None of these propositions are controverted, but the respondents insist that the acts of the legislature under which they have been required to make the fishways in question, impair the obligation of the contract contained in the charter incorporating their grantors, and that those acts are inoperative and void as contravening the article of the constitution which prohibits the states from passing any law impairing the obligation of contracts.

§ 2171. *Charters are executed contracts, but are to be construed strictly against the corporation and in favor of the public, and nothing passes but what is granted in clear and explicit terms.*

Such a charter, when accepted by the corporators, is undoubtedly a contract that the powers, privileges and franchises granted shall not be restrained, controlled or destroyed without their consent, unless a power for that purpose is reserved to the legislature in the act of incorporation or in some prior general law in operation at the time the act of incorporation was passed. *Dartmouth College v. Woodward*, 4 Wheat., 709-712 (§§ 2099-2117, *supra*); *Wales v. Stetson*, 2 Mass., 146. Private charters of the kind are held to be contracts, because they are based for their consideration on the liabilities and duties which the incorporators assume by accepting the terms therein specified, and the general rule is that the grant of the franchise on that account can no more be resumed by the legislature, or its benefits diminished or impaired, without the assent of the corporators, than any other grant of property or legal estate, unless the right to do so is reserved in the act of incorporation or by some immemorial usage or general law of the state, which was in operation at the time the charter was granted. *Pennsylvania College Cases*, 13 Wall., 213 (§§ 2118-26, *supra*). Charters of private corporations, duly accepted, it must be admitted, are executed contracts, but the different provisions, unless they are clear, unambiguous and free of doubt, are subject to construction, and their true intent and meaning must be ascertained by the same rules of interpretation as other legislative grants. Repeated decisions of this court have established the rule that whenever privileges are granted to a corporation, and the grant comes

under revision in the courts, such privileges are to be strictly construed against the corporation and in favor of the public, and that nothing passes but what is granted in clear and explicit terms. *Rice v. Railroad Co.*, 1 Black, 380; *Charles River Bridge v. Warren Bridge*, 11 Pet., 544 (§§ 2058-82, *supra*). Whatever is not unequivocally granted in such acts is taken to have been withheld, as all acts of incorporation and acts extending the privileges of corporate bodies are to be taken most strongly against the corporations. *Sedgwick on Stat. and Const. Law*, 339; *Lees v. Canal Co.*, 11 East, 652.

§ 2172. *Right of fishery and right to use water.*

Evidently the right of fishery, as well as the right to use the water of a stream for mill purposes, is the subject of private ownership, and when held by a good title the one as much as the other is a vested right, and both alike are entitled to public protection, and are subject, in a certain sense, to legislative regulation and control. Difficulties in every case attend the proper adjustment of such rights, as the complete enjoyment of the one may interfere with the corresponding enjoyment of the other; but the presumption is, in construing any regulation upon the subject, that the framers of the regulation did not intend to allow either party to disregard the rule that he should so use his own property as not to injure the property of the owner of the other right.

Ownership of the banks and bed of the stream, as before remarked, gives to the proprietor the exclusive right of fishery opposite his land, as well as the right to use the water to create power to operate mills, but neither the one nor the other right, nor both combined, confer any right to erect obstructions in the river to prevent the free passage of the fish up and down the river at their accustomed seasons, as such obstructions would impair and ultimately destroy all such rights owned by other proprietors both above and below the obstruction on the same stream. Authoritative support to these views is found in the judicial decisions and legislative enactments of the state throughout her history, commencing even before the Revolution, and continued in an unbroken series to the present time. *Commonwealth v. Chapin*, 5 Pick., 204.

§ 2173. *Regulation of the right of fishery.*

Undoubtedly each proprietor of the land adjoining such a river or stream has in that state a several or exclusive right of fishery in the river immediately before his land, to the middle of the river, and may prevent all others from participating in it, and will have a right of action against any who shall usurp the exercise of it without his consent, but the Provincial Statute of 8 Anne, c. 3 (A. D. 1709), 1 Provincial Law, 162, prohibited all persons, "without approbation or allowance," from placing in or across rivers or streams any weir, hedge or other incumbrance to obstruct the free passage of fish in the proper seasons of the year. Persons who erect or build a dam across any river or stream where the salmon, shad, alewives or other fish usually pass up into the natural ponds to cast their spawn, were required by the Provincial Statute of 15 George II., c. 6 (A. D. 1741), to make a sufficient passageway for the fish to pass up such river or stream, and the owners of dams, so constructed that such fish could not conveniently pass up the river or stream, were required to make such a passageway and keep it open for a certain period in each year, as therein prescribed. *Id.*, 297; *id.*, 17 Geo. II. (A. D. 1743), 313; *id.*, 19 Geo. II. (A. D. 1745), 321. Laws of the kind, requiring the owners of dams across the rivers and streams of the state to build fishways and keep them in repair, have been passed, in numerous instances, since the state constitution was adopted, many of which are still in full force. Such laws usually require the owners of the dam

to build the fishway at their own expense, and subject their doings in that behalf to the approval of some supervisory board or committee. 2 Laws of Massachusetts, Appendix, 1020-1026. Reference was made at the argument to some thirty-five or forty statutes of the kind, passed at different periods, commencing the year the constitution of the state was adopted (1780) and coming down to the present time, covering a period of more than ninety years. *Vinton v. Welsh*, 9 Pick., 90; *Angell on Waters* (6th ed.), 72; *Washburn on Easements* (2d ed.), 501; *Peables v. Hannaford*, 18 Me., 106; *Parker v. Mill Dam Co.*, 20 id., 353.

Statutes also encouraging mills by authorizing their owners or occupants to overflow the lands of other persons, by paying such damages as may be assessed in the mode prescribed, are also of very ancient origin, and have received the sanction of the courts of the state throughout the whole period of her history. 1 Provincial Statutes, 12 Anne, c. 1 (A. D. 1709), 160; id., 12 Anne, c. 8 (A. D. 1714), 181; Ancient Charter, 388-404; 2 Laws of Massachusetts, 729; Revised Statutes (1836), 676; *Angell on Waters* (6th ed.), 664; *Washburn on Easements*, 332; *Murdock v. Stickney*, 8 Cush., 119.

Public rights, in all jurisdictions, are subject to legislative control, and it is settled law in Massachusetts, and has been for a century and a half, including her colonial history, that the right of fishery in such rivers as the Connecticut and Merrimac, even above the point where they are navigable for boats or rafts, and the right to erect and maintain dams to create water-power for mill purposes, are public rights, and that the owners of such rights are bound by such reasonable regulations as the state may make and ordain for their protection and enjoyment.

All persons, say the supreme court of that state, in the case of *Stoughton v. Baker*, 4 Mass., 528, who may build a dam for mill purposes, on a stream annually frequented by fish, do it under an implied obligation to keep open sufficient sluices and fishways for the passage of fish at the proper seasons, and that the grant of the right to erect a dam, if made by the legislature, is to be construed to be under the same implied condition to keep open the fishways, unless such implication is excluded by an express provision exempting the grantees from such an obligation. By the statement of facts in that case it appears that the defendants' dam was an ancient dam; that they deraigned their title from the original proprietor, who acquired his right thereto in 1633 by a grant from the town within whose limits the mill-site was then situated; that the grant included the mill privilege and a weir adjoining the mill, and the exclusive right of fishery; that the grant was subsequently confirmed by the legislature, and that no fishway was ever made through the dam until the year 1789, when one was constructed at the expense of third parties, pursuant to a resolution passed by the legislature of the state; that on the 15th of March, 1805, the legislature appointed a committee to examine the dams on that river and to order such alterations to be made in the fishways as in their opinion would be sufficient for the convenient passage of the fish at said dam. Three-fourths of the expenses were to be borne by the owners of the dams and one-fourth by the towns interested in the fisheries. Suitable fishways were accordingly constructed, and the towns, having paid the whole expense, instituted a suit to recover one-fourth of the expense of the owners of the dam. Able counsel appeared on both sides, and the opinion of the court was delivered by Chief Justice Parsons, all of the other justices concurring. Based on these facts it was contended for the defendants that the original grant was a bar to

the claim, but the court, conceding that the grant as confirmed amounted to a franchise of a several fishery, nevertheless held that the franchise could not be construed to include the right of excluding all fish from passing above the weir, the court giving as a reason for the conclusion that the value of a fishery in such a stream depends upon the shoals of fish that enter the river and pass to the ponds above to cast their spawn, adding that if none were allowed to pass, the public would lose their supply, and that the fishery would become of little or no value. Evidence was introduced tending to show that the franchise of the exclusive fishery was lost by non-user, but the court held that the said franchise, if it was not lost, would be no objection to the right of the public to have a convenient passageway for the fish to ascend the river to the ponds. They also held that the original proprietor took a fee in the mill-privilege, and that he had the right to erect the dam to raise water sufficient to operate his mill, but that the right to build a dam for the use of a mill was subject to the following limitations: (1) That the proprietor must make compensation to the owners of the lands above the dam for damages occasioned by overflowing their lands. (2) That he must so construct the dam that the fish will not be interrupted in their passage up the river to cast their spawn, adding that every owner of a water mill or dam holds it on the condition that a sufficient and reasonable passageway shall be allowed for the fish. *Burnham v. Webster*, 5 Mass., 266; *Nickerson v. Brackett*, 10 id., 212; *Commonwealth v. McCurdy*, 5 id., 324; *Cottrill v. Myrick*, 12 Me., 229.

Substantially the same questions were presented to the supreme court of the state in the case of *Vinton v. Welsh*, 9 Pick., 92, in which the opinion of the court was delivered by Chief Justice Parker, and the decision was in the same way and to the same effect. He decided that the owners of dams across such rivers, as well as the owners of such fisheries, hold their property subject to such regulations as the legislature from time to time shall prescribe for the preservation of the fish, basing his conclusion chiefly upon the fact that the colonial and provincial governments, as well as the government of the state under the state constitution, had exercised the right of prescribing such regulations from the first settlement of the country to the date of the decision in that case. *Commonwealth v. Chapin*, 5 Pick., 204.

Litigations upon the subject ceased for a time, but the same questions thirty years later were again presented to the supreme court of the state in the case of *Commonwealth v. Essex Co.*, 13 Gray, 248, in which the opinion of the court was delivered by Chief Justice Shaw, as the organ of the whole court. Special reference is made in that opinion to the prior decisions of the court upon that subject, and all the leading cases here referred to are approved and the propositions decided are reaffirmed, the court announcing the following conclusions: That from the earliest times the right of the public to the passage of fish in rivers and the private rights of riparian proprietors, incident to and dependent on the public right, have been subject to the regulation of the legislature; that the mode adopted by the legislature, whether by public or private acts, to secure and preserve such rights, has been by requiring, in the erection of dams, such sluices and fishways as would enable these migratory fish, according to their known habits and instincts, to pass from the lower to the higher level of the water occasioned by such dam, so that, although their passage might be somewhat impeded, it would not be thereby essentially obstructed. It appears in that case that the company was duly incorporated with

power to construct a dam across the Merrimac river at Lawrence, subject to the condition, among other things, that they should construct suitable fishways in their dam for the passage of migratory fish; that they applied to the county commissioners, requesting them, after due notice, to prescribe the mode in which they should construct such fishways in their dam; that such notice was given and a hearing had, and that the commissioners did prescribe the mode in which the company should comply with that requirement, and that the company did construct such fishways in their said dam according to the mode and plan so prescribed; that the fishways, however, as constructed, proved to be unsuitable and insufficient to provide as convenient passageway for the fish. 8 Special Laws, 470. Circumstances occurring subsequently made it necessary for the company to ask for leave to increase their capital stock, and the legislature, in granting their application, also provided that the company should be liable for all damages occasioned to the owners of fish rights above the dam by the stopping or impeding the passage of the fish up and down the river by the said dam, and that such damages should be assessed by the county commissioners of the county in which such fish rights existed, saving to the respective parties the right to apply for a jury to make such assessment in the manner provided for the recovery of damages from laying out highways. 8 Special Laws, 990. Having accepted the amendatory act, the company availed themselves of that provision and caused the damages to the fish rights existing above the dam to be assessed, and they paid the several assessments to the owners of the same, amounting to the sum of \$26,000, "as damages for hindering or impeding the passage of fish by their said dam, with the aforesaid fishways therein, as previously constructed." Such fishways did not admit of the usual and unobstructed passage of the fish as required by the law of the state and the seventh section of their act of incorporation. Complaints subsequently arose, and the company was indicted for such neglect and the case came to trial, and the jury, under the rulings and instructions of the court, found the defendants guilty, and they excepted to the rulings and instructions of the court, and the case was heard before the full court. Unquestionably the case was fully considered, and the court in the first place reaffirmed all of their previous decisions upon the subject, which hold that persons who build a dam for mill purposes on a stream frequented by migratory fish do it under an implied obligation to keep open sufficient sluices and fishways for the passage of the fish in their accustomed seasons, and that every grant to erect such a dam is to be construed as under the same implied condition, unless such implication is excluded by an express provision to that effect. Still the court held that the legislature had the power to regulate the public right, and in view of the fact that the amended charter substituted a new proceeding for the recovery of damages by the owners of the fish rights, and that the same, as assumed by the court, had been executed, the court also held that the amended charter had in it all the elements of a contract executed by one party and binding on the other, and that it was not competent for the legislature, even under the power reserved in a prior general law, to amend, alter or repeal any such charter, to require the proprietors of the dam, *without any change of circumstances*, to construct the fishways, which by the terms of the amended charter they had been exempted from any obligation to construct, basing their opinion upon the ground that the right acquired under that provision had become vested by a legitimate exercise of the power granted. Sessions Acts 1831, 613.

§ 2174. *Vested rights cannot be destroyed by a reservation of the right to alter or repeal a charter.*

Vested rights, it is conceded, cannot be destroyed or impaired under such a reserved power, but it is clear that the power may be exercised, and to almost any extent, to carry into effect the original purposes of the grant and to protect the rights of the public and of the corporators, or to promote the due administration of the affairs of the corporation. *Miller v. The State*, 15 Wall., 478 (§§ 2127-32, *supra*). Had it appeared in that case that the amended charter contemplated the assessment of damages for fish rights owned below the dam as well as those owned above the dam, the opinion would certainly be more satisfactory, as in that event the theory assumed by the court, that all the parties damaged in their fisheries had been indemnified by the owners of the structure, would be correct. *Moulton v. Libbey*, 37 Me., 484. Fish rights below a dam, constructed without passageways for the fish, are liable to be injured by such a structure as well as those owned above the dam, as the migratory fish, if they cannot ascend to the head waters of the stream at their accustomed seasons, will soon cease to frequent the stream at all, or in greatly diminished numbers.

Suppose the rule, however, to be correct, still it is quite clear that it does not control the case before the court, for the reasons given by the same court in rendering the decree brought here for re-examination by the present writ of error. Passageways for the fish had been constructed in that case under the act passed incorporating the company, but they proved to be unsuitable and insufficient, and the court, in sustaining the views of the defendants, rested their decision upon the ground that the amended charter discharged them from the obligation to reconstruct such fishways, as the amended charter required them to make compensation for the injuries to the fish rights in the place of the prior obligation arising from the rules of the common law of the state and the terms of their original charter, the court holding that the government could not, *without any change of circumstances*, require the defendants to do the very acts which, by the terms of the amended charter, they had been exempted from doing; but the court declined to decide whether, if the fishways provided should prove to be wholly unfit and inadequate to their purpose, the legislature could not by further legislation require the company to fulfil the original obligation. Sufficient appears to warrant the conclusion that no evidence was introduced in that case to show that the fish rights below the dam suffered any injury whatever, nor does it appear that the attention of the court was drawn to the fact that the river across which the dam was built runs through more than one state. *Moor v. Veazie*, 32 Me., 353; *Veazie v. Moor*, 14 How., 571 (§ 1202, *supra*). Different rules perhaps may be applied in ascertaining the power of a state legislature to authorize permanent obstructions to the free passage of fish in a river flowing through two or more states, like the Connecticut or Merrimac, from the rules which should be applied in a case where the river across which the dam is constructed is wholly within the state which authorizes the structure; but it is not necessary to consider that question in this case, as it was not raised in the state court nor was it presented here by either party.

Fishways have never been constructed by the respondents in their dam, and they contend that they are not obliged to make any such provision for the passage of the fish, as their charter does not create any such obligation; but the answer which the complainants make to that suggestion is decisive, that the

charter does not contain any provision exempting them from that implied obligation, which arises in every such case by the common law of that state, unless the charter contains some provision which expressly negatives that implication.

§ 2175. *Under the reserved power to alter or amend, etc., owners of a dam may be required to maintain fishways.*

Even suppose that is so, still they contend that the fourth section of the charter of their grantors should be construed as negating any such implied condition; but the court is entirely of a different opinion, as that section makes no provision for any compensation to the owners of the fish rights below the dam, and the record shows that such fish rights, as well as those above the dam, are injured by the obstruction to the free passage of the fish in their accustomed seasons to the head waters of the river. Authority to construct and maintain a dam without a fishway, it is conceded, is not granted in terms in the charter, and it may be added that the charter does not contain any words to warrant any such implication. On the contrary, the terms and provisions of the charter are consistent with the theory that the legislature contemplated the construction of a dam with a convenient passageway for fish, so as not to impair unnecessarily the rights of the riparian owners either above or below the dam, and that the legislature, if the company failed to fulfil that obligation, may "compel them to do so by more specific legislation." Damages, it is true, were to be paid to "the owners of present fish rights existing above the dam," but the court here, in respect to that matter, concurs with the state court that the meaning of the sentence is satisfied by regarding it as providing for a partial interruption and injury of those rights and not as contemplating their utter destruction; that the legislature which granted the charter may well have supposed that a dam across the river at that place, with the best fishway that could be constructed, would, to some extent, obstruct the free passage of the fish, and may have intended by that provision to require the owners of the dam to make compensation for such injuries.

Viewed in any reasonable light it is quite clear that the charters of the respondents do not contain any stipulation or contract exempting them from the implied condition annexed to such a grant, not qualified by such a contract, that the corporation in erecting such a dam shall construct suitable and convenient fishways for the free passage of the fish to the head waters of the river in their accustomed seasons; and that the charter, in view of the fact that it contains no such exemption, is subject to the power reserved to the legislature by the general law, in operation when the charters were granted, that all acts of incorporation shall at all times hereafter be liable to be amended, altered or repealed at the pleasure of the legislature. Such charters being subject to the implied condition to construct suitable fishways for the free passage of the fish, it follows that the corporations are not exempt from that burden, and that the legislature, under the reserved power to amend, alter or repeal the charter, may pass laws to enforce that duty, as such a law does not impair any contract created by the charter or infringe any right vested in the corporation. R. S., 366; Pennsylvania College Cases, 13 Wall., 213. Charters subsequently granted must be understood as standing just as they would if that reservation of the power to amend, alter or repeal the same had been incorporated into each charter. *Miller v. The State*, 15 Wall., 478 (§§ 2127-32, *supra*).

§ 2176. *Scope of power over corporations where the power to alter and modify is reserved.*

Power to legislate, founded upon such a reservation, is certainly not with-

out limit, but it may safely be affirmed that it reserves to the legislature the authority to make any alteration or amendment in a charter granted subject to it, that will not defeat or substantially impair the object of the grant, or any rights which have vested under it, which the legislature may deem necessary to secure either the object of the grant or any other public right not expressly granted away by the charter. *Commissioners on Inland Fisheries v. Holyoke Water-power Co.*, 104 Mass., 451. Such a charter may doubtless be granted to build a dam across a river whose whole course is within the state granting the franchise, with a provision exempting the corporation from all obligation to construct such fishway for the free passage of the fish, as the enterprise of erecting a dam to create power to operate mills is so far public in its nature that it is competent for the legislature to exercise the power of eminent domain to accomplish the purpose, if suitable provision is made to compensate the owners of the property or rights condemned under that power; but it may be more doubtful whether the legislature of a state can make a contract with such a corporation authorizing them to construct a dam across a river flowing through two or more states, which shall permanently exempt the grantees from all such obligation and destroy forever the rights of fishery in the river throughout its whole course from its source to its confluence with tide waters.

Concede, however, that the power to make such a contract exists, and that it is as boundless as the theory of the respondents assumes it to be, still the court here is of the opinion that the decree of the state court is correct and that it should be affirmed, as the charters under which the dam in this case was erected and is maintained do not contain any such exemption from the implied obligation to construct fishways for the free passage of the fish, nor any provision which prohibits the legislature from imposing that obligation under the power reserved to amend, alter or repeal the charter. Properly construed neither of the charters affords any support whatever to the theory of the respondents, as they do not contain any semblance of a grant to take and subvert the fish rights below the dam; nor is there anything in the provision requiring compensation to be made to the owners of the fish rights above the dam, which is not perfectly consistent with the theory that it was incorporated into the charter merely to compensate the owners of such fish rights for injuries which they would suffer from the obstruction, even if the customary fishways were constructed as required by immemorial usage and the express enactment of the legislature.

Decree affirmed.

PLANTERS' BANK v. SHARP — BALDWIN v. PAYNE.

(6 Howard, 301-348. 1847.)

ERROR to the High Court of Errors and Appeals of Mississippi.

Opinion by MR. JUSTICE WOODBURY.

STATEMENT OF FACTS.—The question to be considered in this case is, whether an act of the legislature of Mississippi, passed February 21, 1840, impaired the obligation of any contract which the state or others had previously entered into with the Planters' Bank. If it did, the clause in the constitution of the United States, expressly prohibiting a state from passing any such law, has been violated, and the plaintiffs in error are entitled to judgment. But, on the contrary, if that act does not impair the obligation of any contract, the judgment below in favor of the defendants must be affirmed.

In considering this question no peculiar liberality of construction in favor of a corporation, so as to render that an encroachment on its rights which is not clearly so, seems to be demanded of us by any more sacredness in the character of a corporation or its rights, than in that of an individual; but rather, that its charter as a public grant is not to be construed beyond its natural import. 8 Pet., 738; 3 id., 289 (§§ 1845-48, *supra*); 4 id., 168, 514 (§§ 2321-24, *infra*). The inviolability of contracts, however, and the faithful protection of vested rights, are due to the one no less than the other, and are both involved in the present inquiry, so far as affecting, by way of principle or precedent, all the various and vast interests of this kind existing over the whole Union. Mr. Madison denounced laws impairing the obligation of contracts as among those not only violating the constitution, but "contrary to the first principles of the social compact and to every principle of sound legislation." Federalist, No. 44. Again, in *Payne v. Baldwin*, 3 Smedes & Marsh., 675, one of the cases now before us, it is truly admitted that, "in a government like ours, such power is totally out of the range of legislative authority." At the same time, it is to be recollected that our legislatures stand in a position demanding often the most favorable construction for their motives in passing laws, and they require a fair rather than hypercritical view of well-intended provisions in them. Those public bodies must be presumed to act from public considerations, being in a high public trust; and when their measures relate to matters of general interest, and can be vindicated under express or justly implied powers, and more especially when they appear intended for improvements, made in the true spirit of the age, or for salutary reforms in abuses, the disposition in the judiciary should be strong to uphold them.

Certainly it will be only when they depart from limitations or qualifications of this character, and so use their own rights as to impair the prior rights of others, that a check must be used, however unpleasant to us, by declaring that the constitutional restrictions of the general government must control a statute of a state conflicting with them, and thus, for harmony and uniformity, make the former supreme, in compliance with the injunctions imposed by the people and the states themselves in the constitution. Governed by such views, we proceed to the examination of the questions arising here, by ascertaining, first, what powers the legislature of Mississippi granted to the plaintiffs, and then, what powers it has taken away from them.

On the 10th of February, 1830, "An act to establish a Planters' Bank in the state of Mississippi," passed; and among other privileges, in the sixth section, granted that the bank "shall be capable and able in law to have, possess, receive, retain and enjoy, to themselves and their successors, lands, rents, tenements, hereditaments, goods, chattels and effects, of what kind soever, nature and quality, not exceeding in the whole \$6,000,000, including the capital stock of said bank, and the same to grant, demise, alien or dispose of for the good of said bank." The seventeenth section gives power, also, "to receive money on deposit, and pay away the same free of expense, discount bills of exchange and notes, with two or more good and sufficient names thereon, or secured by a deposit of bank or other public stock, and to make loans to citizens of the states in the nature of discount on real property, secured by mortgage," etc. Doing business with these powers, amounting, as it has been repeatedly settled, to a contract in the charter for the use of them (see cases in the *West River Bridge*, at this term, 6 How., 507, §§ 2188-90, *infra*), the bank, on the 24th of May, 1839, took the promissory note on which the present suit was instituted, and on

the 10th day of June, 1842, transferred it to the United States Bank, having first commenced this action on it the 11th of October, 1841.

But in the mean time, after the execution of the note, though before its transfer, the legislature of Mississippi, on the 21st day of February, 1840, passed a law, the seventh section of which is in these words: "It shall not be lawful for any bank in this state to transfer, by indorsement or otherwise, any note, bill receivable, or other evidence of debt; and if it shall appear in evidence, upon the trial of any action upon any such note, bill receivable, or other evidence of debt, that the same was transferred, the same shall abate upon the plea of the defendant." See Acts of 1840, p. 15. This law constitutes the only defense to a recovery in the present case by the plaintiffs. But they contend it is invalid because, by the constitution, article 1, section 10, "no state" shall pass any law "impairing the obligation of contracts;" and this law does impair it, in this instance, in two respects. First, in the obligation of the contract in the charter with the state; and secondly, in the obligation of the contract made by the signers of the note declared on with the bank.

§ 2177. *Notes are embraced by the terms "goods, chattels or effects."*

To decide understandingly these questions, it will be necessary to go a little further into the true extent of those two contracts under the powers held by the bank, and likewise into the true extent of the subsequent act of the legislature affecting them. That promissory notes are to be regarded as either goods, chattels or effects, within the sixth section of the charter, can hardly be questioned, when it includes these "of what kind soever, nature and quality." This addition evidently meant to remove any doubt or restriction as to the meaning of those terms, as sometimes employed in connection with peculiar subjects, and to extend the description by them to every kind of personal property belonging to the bank. This construction would go no further than sometimes has been done in England, holding the words goods and chattels to include *choses in action*, as well as other personal property (12 Coke, 1; 1 Atkins, 182); and by the word goods alone, in a bequest, it has been held that a bond will pass. Anonymous, 1 P. Wms., 267.

So in respect to effects, it has been held, when the word is used alone, or *simpliciter*, it means all kinds of personal estate. 13 Ves., 39, 47, note; Michell v. Michell, 5 Madd., 72; Hearne v. Wigginton, 6 Madd., 119; Cowp., 299. But if there be some words used with it, restraining its meaning, then it is governed by that, or means something *ejusdem generis*. Here, however, instead of restraining terms being used with it, those most broad and enlarging are added, being "effects of what kind soever, nature and quality." Hotham v. Sutton, 15 Ves. Jr., 326; Campbell v. Prescott, 15 Ves. Jr., 500; 3 Ves., 212, note. The same rule prevailed in the civil law, under the term *bona mobilia*. 1 P. Wms., 267. And by that law, as well as the common law, promissory notes or *choses in action* come under the category of movable goods or personal property, as they accompany the person. 2 Bl. Comm., 384, 398.

§ 2178. *A charter of a bank, giving it full power to dispose of all its effects, and providing that all paper should be made payable and negotiable on its face at some bank, empowered the bank to take negotiable paper.*

The bank was allowed, also, by the seventeenth section, "to discount bills of exchange and notes;" and, in truth, promissory notes usually constitute a large portion of the property of such institutions. Such notes, also, not only by general usage and established forms, are, in most cases, made to run to banks or their order, and must be expected to run so when the banks please, but it is

expressly provided by the twenty-second section of this charter that "it shall not be lawful for said bank to discount any note or notes which shall not be made payable and negotiable at said bank," etc. And again, by an amendatory act, accepted by the bank, it was provided, on the 9th of December, 1831, "that such promissory notes shall be made payable and negotiable on their face at some bank or branch bank." But why made negotiable, if no right was to exist to negotiate or transfer them? The bank then, as the legal holder of such notes, possessed a double right "to dispose" of them; first, from the express grant in the charter itself, empowering them, as to their "goods, chattels and effects of what kind soever, nature and quality," "the same to grant, demise, alien or dispose of, for the good of said bank" (sixth section); secondly, by an implied authority, incident to its charter and business, and the express requirement that the notes should be "negotiable on their face." We do not refer to the next ground because it is necessary to resort to implication or analogy to establish an authority in the bank under its charter to make a transfer of its notes when it possesses that authority by the very words and spirit of the contract made in the charter by the state.

But to make the correctness of this conclusion from the specific words of the charter stronger and undoubted, it will be found to be the natural, useful and proper view of its powers as a bank under all sound analogy and necessarily implied authority. To reach this end, it is not indispensable to hold that corporations in modern times possess numerous incidental powers equal to those of individuals, as was once the doctrine (*Kyd on Corp.*, 108; 2 *Kent, Comm.*, 281, and cases in those treatises), but seems now in some respects overruled. *Bank of Augusta v. Earle*, 13 *Pet.*, 519, 587, 153; 2 *Cranch*, 167; 12 *Wheat.*, 64. But merely to hold, as it often has been in late years, that what is necessary and proper to be done to carry into effect express grants, and which is nowhere forbidden, may in most cases be lawful. Though such a power as this last to congress is expressly added in the constitution of the United States, yet it has been considered by some that it would exist as a reasonable incident under reasonable limitations without any such express addition. 2 *Kent, Comm.*, 298, and cases there cited. Thus a corporation, if once organized, has the implied power to make contracts connected with its business and debts, and through agents and notes as well as under its seal. *Bank of Columbia v. Patterson*, 7 *Cranch*, 299; 8 *Wheat.*, 338; 12 *Wheat.*, 64; 11 *Pet.*, 588 (§§ 2058-82, *supra*). So it may hold and dispose of property even in trust, if not inconsistent and unconnected with its express duties and objects. *Vidal v. Girard*, 2 *How.*, 127. Hence a power to dispose of its notes, as well as other property, may well be regarded as an incident to its business as a bank to discount notes which are required to be in their terms assignable, as well as an incident to its right of holding them and other property, when no express limitation is imposed on the authority to transfer them.

Not that a banking corporation has under its charter a constructive power to follow another independent branch of business, such as manufacturing or foreign trade, but merely the business of banking, and to do such acts as are necessary and proper or usual to carry that business into effect, and such as are in harmony with the letter and spirit of its charter. Nor even that it can adopt any course as an incident, and as necessary and proper, which is merely convenient, or which is expressly forbidden by the charter, or so forbidden by any previously existing laws in the state of a general character. But in discounting notes and managing its property in legitimate banking business, it

must be able to assign or sell those notes when necessary and proper, as, for instance, to procure more specie in an emergency, or return an unusual amount of deposits withdrawn, or pay large debts for a banking-house, and for any "goods and effects" connected with banking which it may properly own. It is its duty to pay in some way every debt. 6 Gill & Johns., 219. This court, in the *United States v. Robertson*, 5 Pet., 650, has expressly recognized the authority of a bank to give bonds and assignments to pay its deposit debtors. In that case "the directors agree to pledge to the government of the United States the entire estate of the corporation as a security for the payment of the original principal of the claim," etc. P. 648. And such a pledge or transfer was held there to be valid.

§ 2179. *Incurring debts is incident to banking.*

It is said, in opposition to this, Why should a bank be considered as able to incur debts? Or why to do any business on credit, requiring sales of its notes or other property to discharge its liabilities? Such inquiries overlook the fact that the chief business and design of most banks, their very vitality, is to incur debts as well as have credits. All their deposit certificates or bank-book credits to individuals are debts of the bank, and which it is a legitimate and appropriate part of its business as a bank to incur and to pay. The same may be said, also, of all its bank-notes or bills, they being merely promises or debts of the bank, payable to their holders, and imperative on them to discharge. See *Bank of Columbia v. Patterson*, 7 Cranch, 307; 13 Pet., 593.

§ 2180. — *and a bank may dispose of its effects to pay indebtedness.*

It may, to be sure, independent of justifications like these, not be customary for banks to dispose of their notes often. But in exigencies of indebtedness and other wants under pressures like those referred to, it may not only be permissible, but much wiser and safer to do it than to issue more of its own paper, too much of it being already out, or part with more of its specie on hand, too little being now possessed for meeting all its obligations. Indeed, its right to sell any of its property, when not restricted in the charter or any previous law, is perhaps as unlimited as that of an individual, if not carried into the transaction of another separate and unauthorized branch of business. *Angell & Ames on Corp.*, p. 104, § 9; 4 Johns. Ch., 307; 2 Kent, Comm., 282; 11 Serg. & Rawle, 411. Both may sell notes to liquidate their debts, both sell their lands acquired under mortgages foreclosed, or acquired under the extent of executions not redeemed. Both, too, must be able to sell all kinds of their property, when proceeding to close up their business, or find it impracticable. Nor is there any pretense here that any clause in the charter of this bank restricted it from selling its notes or other property under any circumstances, and much less under those connected with indebtedness and with banking, which have just been referred to. It will be seen, in this way, that all analogies seem to sustain the right which exists by the express grant in this charter, to "alien and dispose of" all its "goods, chattels and effects, of what kind soever, nature and quality, for the good of said bank." But to avoid differences of opinion, we place the right here solely on the express grant. It ought, perhaps, to be added, that the courts of Mississippi once put a more limited construction on this charter. *Payne v. Baldwin*, 3 Smedes & Marsh., 661. But as that very case is now before us for revision, on the ground that it was erroneous, we feel obliged, for that and other reasons, which need not be here enumerated, to put such construction on the charter, and on the law supposed to violate it, as seems right according to our own views of their true intent.

§ 2181. *Where a charter permits a bank to take negotiable paper, the contract between the maker and the bank includes the right of the bank to sell the paper.*

Having thus ascertained the extent of the contract made by the state with the bank in the charter, we proceed next to examine the character and scope of the contract between the maker of the note and the bank. We have already seen that the bank was not only authorized, but expressly required, to discount notes which were negotiable, or, in other words, which contained a contract or stipulation to pay them to any assignee. Nor is it pretended there was any law of Mississippi, when this charter was given or when this note was taken, which prohibited selling it, and passing to an assignee all the rights, either of property or of bringing a suit in his own name, which then existed with individuals and other banking institutions. What law existed on this point when the note was actually transferred is not the inquiry, but what existed when it was made, and its obligations as a contract were fixed. The law which existed at the transfer, so far from being the test of the force of a contract made long before, and under different legal provisions, is the violation of it, and the very ground of complaint in the present proceeding.

This contract, then, by the bank with the maker, when executed, enabled the former to sell or assign it, and the indorsee to collect it, not only by its express terms, but by the general law of the state, then allowing transfers of negotiable paper and suits in the name of indorsees. Howard and Hutchinson's Laws, 373. Indeed, independent of the last circumstance, it is highly probable that, by the principles of the law of contracts and commercial paper, such *choses in action* may be legally assigned or transferred everywhere, when not expressly prohibited by statute. This was done before the statute of Anne, in England. And it is done since, as to paper both negotiable and not negotiable, independent of that statute. If such notes cannot be sued in the name of the indorsee, when running to order, without the help of a statute, they certainly can be sued in the name of the payee, for the benefit of the indorsee, when the transfer is legal in its consideration and form. The state itself, by passing this law prohibiting the transfer of notes by banks, recognizes the previous right, as well as custom, to transfer them; otherwise the law would not be necessary to prevent it. Nor is this law supposed to have been founded on any prior abuse of power in negotiating or selling its notes, which, if existing, might obviate the above inference. But it is understood, from the record and opinions of the state court, that the design of the law was to secure another provision of statute not previously existing, but made by the legislature at the same time, requiring banks to receive their own notes in payment of their debtors, though below par. That design, too, would still recognize the prior authority to sell or transfer.

We are not prepared to say that a state, under its general legislative powers, by which all rights of property are held and modified as the public interest may seem to demand, might not, where unrestricted by constitutions or its own contracts, pass statutes prohibiting all sales of certain kinds of property, or all sales by certain classes of persons or corporations. 14 Pet., 74. Such has often been the legislation as to property held in mortmain or by aliens or certain proscribed sects in religion. This is, however, very invidious legislation, when applied to classes or to particular kinds of property before allowed to be held generally. Legislation for particular cases or contracts, without the consent of all concerned, is of very doubtful validity. *Merrill v. Sherburne*, 1 N. H., 199. Under our system of government, and the abuses to which, in vari-

ous ways and to various extents, that kind of legislation might lead, several of the state constitutions possess clauses prohibitory of such a course where it affects contracts or vested rights, and more especially does the constitution of the United States expressly forbid any such legislation, whenever it goes to impair the obligation of a contract. Hence, the general powers which still exist under other governments, or might once have prevailed here in the states, to change the tenure and rights over property, and especially the *jus disponendi* of it, cannot now, under the federal constitution, be exercised by our states to an extent affecting the obligation of contracts.

§ 2182. — *and an act passed after the note is taken, prohibiting its assignment, impairs the obligation of the contract.*

The next and final question, then, is, Did the act in question impair the obligation, either of the contract by the state with the bank, or of the contract by the maker of the note with the bank? We have already ascertained the true extent of both of these contracts before this act passed; that by the state with the bank clearly allowing it to take negotiable notes, and to sell or transfer them, and that with the maker clearly enabling the bank to assign his note, and a recovery to be had on it after a transfer, by the assignee. In this condition of things, with this note taken and held, accompanied by such rights and obligations, the legislature of Mississippi passed the law already quoted, and now under consideration. It expressly took away the right of the bank to make any transfer whatever of its notes, and virtually deprived an assignee of them of the right to sustain any suit, either in his own name or that of the bank, to recover them of the maker.

The new law, also, conferred in substance on the maker a new right to defeat any action so brought, which he would otherwise have been liable to. These results vitally changed the obligation of the contract between him and the bank, to pay to any assignee of it, as well as changed the obligation of the other contract between the state and the bank in the charter to allow such notes to be taken and transferred. It is true that this new law might bear a construction that the transfer was only a voidable act, and not void, and that, if canceled or waived, a recovery might afterwards be had on the note by the bank; and this seems to have been the view of some of the court in 3 Smedes & Marsh., 681, as well as in *Hyde v. Planters' Bank*, 8 Rob., 421. Yet the state court in Mississippi appears finally to have thought it meant otherwise, and to have decided that no suit at all can be sustained on such a note by anybody after a transfer. This was the view which they think influenced the legislature. See *Planters' Bank v. Sharp*, 4 Smedes & Marsh., 28. We are disposed to acquiesce in the correctness of this construction, as it seems to conform nearest to the real designs of the legislature. But this view is not adopted, because the decision by a state court on a state statute, though generally governing us, is to control here in the very cases which, on account of that decision, are brought here by appeal or writ of error.

The rights of a party under a contract might improperly be narrowed or denied by a state court, without any redress, if their decision on the extent of them cannot be reviewed and overruled here in cases of this kind; while their decision, if restricting or enlarging the prohibitory act, might more safely stand, as doing no injury in the end, if we hold the act null wherever it is construed by them or us so as to conflict with prior rights obtained under contracts. See *Commercial Bank v. Buckingham*, 5 How., 317.

If the state courts of Mississippi should hereafter adopt the dissenting opin-

ion of Judge Sharkey, in 4 Smedes & Marsh., 28, and go back to what they appear to have before held, in 3 Smedes & Marsh., 661,—namely, that the right to sue by the bank, after a transfer, was not taken away, if the plaintiff replied that the transfer had been rescinded, and the interest was now solely in the bank,—and should that construction be adopted here, the force of this new law, as impairing the obligation of the contract, might not be so extensive and clear as now. But still, it would seem to impair the contract in some respects; yet whether in such way and extent as to render the obligation itself changed must be left to be decided definitively when such a case is presented for our decision. In the present instance, however, as before explained, the extent and operation of the prohibitory law being regarded as forbidding any transfer whatever, and, if it takes place, as barring every kind of remedy on the note, the decisive question may be repeated, How can this happen without injury to the plaintiff's contracts? When every form of redress on a contract is taken away, it will be difficult to see how the obligation of it is not impaired. *Green v. Biddle*, 8 Wheat., 76 (§§ 191–206, *supra*); 1 How., 317 (§§ 1650–55, *supra*); 4 Smedes & Marsh., 507; *King v. Dedham Bank*, 15 Mass., 447. If any right or power be left, under the note, by this act, after a transfer is made, it is of no use, when it cannot be enforced and no benefit be derived from it, but an action abated *toties quoties* as often as it is instituted. 8 Wheat., 12; 1 Bl. Comm., 55. In the mildest view, a new disability is thus attached to an old contract, and its value and usefulness restricted; and these of course impair it. *Society for Propagation of Gospel v. Wheeler*, 2 Gall., 139.

§ 2183. *When the value of a contract has been diminished by legislation, its obligation is impaired.*

One of the tests that a contract has been impaired is, that its value has by legislation been diminished. It is not, by the constitution, to be impaired at all. This is not a question of degree or manner or cause, but of encroaching in any respect on its obligation, dispensing with any part of its force. *Commercial Bank of Rodney v. State of Mississippi*, 4 Smedes & Marsh., 507. So, if the obligation of a contract is to be regarded as the duty imposed by it, here the duty imposed by the state to adhere to its own deliberate grant, and the duty imposed on the signer of the note to make payment to an assignee, as well as to the bank itself, are both interfered with and altered.

§ 2184. *Analogy of insolvent laws.*

In answer to this supposed violation of the contract between the maker of the note and the bank, some objections have been urged which deserve further notice here. It is sometimes stated, with plausibility, that states may pass insolvent laws suspending or taking away actions on contracts, where the debtor goes into insolvency, and hence, by analogy, can do it here. But there another remedy is still given on the contract, before the commissioners of insolvency, and a payment is made *pro rata*, as far as means exist. Here there is no other remedy given, or any part payment made. Indeed, it seems that a forfeiture of all right to recover on the note, in any way, is inflicted here as a penalty for making that very transfer which the bank before, by the act of incorporation, as well as by the note itself, was authorized to make. Again, state insolvent laws, if made, like this law, to apply to past contracts and stop suits on them, have been held not to be constitutional, except so far as they discharge the person from imprisonment, or in some other way affect only the remedy. When so restricted, they do not impair the obligation of the contract itself, because the obligation is left in full force and actionable, and future

property, as well as present, subjected to its payment, and the body exonerated only as a matter connected merely with the form of the remedy. *Cook v. Moffat*, 5 How., 316, and cases there cited. The case in 8 Rob., 421, appears also to have been one on a note executed after the prohibitory law, and not, as here, before. But where future acquisitions are attempted to be exonerated, and the discharge extended to the debt or contract itself, if done by the states, it must not, as here, apply to past contracts, or it is held to impair their obligation. *Ogden v. Saunders*, 12 Wheat., 213 (§§ 1940–2003, *supra*); *Sturges v. Crowninshield*, 4 Wheat., 122 (§§ 1937–39, *supra*); 6 Wheat., 131; 2 Kent, Comm., 392; *Bronson v. Kinzie*, 1 How., 311 (§§ 1650–55, *supra*); *McCracken v. Hayward*, 2 How., 608 (§§ 1656–58, *supra*); 1 Cowen, 321; 16 Johns., 237; 1 Ohio, 236; *Cook v. Moffat*, 5 How., 308, 314. Congress alone can do this as to prior contracts, by means of an express permission in the constitution to pass uniform laws on the subject of bankruptcy; and which laws, when not restrained by any constitution or clause like this as to states impairing contracts, may, in that way, be made to reach past obligations.

The misfortune here is that the legislature, if meaning merely to insure to bill-holders of the bank, when debtors, the privilege of paying in the bills of the bank (as is supposed, 4 Smedes & Marsh., 1, 90), have not said so, and no more, by providing that promissory notes, though assigned by banks, should still be open to set-offs by their debtors of any of their bills which they then held. This would have been equitable, and no more, probably, than they would be entitled to, on common law principles, if an assignee purchased, as here, after the promissory notes fell due, and perhaps with a knowledge of the existence of such a set-off.

Chief Justice Marshall in *United States v. Robertson*, 5 Pet., 659, says, independent of any statute, “every debtor may pay his creditor with the notes of that creditor. They are an equitable and legal tender.” Equally just and reasonable would have been a declaratory law as to the allowance of such bills as a set-off, where an assignment had been made collusively between the parties with a view to prevent such a set-off. 8 Rob., 421.

But instead of resorting to such measures, the legislature adopted a shorter and more sweeping mode of attaining the end of preventing assignments which might embarrass or defeat set-offs. They did it by cutting off all assignments whatever, and all remedies whatever upon them. And they accompanied this by another statute, enabling debtors of the bank who held its notes, when their debts fell due, to pay in them, or set them off, and even virtually authorized them to make payment in depreciated bills or notes afterwards bought up for that purpose, and thus to gain an undue advantage over set-offs by other debtors in other matters. The act as to this last topic was passed the next day after the act prohibiting transfers. Mississippi Laws, 2d February, 1840, p. 21, § 2. It was in these words: “All banks above alluded to, and all other banks in this state, shall, at all times, receive their respective notes at par in liquidation of their bills receivable, and other claims due them.” These two acts, though undoubtedly well meant, and designed to give an honest preference to bill-holders (see Sharkey’s dissenting opinion) as to a paper currency which ought always to be kept on a par with specie, were unfortunately, in the laudable zeal to avert a great apprehended evil, passed without sufficient consideration of the limitations of the powers imposed by the constitution of the Union on the state legislatures not to impair the obligation of existing contracts. Nor was it necessary to go so far to secure any legitimate results.

§ 2185. *Whether the remedy may be changed.*

Some other laws are referred to, which are upheld and which affect the whole community, and seem to violate some of the important incidents of contracts between individuals, or between them and corporations. But it will usually be found that these are such laws only as relate to future contracts, or if to past ones, relate to modes of proceeding in courts, to the form of remedy merely, to priority to some classes of creditors (5 Cranch, 298), to the kind of process (9 Pet., 319; 10 Wheat., 51), to the length of the statute of limitations (6 Wheat., 131; 2 Mason, 168; 3 Johns. Ch., 190; 4 Wheat., 200 (§§ 1937–39, *supra*); 1 How., 315) (§§ 1650–55, *supra*), to exempting the body from imprisonment (4 Wheat., 200), or tools and household goods from seizure (16 Johns., 244; 1 How., 15; 11 Martin, 730), or affecting some privilege attached to the person or territory (Story on Conf. of Laws, 339, etc.), and not to the terms or obligations of any part of the contract itself. *Cook v. Moffat*, 5 How., 295; *Towne v. Smith*, 1 Woodb. & M., 132; 7 Greenl., 337; 3 Burge on Col. and For. Law, 234, 1046.

And if, in professing to alter the remedy only, the duties and rights of a contract itself are changed or impaired, it comes just as much within the spirit of the constitutional prohibition. *Bronson v. Kinzie*, 1 How., 316 (§§ 1650–55, *supra*); 2 *id.*, 612; 2 Madison Papers, 1239, 1581. Thus, if a remedy is taken away entirely, as here, or clogged “by condition of any kind, the right of the owner may indeed subsist and be acknowledged, but it is impaired.” *Green v. Biddle*, 8 Wheat., 75 (§§ 191–206, *supra*). And the test, as before suggested, is not the extent of the violation of the contract, but the fact that in truth its obligation is lessened, in however small a particular, and not merely altering or regulating the remedy alone. 2 How., 612 (§§ 1656–58, *supra*); 8 Wheat., 1.

§ 2186. *Cases illustrative of the limits of the constitutional prohibition.*

Having, it is believed, assigned sufficient reasons to show that the obligation of both of these contracts was impaired, it is now proposed briefly to refer to a few precedents bearing on the correctness of this conclusion, chiefly in respect to the most important of the contracts,—that between the state and the bank. On an examination of the various decisions which have taken place in this court on the violation of the obligation of contracts, it will be found that this case does not come within the principle of any of those where the decision was that the new laws were no violation; but, on the contrary, is much like several where the decision annulled them as a clear violation. Thus, where a new law has taken the property of a corporation for highways under the right of eminent domain, which reaches all property, private or corporate, on a public necessity, and on making full compensation for it, and under an implied stipulation to be allowed to do it in all public grants and charters, no injury is committed not atoned for, nothing is done not allowed by pre-existing laws or rights, and consequently no part of the obligation of the contract is impaired. See case of *West River Bridge Co. v. Dix*, and authorities there cited, in 6 How., 507 (§§ 2188–90, *infra*).

So, when the legislature afterwards tax the property of such corporations, in common with other property of like kind in the state, it is under an implied stipulation to that effect, and violates no part of the contract contained in the charter. *Armstrong v. Treasurer of Athens County*, 16 Pet., 281. See *Providence Bank v. Billings*, 4 Pet., 514 (§§ 2321–24, *infra*); 11 *id.*, 567 (§§ 2058–82, *supra*); 4 Wheat., 699 (§§ 2099–2117, *supra*); 12 Mass., 252; 4 Gill & Johns., 132; 4 Durn. & East, 2; 5 Barn. & Ald., 157; 2 Railway Cases, 23. So,

when no clause existed in a charter for a bridge against authorizing other bridges near at suitable places, it is no violation of the terms or obligation of the contract to authorize another. *Charles River Bridge v. Warren Bridge*, 11 Pet., 420 (§§ 2058-82, *supra*). Nor is it, if a law make deeds by *femes covert* good when *bona fide*, though not acknowledged in a particular form; because it confirms rather than impairs their deeds, and carries out the original intent of the parties. *Watson v. Mercer*, 8 Pet., 88 (§§ 1849-51, *supra*). Or, if a state grant lands, but makes no stipulation not to legislate further upon the subject, and proceeds to prescribe a mode or form of settling titles, this does not impair the force of the grant, or take away any right under it. *Jackson v. Lamphire*, 3 Pet., 280 (§§ 1845-48, *supra*). Nor does it, if a state merely changes the remedies in form, but does not abolish them entirely, or merely changes the mode of recording deeds, or shortens the statute of limitations. 3 Pet., 280; *Hawkins v. Barney*, 5 id., 457.

It has been held, also, not only that a legislature may regulate anew what is merely the remedy, but some state courts have decided that it may make banking corporations subject to certain penalties for not performing their duties,—such as paying their notes on demand in specie, and that this does not violate any contract. *Brown v. Penobscot Bank*, 8 Mass., 445; 2 Hill, 242; 5 How., 342. It is supposed to help enforce, and not impair, what the charter requires. But on this, being a very different question, we give no opinion. But look a moment at the other class of decisions. Let a charter or grant be entirely expunged, as in the case of the Yazoo claims in Georgia, and no one can doubt that the obligation of the contract is impaired. *Fletcher v. Peck*, 6 Cranch, 87 (§§ 1805-12, *supra*). So, if the state expressly engage in a grant, that certain lands shall never be taxed, and a law afterwards passes to tax them. *New Jersey v. Wilson*, 7 Cranch, 164 (§ 2295, *infra*). Or that corporate property and franchises shall be exempt, and they are then taxed. *Gordon v. Appeal Tax Court*, 3 How., 133. So, if lands have been granted for one purpose, and an attempt is made by law to appropriate them to another or to revoke the grant. *Terrett v. Taylor*, 9 Cranch, 43; *Town of Pawlet v. Clark*, 9 id., 292.

Or if a charter, deemed private rather than public, has been altered as to its government and control. *Dartmouth College v. Woodward*, 4 Wheat., 518 (§§ 2099-2117, *supra*). Or if owners of lands, granted without conditions or restrictions, have been by the legislature deprived of their usual remedy for mesne profits, or compelled to pay for certain kinds of improvements, for which they were not otherwise liable. *Green v. Biddle*, 8 Wheat., 1 (§§ 191-206, *supra*). Or if, after a mortgage, new laws are passed, prohibiting a sale to foreclose it, unless two-thirds of its appraised value is offered, and enacting further that the equitable title shall not be extinguished till twelve months after the sale. *Bronson v. Kinzie*, 1 How., 311 (§§ 1650-55, *supra*); *McCracken v. Hayward*, 2 id., 608 (§§ 1656-58, *supra*). These last cases in Wheaton and Howard are very near in point to the present one, though, in my view, a less strong and decisive encroachment on a previous contract than this is. So are the cases very near where all remedy whatever is taken away, and it is held that the obligation of the contract is thus impaired. See some before cited, and 8 Mass., 430; 2 Gall., 141; 2 Greenl., 294; 1 How., 311; 3 Pet., 290; 2 How., 608. The whole usefulness and value of a note or contract is in this way destroyed, and that without any reference to the contract itself. For these reasons the judgment below must be reversed.

BALDWIN v. PAYNE.

This case involves several of the questions just discussed in that of *The Planters' Bank v. Sharp et al.* Some of the points of difference are merely nominal; as, for instance, that the charter of the Mississippi Railroad Company, which transferred the notes in this case, is different. But, it being subsequent in date to the charter to the Planters' Bank, and with "all the usual rights, powers and privileges of banking which are permitted to banking institutions within the state," the court seemed, by mutual consent of parties, to regard those conferred on the Planters' Bank as extensive as any, and therefore a correct guide here. Other differences may be more material in appearance, as that the transfer in this case was found by the special verdict to have been in payment of a debt of the bank; and another, that the suit here is in the name of the indorsee, and not, as in the former case, in the name of the promisee.

Its being assigned in payment of a debt is, however, no more than was presumed might have been the truth in the other case. And its being sued in the name either of the indorsee or payee can make little difference on the final construction given by the state court to the prohibitory law in the action of the *Planters' Bank v. Sharp*. That construction, we have seen, was that it is the transfer itself which is prohibited and made in some degree penal, rather than the action in the name of the indorsee being all which is prohibited. It will be remembered, also, that if the state might be able, by a general repealing law, to prevent a suit in the name of an indorsee, without impairing any contract in the charter itself, as is argued for the defense, it could hardly do this without impairing the other contract between the bank and the maker, by which the latter promises to pay any indorsee.

Certainly the new prohibitory law ought not to have attempted more than a repeal of the statute allowing suits by indorsees of negotiable paper in their own name. Then the indorsees of notes negotiable, as of notes not negotiable, would still possess a right to sue their notes in the names of the payees. In such a case, there would be some plausibility in the idea that, though the action would not lie in the name of the indorsee, yet if it could in the name of the payee, for and on his account, the prohibitory law would chiefly affect the remedy and not the right of action in some form or other. But even then, if the obligation or force or duty of the contracts, whether with the bank by the state or with the maker, was impaired in any degree, though under cover of affecting the remedy only, it would come within the constitutional restriction. But how much more must it so come in this case, as well as the other, where, instead of merely changing the obligation so as to render a recovery on the contract not permissible in the name of an assignee, but more inconvenient, expensive, dilatory and often difficult in the name of another, the payee, the state court of Mississippi hold that the legislature, by the prohibitory law of 1840, not only meant to abate a suit in the name of an indorsee, but in the name of the payee, if a transfer had once been made. Substantially, they consider any suit on the note, by anybody, after it has once been transferred, as illegal, and the right to enforce the contract to be lost or forfeited forever.

§ 2187. *The rule applied in the case just decided applies to this case.*

This view of the statute of 1840 being regarded as established in Mississippi, renders it clear that in this case, as well as the case of the *Planters' Bank v. Sharp*, the law under which this action has been abated must be considered as

having impaired the obligation of contracts, and therefore to be in this respect unconstitutional, and the judgment of the state court erroneous.

The judgment below must, therefore, be reversed, and as a special verdict was found in this case, judgment must be entered on it in favor of the original plaintiffs.

MR. JUSTICE DANIEL dissented, holding that the act prohibiting the transfer of notes did not impair the obligation of any contract; that the power to receive and dispose of goods, chattels and effects did not include the power to transfer notes; that no one can claim to have a perfect and vested right, through all future time, in the mere capacity to do an act from the absence of a law forbidding that act. TANEY, C. J., also dissented.

WEST RIVER BRIDGE COMPANY *v.* DIX.

(6 Howard, 507-540. 1847.)

Opinion by MR. JUSTICE DANIEL.

STATEMENT OF FACTS.—The West River Bridge Company, plaintiffs, *v.* Joseph Dix and the Towns of Brattleboro' and Dummerston, defendants, upon a writ of error to the supreme court of judicature of the state of Vermont, sitting in certain proceedings as a court of law; and the same Plaintiffs *v.* The Towns of Brattleboro' and Dummerston, and Joseph Dix, Asa Boyden and Phineas Underwood, upon a writ of error to the supreme court of judicature and to the chancellor of the first circuit of the state of Vermont.

These two causes have been treated in the argument as one, and such they essentially are. Though prosecuted in different forms and in different forums below, they are merely various modes of endeavoring to attain the same end, and a decision in either of the only question they raise for the cognizance of this court disposes equally of that question in the other. They are brought before us under the twenty-fifth section (1 Stats. at Large, 85) of the judiciary act, in order to test the conformity with the constitution of the United States of certain statutes of Vermont; laws that have been sustained by the supreme court of Vermont, but which it is alleged are repugnant to the tenth section of the first article of the constitution, prohibiting the passage of state laws impairing the obligation of contracts.

It appears from the records of these causes, that, in the year 1795, the plaintiffs in error were, by act of the legislature of Vermont, created a corporation, and invested with the exclusive privilege of erecting a bridge over West river within four miles of its mouth, and with the right of taking tolls for passing the same. The franchise granted this corporation was to continue for one hundred years, and the period originally prescribed for its duration has not yet expired. The corporation erected their bridge, have maintained and used it, and enjoyed the franchise granted to them by law, until the institution of the proceeding now under review.

By the general law of Vermont, relating to roads, passed 19th November, 1839 (*vide* Revised Laws of Vermont, p. 553), the county courts are authorized, upon petition, to appoint commissioners to lay out highways within their respective counties and to assess the damages which may accrue to landholders by the opening of roads, and these courts, upon the reports of the commissioners so appointed, are empowered to establish roads within the bounds of their local jurisdiction. A similar power is vested in the supreme court to lay out and establish highways extending through several counties.

By an act of the legislature of Vermont, passed November 19, 1839, it is declared that "whenever there shall be occasion for any new highway in any town or towns of this state, the supreme and county courts shall have the same power to take any real estate, easement or franchise of any turnpike or other corporation, when in their judgment the public good requires a public highway, which such courts now have, by the laws of the state, to lay out highways over individual or private property; and the same power is granted, and the same rules shall be observed in making compensation to all such corporations and persons whose estates, easement, franchise or rights shall be taken as are now granted and provided in other cases." Under the authority of these statutes, and in the modes therein prescribed, a proceeding was instituted in the county court of Windham, upon the petition of Joseph Dix and others, in which, by the judgment of that court, a public road was extended and established between certain termini, passing over and upon the bridge of the plaintiffs, and converting it into a free public highway. By the proceedings and judgment just mentioned, compensation was assessed and awarded to the plaintiffs for this appropriation of their property and for the consequent extinguishment of their franchise. The judgment of the county court, having been carried by *certiorari* before the supreme court of the state, was by the latter tribunal affirmed.

Pending the proceedings at law upon the petition of Dix and others, a bill was presented by the plaintiffs in error to the chancellor of the first judicial circuit of the state of Vermont, praying an injunction to those proceedings so far as they related to the plaintiffs or to the real estate, easement or franchise belonging to them. This bill, having been demurred to, was dismissed by the chancellor, whose decree was affirmed on appeal to the supreme court, and a writ of error to the last decision brings up the case on the second record.

§ 2188. *A charter to a private corporation is a contract; but the power of eminent domain is paramount to all private vested rights.*

In considering the question propounded in these causes, there can be no doubt, nor has it been doubted in argument, on either side of this controversy, that the charter of incorporation granted to the plaintiffs in 1793, with the rights and privileges it declared or implied, formed a contract between the plaintiffs and the state of Vermont, which the latter, under the inhibition in the tenth section of the first article of the constitution, could have no power to impair. Yet this proposition, though taken as a postulate on both sides, determines nothing as to the real merits of these causes. True, it furnishes a guide to our inquiries, yet leaves those inquiries still open, in their widest extent, as to the real position of the parties with reference to the state legislation or to the constitution. Following the guide thus furnished us, we will proceed to ascertain that position. No state, it is declared, shall pass a law impairing the obligation of contracts; yet, with this concession constantly yielded, it cannot be justly disputed that in every political sovereign community there inheres necessarily the right and the duty of guarding its own existence, and of protecting and promoting the interests and welfare of the community at large. This power and this duty are to be exerted not only in the highest acts of sovereignty, and in the external relations of governments; they reach and comprehend likewise the interior polity and relations of social life, which should be regulated with reference to the advantage of the whole society. This power, denominated the eminent domain of the state, is, as its name imports, paramount to all private rights vested under the government, and these last are, by

necessary implication, held in subordination to this power, and must yield in every instance to its proper exercise.

The constitution of the United States, although adopted by the sovereign states of this Union, and proclaimed in its own language to be the supreme law for their government, can, by no rational interpretation, be brought to conflict with this attribute in the states; there is no express delegation of it by the constitution; and it would imply an incredible fatuity in the states, to ascribe to them the intention to relinquish the power of self-government and self-preservation. A correct view of this matter must demonstrate, moreover, that the right of eminent domain in government in nowise interferes with the inviolability of contracts; that the most sanctimonious regard for the one is perfectly consistent with the possession and exercise of the other.

§ 2189. *Tenure of property, how derived. Conditions enter into all contracts which do not arise out of their literal terms.*

Under every established government, the tenure of property is derived mediately or immediately from the sovereign power of the political body, organized in such mode or exerted in such way as the community or state may have thought proper to ordain. It can rest on no other foundation, can have no other guaranty. It is owing to these characteristics only, in the original nature of tenure, that appeals can be made to the laws either for the protection or assertion of the rights of property. Upon any other hypothesis, the law of property would be simply the law of force. Now it is undeniable that the investment of property in the citizen by the government, whether made for a pecuniary consideration or founded on conditions of civil or political duty, is a contract between the state, or the government acting as its agent, and the grantee; and both the parties thereto are bound in good faith to fulfil it. But into all contracts, whether made between states and individuals, or between individuals only, there enter conditions which arise not out of the literal terms of the contract itself; they are superinduced by the pre-existing and higher authority of the laws of nature, of nations, or of the community to which the parties belong; they are always presumed, and must be presumed, to be known and recognized by all, are binding upon all, and need never, therefore, be carried into express stipulation, for this could add nothing to their force. Every contract is made in subordination to them, and must yield to their control, as conditions inherent and paramount, wherever a necessity for their execution shall occur. Such a condition is the right of eminent domain. This right does not operate to impair the contract affected by it, but recognizes its obligation in the fullest extent, claiming only the fulfillment of an essential and inseparable condition. Thus, in claiming the resumption or qualification of an investiture, it insists merely on the true nature and character of the right invested. The impairing of contracts inhibited by the constitution can scarcely, by the greatest violence of construction, be made applicable to the enforcing of the terms or necessary import of a contract; the language and meaning of the inhibition were designed to embrace proceedings attempting the interpolation of some new term or condition foreign to the original agreement, and therefore inconsistent with and violative thereof. It then being clear that the power in question, not being within the purview of the restriction imposed by the tenth section of the first article of the constitution, it remains with the states to the full extent in which it inheres in every sovereign government, to be exercised by them in that degree that shall by them be deemed commensurate with public necessity. So long as they shall steer clear of the single pre-

dicament denounced by the constitution, shall avoid interference with the obligation of contracts, the wisdom, the modes, the policy, the hardship of any exertion of this power are subjects not within the proper cognizance of this court. This is, in truth, purely a question of power; and, conceding the power to reside in the state government, this concession would seem to close the door upon all further controversy in connection with it. The instances of the exertion of this power, in some mode or other, from the very foundation of civil government, have been so numerous and familiar, that it seems somewhat strange at this day to raise a doubt or question concerning it. In fact, the whole policy of the country, relative to roads, mills, bridges and canals, rests upon this single power, under which lands have been always condemned; and without the exertion of this power, not one of the improvements just mentioned could be constructed. In our country, it is believed that the power was never, or, at any rate, rarely, questioned, until the opinion seems to have obtained, that the right of property in a chartered corporation was more sacred and intangible than the same right could possibly be in the person of the citizen; an opinion which must be without any grounds to rest upon, until it can be demonstrated either that the ideal creature is more than a person, or the corporeal being is less. For, as a question of the power to appropriate to public uses the property of private persons, resting upon the ordinary foundations of private right, there would seem to be room neither for doubt nor difficulty.

§ 2190. *In the exercise of the right of eminent domain a state may resume or extinguish a franchise.*

A distinction has been attempted, in argument, between the power of a government to appropriate for public uses property which is corporeal, or may be said to be in being, and the like power in the government to resume or extinguish a franchise. The distinction, thus attempted, we regard as a refinement which has no foundation in reason, and one that, in truth, avoids the true legal or constitutional question in these causes; namely, that of the right in private persons, in the use or enjoyment of their private property, to control and actually to prohibit the power and duty of the government to advance than protect the general good. We are aware of nothing peculiar to a franchise which can class it higher, or render it more sacred, than other property. A franchise is property, and nothing more; it is incorporeal property, and is so defined by Justice Blackstone, when treating, in his second volume, c. 3, p. 20, of the Rights of Things. It is its character of property only which imparts to it value, and alone authorizes in individuals a right of action for invasions or disturbances of its enjoyment. *Vide* Bl. Comm., vol. 3, c. 16, p. 236, as to injuries to this description of private property, and the remedies given for redressing them. A franchise, therefore, to erect a bridge, to construct a road, to keep a ferry, and to collect tolls upon them, granted by the authority of the state, we regard as occupying the same position, with respect to the paramount power and duty of the state to promote and protect the public good, as does the right of the citizen to the possession and enjoyment of his land under his patent or contract with the state, and it can no more interpose any obstruction in the way of their just exertion. Such exertion we hold to be not within the inhibition of the constitution, and no violation of a contract. The power of a state, in the exercise of eminent domain, to extinguish immediately a franchise it had granted, appears never to have been directly brought here for adjudication, and consequently has not been heretofore formally propounded from this court; but in England, this power, to the fullest extent, was recognized in the case of *The Governor*

and Company of the Cast Plate Manufacturers *v.* Meredith, 4 Term R., 794, and Lord Kenyon, especially, in that case, founded solely upon this power the entire policy and authority of all the road and canal laws of the kingdom.

The several state decisions cited in the argument, from 3 Paige's Ch., 45, from 23 Pick., 361, from 17 Conn., 454, from 8 N. H., 398, from 10 N. H., 371, and 11 N. H., 20, are accordant with the decision above mentioned, from 4 Durnf. & E., and entirely supported by it. One of these state decisions, namely, the case of Enfield Toll-Bridge Co. *v.* Hartford & New Haven R. Co., 17 Conn., 454, places the principle asserted in an attitude so striking, as seems to render that case worthy of a separate notice. The legislature of Connecticut, having previously incorporated the Enfield Bridge Company, inserted, in a charter subsequently granted by them to the Hartford & Springfield Railroad Company, a provision in these words: "That nothing therein contained shall be construed to prejudice or impair any of the rights now vested in the Enfield Bridge Company." This provision, comprehensive as its language may seem to be, was decided by the supreme court of the state as not embracing any exemption of the Bridge Company from the legislative power of eminent domain, with respect to its franchise, but to declare this and this only,—that, notwithstanding the privilege of constructing a railroad from Hartford to Springfield in the most direct and feasible route, granted by the latter charter, the franchise of the Enfield Bridge Company should remain as inviolate as the property of other citizens of the state. These decisions sustain clearly the following positions, comprised in this summary given by Chancellor Walworth, 3 Paige, 73, where he says that, "notwithstanding the grant to individuals, the eminent domain, the highest and most exact idea of property, remains in the government, or in the aggregate body of the people in their sovereign capacity; and they have a right to resume the possession of the property in the manner directed by the constitution and laws of the state, whenever the public interest requires it. This right of resumption may be exercised, not only where the safety, but also where the interest, or even the expediency of the state is concerned." In these positions, containing no exception with regard to property in a franchise (an exception which we should deem to be without warrant in reason), we recognize the true doctrines of the law as applicable to the cases before us. In considering the question of constitutional power,—the only question properly presented upon these records,—we institute no inquiry as to the adequacy or inadequacy of the compensation allowed to the plaintiffs in error for the extinguishment of their franchise; nor do we inquire into the conformity between the modes prescribed by the statutes of Vermont and the proceedings which actually were adopted in the execution of those statutes; these are matters regarded by this court as peculiarly belonging to the tribunals designated by the state for the exercise of her legitimate authority, and as being without the province assigned to this court by the judiciary act.

Upon the whole, we consider the authority claimed for the state of Vermont and the exertion of that authority which has occurred under the provisions of the statutes above mentioned, by the extinguishment of the franchise previously granted the plaintiffs, as set forth upon the records before us, as presenting no instance of the impairing of a contract, within the meaning of the tenth section of the first article of the constitution, and consequently no case which is proper for the interposition of this court. The decisions of the supreme court of Vermont are therefore affirmed.

MR. JUSTICE WAYNE dissented.

HAWTHORNE v. CALEF.

(2 Wallace, 10-23. 1864.)

ERROR to the Supreme Court of Maine.

STATEMENT OF FACTS.—At the time the debt in this case was contracted the charter of the corporation made the stockholders individually liable for the debts of the corporation to the amount of their stock. Afterwards, but before judgment was recovered against the company, the individual liability clause was repealed. The plaintiff obtained judgment against the company, but, being unable to obtain satisfaction, brought suit against a stockholder. On the question whether the repealing act was repugnant to the constitution of the United States, the state court found against the plaintiff.

§ 2191. *A repeal of a provision making stockholders individually liable is void as against debts contracted before the repeal.*

Opinion by MR. JUSTICE NELSON.

The question upon the provisions of the charter of the railroad company — in connection with the sale of the property by the plaintiff to the corporation, out of which this debt accrued — is, whether a contract, express or implied, existed between him and the stockholder? It is asserted, in behalf of the latter, that a contract existed only between the creditors and the corporation, and that the obligation of the stockholder rests entirely upon a statutory liability, destitute of any of the elements of a contract. Without stopping to discuss the question upon the clause of the statute, we think that the case falls within the principle of *Woodruff v. Trapnall*, 10 How., 190, and *Curran v. State of Arkansas*, 15 id., 304 (CORPORATIONS, §§ 1316-29), heretofore decided in this court. In the first of these cases the charter of the bank provided that the bills and notes of the institution should be received in all payment of debts due to the state. The bank was chartered 2d November, 1836. On the 10th January, 1845, this provision was repealed, and the question was, whether or not, after this repeal, the bills and notes of the bank, outstanding at the time, were receivable for debts due to the state. The court held, after a very full examination, that the clause in the charter constituted a contract with the holders of the bills and notes on the part of the state, and that the repealing act was void as impairing the obligation of the contract. In the second case, the charter of the bank contained a pledge or assurance that certain funds deposited therein should be devoted to the payment of its debts. It was held by the court that this constituted a contract with the creditors, and that the acts of the legislature withdrawing these funds were void, as impairing the obligation of the contract.

§ 2192. *Stockholders, by subscribing, assent to the individual liability clause.*

Now, it is quite clear that the personal liability clause in the charter, in the present case, pledges the liability or guaranty of the stockholders to the extent of their stock, to the creditors of the company, and to which pledge or guaranty the stockholders, by subscribing for stock and becoming members of it, have assented. They thereby virtually agree to become security to the creditors for the payment of the debts of the company, which have been contracted upon the faith of this liability. This question has been repeatedly before the courts of the state of New York, and they place the obligation of the stockholders upon two grounds. The *first* is that of contract. In *Corning v. McCullough*, 1 Comst., 47, 49, Chancellor Jones, then in the court of appeals, observes that the liability of the defendant, upon which the action is grounded, is for the

payment of a debt of the company incurred by the purchase of merchandise of the plaintiffs, for the use and benefit of the company, and wherein the defendant, as one of the members, was interested, and for which he thereby, and under the provisions of the charter, became and was, concurrently with the company, from the inception of the debt, personally liable. It is, he says, virtually and in effect, a liability upon a contract and the mutual agreement of the parties; not, indeed, in form, an express personal contract, but an agreement of equally binding obligation, consequent upon and resulting from the acts and admissions or implied assent of the parties. The *second* ground is upon the view that the legislature, by subjecting the stockholders to personal liability for the debts of the company, thereby removed the corporate protection from them as corporators, and left them liable as partners and associates as at common law. *Conant v. Van Schaick*, 24 Barb., 87.

§ 2193. — *this liability was a security given at the time the debt was contracted, and no legislation can impair a creditor's remedy against a surety.*

There is another view of the case, involving a violation of the principal contract between the creditors and the corporation, which we think equally conclusive against the judgment of the court below. This view rests upon a principle decided in *Bronson v. Kinzie*, 1 How., 311 (§§ 1650-55, *supra*), and the several subsequent cases of this class. There Kinzie executed a bond mortgage to Bronson, conditioned to pay \$4,000 on the 1st of July, 1842, and covenanted that, in case of default, the mortgagee should sell the premises at public auction, and convey them to the purchaser. Subsequently to the execution on the mortgage, the legislature passed a law that mortgagors on a sale of the premises, under a decree of foreclosure in chancery, should have a right to redeem them at any time within twelve months from the day of sale. By another law it was provided that, when the premises were offered for sale, they should not be struck off unless at two-thirds of a previous valuation. The court held that these acts so seriously affected the remedy of the mortgagee as to impair the obligation of the mortgage contract within the meaning of the constitution, and declared them void. Now, applying the principle of this class of cases to the present one, by the clause in the charter subjecting the property of the stockholder, he becomes liable to the creditor, in case of the inability or insolvency of the company for its debts, to the extent of his stock. The creditor had this security when the debt was contracted with the company, over and above its responsibility. This remedy the repealing act has not merely modified to the prejudice of the creditor, but has altogether abolished, and thereby impaired the obligation of his contract with the company.

We are of opinion, upon both of the grounds above recited, that the court below erred.

Judgment reversed.

SHERMAN v. SMITH.

(1 Black, 587-594. 1861.)

Opinion by MR. JUSTICE NELSON.

STATEMENT OF FACTS.—This is a writ of error to the supreme court of the state of New York. The proceeding was instituted under an act of the legislature of the state of New York, to enforce the responsibility of stockholders in certain banking corporations or associations. The judge before whom the proceedings were instituted declared the bank insolvent, and appointed Smith, the defendant in error, the receiver to take charge of its assets, and to perform

such other duties as the law imposed. The case was afterwards referred to Judge Hall, as a referee, to apportion the debts and liabilities of the bank which had been contracted after the 1st day of January, 1850, and remained unsatisfied among the stockholders, ratably in proportion to their stock, according to the principles declared by an act passed April 5, 1849, and report to the court. Judge Hall reported that the capital of the bank was \$170,000, and its indebtedness \$502,944.22; and further, that the assets in the hands of the receiver, and an assessment upon the stockholders of an amount equal to the capital of the bank, would be insufficient to discharge its debts and liabilities, and hence apportioned upon each of the stockholders an amount equal to the amount of stock held by them respectively in the bank. The sum of \$7,000 was assessed upon the plaintiff in error. The referee further reported that this bank was an association formed 23d April, 1844, under the general banking law of the state, passed 18th April, 1838; and inserted in his report a copy of the articles of association, among which is one that declares: "The stockholders of this association shall not be liable in their individual capacity for any contract, debt or engagement of the association."

The counsel for the plaintiff in error appeared before the referee and objected to the assessment, on the ground, among others, that the clause in the articles of association above referred to, and which were authorized by the general banking act of 1838, constituted a contract that the stockholders were not to be made individually liable for the debts of the association, which was protected by the constitution of the United States; and that the provision of the constitution of the state of New York of 1846, imposing upon them individual liability, and the act of the legislature of 1849, carrying it into effect, were inoperative and void. The counsel further objected, that a reservation by the state, in express terms, of a power to impair by subsequent laws the obligation of contracts between individual citizens, lawful at the time it was made, would be in conflict with the federal constitution.

Numerous other objections were taken to the assessment before the referee, but the above are the only ones material to notice in this court. The referee overruled these objections, and the report was afterwards confirmed by the judge. This judgment, confirming the report, was appealed from to the supreme court of the state, which affirmed it. An appeal was afterwards taken to the court of appeals, the highest court in the state of New York, in which the judgment in the supreme court was affirmed, and the record remitted to that court to have the judgment carried into execution.

As this case comes before us under the twenty-fifth section of the judiciary act, the only question involved is, whether or not the court below erred in denying a right set up by the plaintiff in error under the constitution of the United States; in other words, whether the constitution of the state of New York of 1846 or the act of the legislature of 1849, or both, which subjected the stockholders of the bank to personal liability for its debts accruing after the 1st day of January, 1850, impaired the obligation of any contract with the stockholders in its charter? The general banking law of 1838, under which this bank was organized, provided in the twenty-third section that "no shareholder of any such association shall be liable in his individual capacity for any contract, debt or engagement of such association, *unless the articles of association by him signed shall have declared that the shareholder shall be liable.*" The fifteenth section provided that "any number of persons may associate to establish offices of discount, deposit and circulation upon the terms and conditions,

and subject to the liabilities, prescribed in this act." One of the articles of association, as we have already seen, provided that the shareholders should not be liable in their individual capacities for any contract, debt, etc. The thirty-second section of the general banking act provided that "the legislature may at any time alter or repeal this act."

§ 2194. *A provision in a charter, made under an act which is subject to amendment or repeal, is also subject to amendment or repeal.*

The argument on the part of the plaintiff is, that this stipulation of the stockholders in the articles of association from exemption from all personal liability for the debts of the institution, constitutes a contract within the authority of the act under which it was organized, that cannot be legally impaired by the provision in the constitution of New York, or by the act of 1849, which seeks to change the obligation, and impose upon them personal liability; that, in respect to this bank, the provision in the constitution and the law are void, as against the constitution of the United States.

Now, in the first place, it is to be observed that the article of association relied on is but an affirmation of the principle contained in the twenty-third section of the act of 1838, and can be entitled to no greater effect or operation than the law itself, unless, indeed, by incorporating it into the articles, it can be made permanent or perpetual. The section expressly exempts the individual liability of the stockholder, but confers the privilege upon the association to subject him to personal liability if they think fit. It was competent for the stockholders to avail themselves of this privilege in their articles of association, and thus, perhaps, increase public confidence in the credit of the institution. But we can discover no authority in the section or any necessity or propriety on the part of the association for incorporating the law itself into their articles. Certainly, in so doing they cannot change it or make it more or less effectual.

In the second place we remark that this article of association is not within any authority conferred on the stockholders by any provision of the general banking law. By the fifteenth section any number of persons may associate to establish offices, etc., upon the terms and conditions, and subject to the liabilities, prescribed by the act. These terms and conditions, as it respects the personal liability of the stockholders, are found in the twenty-third section, which exempts them, unless they see fit to impose it upon themselves. It is not in their power to change the rule of liability except as specified in the section, and that they have not attempted. This article of association, therefore, being a mere attempt to re-enact a provision of the law, and this even without any authority in the general charter, cannot be regarded as a contract in any legal sense of the term, and, of course, not within the protection of the provision of the constitution of the United States.

§ 2195. *A reservation in an act of the power to alter or repeal it is a reservation of a power to alter or repeal any part of it.*

Another view of this question, even assuming that the stipulation of the stockholders in the article of association amounted to a contract, is equally conclusive against the stockholder. According to the fifteenth section, the association was authorized to establish a bank of discount, deposit and circulation, "upon the terms and conditions, and subject to the liabilities, prescribed in this act." It was not competent for the association to organize their bank upon any other terms or conditions, or subject to any other liabilities than those prescribed in the general charter. Now, the thirty-second section, which reserved to the legislature the power to alter or repeal the act, by necessary construc-

tion, reserved the power to alter or repeal all or any one of these terms and conditions or rules of liability, prescribed in the act. The articles of association are dependent upon, and become a part of, the law under which the bank was organized, and subject to alteration or repeal, the same as any other part of the general system.

§ 2196. *Effect of a saving clause in a constitution.*

The saving clause in the constitution of the state of New York has been referred to, which provided that "nothing contained in this constitution shall affect any grants or charters to bodies, politic or corporate, made by this state, or by persons acting under its authority." This provision saved the charter of the bank in this case, and all others organized under the general banking law, as well as all those created by special charters, but it saved each of them as a whole, as an entirety; the charters remained after the adoption of the constitution the same as before, with all their privileges and disabilities intact. We do not perceive that this provision has any bearing upon the question in the case. It is unimportant to inquire into the effect of this provision of the constitution of the state of New York, or of the act of 1849, when applied to the personal liability of the stockholder for debts of the bank existing at the adoption of the one or the passage of the other, as no such question is presented in the case. The constitution imposed the liability only in respect to all debts contracted after the 1st day of January, 1850, and the act of 1849 simply carries the provision into execution. Neither do we inquire whether or not this constitutional provision applied to existing banks, as that question has been determined by the state court, to which it belonged. Our inquiry has been, assuming this to be the true construction, whether or not any contract in the charter of the bank with the state has been impaired within the meaning of the constitution of the United States, and we are perfectly satisfied that the answer must be in the negative. Judgment of the state court affirmed.

§ 2197. *Charter a contract.*—The charter of a private corporation is a contract the obligation of which cannot be impaired without an infraction of the constitution of the United States. *State Lottery Co. v. Fitzpatrick*,* 3 Woods, 232; *The Delaware Railroad Tax*, 18 Wall., 206 (§§ 2328-35). See §§ 2081, 2085.

§ 2198. *Reservation of power to alter or repeal.*—An act of a state legislature, providing that all subsequent charters shall be subject to alteration and repeal, does not prevent subsequent legislatures from granting charters not subject to alteration or repeal. *New Jersey v. Yard*, 5 Otto, 104 (§§ 2336-41). See §§ 2080, 2082-87, 2049, 2051, 2057.

§ 2199. A general reservation of power over the charters of corporations gives the state no greater control over them than a special provision to the same effect in each charter. *In re Parrott*, 1 Fed. R., 481 (§§ 982-1007).

§ 2200. A general law provided that every act of incorporation passed after a certain date should be subject to alteration or repeal "at the pleasure of the legislature." *Held*, that in repealing a charter the legislature need give no reason for its action in the matter, and that the validity of its action does not depend on the necessity for it, or the soundness of the reasons which prompted it. *Greenwood v. Freight Co.*, 15 Otto, 16.

§ 2201. The charter of a corporation is a contract between the state and the corporators, and the corporation takes the grant subject to the limitations which are contained in the act of incorporation. If no power of repeal is reserved, none can be exercised; but when the charter itself, or a general statute, provides that the charter is subject to repeal by the legislature at its pleasure, without restrictions or conditions, the legislature has the power to repeal the charter summarily, and at will, and its action being a legislative and not a judicial act, cannot be reviewed by the courts, unless it should exercise its power so wantonly or causelessly as palpably to violate the principles of natural justice; and in such a case a repeal, like other legislative acts which do thus palpably violate the principles of natural justice, may be reviewed by the courts. It is always to be presumed that the legislature has exercised its great powers in the repeal of a charter for adequate cause. *Lothrop v. Stedman*, 18 Blatch., 141.

§ 2202. Under the statute of Massachusetts, declaring that "every act of incorporation passed after the 11th day of March, in the year 1831, shall be subject to amendment, alteration or repeal, at the pleasure of the legislature," the legislature of that state may, without impairing the obligation of any contract, repeal the charter of a street railway company, granted after this date, and grant to another corporation the authority to operate a street railroad through the same streets and over the same ground occupied by the former company. It may also authorize the new corporation, upon making compensation therefor, to take such property of the former corporation for public use as may be necessary. A clause in the charter of the old company which declares it to be subject to the restrictions and liabilities contained in the general laws relating to street railways, does not withdraw it from the operation of the act relating to the amendment and repeal of acts of incorporation. *Greenwood v. Freight Co.*, 15 Otto, 18.

§ 2203. Where a bank charter provided that it might be subsequently altered or amended, such power of alteration or amendment may be exercised in the discretion of the legislature; but acts which were in themselves innocent, or involved only a limited responsibility, cannot be essentially changed by subsequent legislation. *White v. How*, 3 McL., 115.

§ 2204. Dissolution.—Impairing contracts of company.—The dissolution of a corporation by legislative enactment cannot be considered an impairment of the contracts of the company, within the meaning of the constitution of the United States. *Mumma v. The Potomac Co.*, 8 Pet., 286.

§ 2205. A repeal of the charter of a corporation does not of itself violate or impair the obligation of any contract which the corporation has entered into. But the legislature cannot establish such rules in regard to the management and disposition of the assets of a corporation, that the avails shall be diverted from or divided unfairly or unequally among the creditors, and thus impair the obligation of contracts, or that the portion of the avails which belongs to the stockholders shall be sequestered and diverted from the owners and thus injure vested rights. *Lothrop v. Stedman*, 18 Blatch., 143.

§ 2206. By legislative enactment, a corporation was authorized to surrender its charter, in which case its property was to be vested in another corporation on the condition that the latter should make certain payments to creditors of the former company, which were specifically named. *Held*, that a person not so named could not compel payment in the manner pointed out in the act, as there was no contract as to payment to him; that as the act provided for the preservation of the assets of the old company, the omission of the name of a creditor did not impair the obligation of the contract of the former company with him. *Smith v. Chesapeake & Ohio Canal Co.*, 14 Pet., 45.

§ 2207. Though a state may have the power to repeal the charter of a corporation, still it cannot, by the exercise of such power, impair the obligations of the executory contracts of the corporation, or withdraw its property from the just claims of its creditors. *Curran v. State of Arkansas*, 15 How., 310 (CORPORATIONS, §§ 1816-20).

§ 2208. Regulating charges for uses of property.—Railroad company A was incorporated in 1846, under a charter which gave it power to charge whatever rates for transportation it deemed reasonable, subject only to the supervision of the legislature at intervals of ten years. In 1850 B was incorporated, and its charter declared that in the event of its consolidation with A, the consolidated company should be governed by certain provisions of the charter of A (omitting the provision as to legislative supervision at intervals of ten years), and the provisions of the charter of B. In 1851 a general consolidation act was passed, declaring that any new corporation formed under it should be invested with the rights and duties of the old ones so far as consistent with this act. Later in 1851, a new constitution declared that no special privileges should ever be granted that might not be altered, repealed or revoked, and that corporations should be created under general and not special laws, such general laws being subject to repeal and alteration. In 1853 A and B consolidated under the name of C. In 1856 another general consolidation act was passed, by the provisions of which consolidating companies became extinguished and the new company acquired its rights and privileges solely from the consolidation act. C, subsequent to the passage of this act, consolidated with another company, and this latter with another still. It was held that an act of the legislature prescribing the rates for transportation by the new company did not, as to the part of the road originally owned by A, impair the obligation of the contract in the charter granted to A. *Shields v. Ohio*,* 5 Otto, 819; *Tilley v. Savannah, etc., R. Co.*, 5 Fed. R., 641 (§§ 2148-57). See §§ 1847, 1848, 2038-45.

§ 2209. Right to revoke for abuse or misuse.—Where the charter of a railroad company provides that "if said company shall at any time misuse or abuse any of the privileges herein granted, the legislature may resume all and singular the rights and privileges granted to such corporation," and there is retained no right of revocation on any other ground, a subsequent act revoking the grant of these rights and privileges, without establishing any misuse or

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abuse thereof, or giving the corporation a right to be heard, is unconstitutional, as impairing the obligation of the contract contained in the charter. *Mayor of Baltimore v. Railroad Co.*,* 4 Am. L. Reg. (N. S.), 750.

§ 2210. *Competing railroads.*— Where a charter granted by a state to a railroad corporation provided that no other railroad should for thirty years be constructed between its termini, or for any portion of the distance, the probable effect of which would be to diminish the number of its passengers traveling between the termini, or to compel the company to reduce its passage money, such charter was held to protect the grantee from competition only from railroads carrying passengers between the points upon its road, and not from the construction of a road between the same points to do other business than the carriage of persons. *Richmond, etc., R. Co. v. Louisa R. Co.*,* 18 How., 71. See §§ 2021, 2023, 2025.

§ 2211. If a state legislature incorporates a turnpike company, but confers no exclusive privileges upon it, either by express terms or by implication, it impairs no contract by authorizing the construction of a rival railroad which greatly injures the business of the turnpike company. *Turnpike Co. v. The State*, 3 Wall., 210.

§ 2212. *Liability of stockholders.*— One who had become a creditor of a corporation at a time when, by the constitution of the state, the stockholders were subject to a double liability, sued a stockholder, under the double liability clause, who had made the original subscription for his stock after the repeal of the double liability clause, the corporation having been authorized to issue this new stock before the repeal, but not having done so until afterwards. It was held that the new stockholder was not liable under the clause which had been repealed, and that no contract of the creditor was thus impaired. *Ochiltree v. Railroad Co.*, 21 Wall., 240. See §§ 2055-56.

§ 2213. *Grants of monopolies* are construed strictly, and nothing can be claimed by a corporation receiving such a grant but what is clearly given by the act. *Richmond, etc., R. Co. v. Louisa R. Co.*,* 18 How., 71. See §§ 738, 841.

§ 2214. *Crossing other roads.*— The exercise of the right of eminent domain in authorizing the construction of one railroad across another, already built, does not interfere with the inviolability of contracts. *Ibid.*

§ 2215. *Charter of lottery company.*— The act of the legislature of Louisiana of 1868 chartered the Louisiana State Lottery Company as a corporation, to continue for the period of twenty-five years. It granted it the sole and exclusive privilege of drawing lotteries for the whole term, the expressed object being to make the business a source of revenue to the state. The corporation was required to pay quarterly, in advance, a large sum of money to the state. It was required to collect capital, and might issue shares of stock, and was controlled by directors chosen under its charter. The requirements of its charter were always complied with. It was held that this grant could not be repealed by the legislature, and that the act of 1879 repealing the charter of the company was a law impairing the obligation of contracts, and, therefore, void. *State Lottery Co. v. Fitzpatrick*,* 3 Woods, 232. See § 2048.

§ 2216. *Abandonment of station by railway company.*— Where a statute provided that no railroad should abandon any station except by the approval of the railroad commissioners, and a certain railroad company abandoned one of its stations, upon the approval of the commissioners, given upon condition of furnishing certain new accommodations, there being a reservation in the charter of the power of amendment, it was held that there was no contract on behalf of the state, made by the commissioners with the company, and that no contract obligation was impaired by a subsequent act compelling the company to restore the abandoned station. *Railroad Co. v. Hamersley*,* 14 Otto, 1.

§ 2217. *Miscellaneous.*— It is held that the act of the legislature of Pennsylvania of August 19, 1864, repealing the charter of the Pittsburgh & Connellsville Railroad Company, is unconstitutional, being a "law impairing the obligation of contracts." *Baltimore v. Pittsburgh & C. R. Co.*,* 3 Pittsb. R., 20.

5. *Exemption from Taxation.*

[See REVENUE. Also the sub-title *Laws Affecting Corporations, supra*.] ⁴

SUMMARY— *Exemption from taxation a contract*, §§ 2218, 2231, 2232, 2233, 2243.— *Power to exempt from taxation*, §§ 2219, 2227, 2230, 2238.— *Reserved power of alteration*, §§ 2230, 2232, 2224, 2239, 2240, 2245.— *License fees for street cars*, §§ 2221, 2222.— *Consolidation of corporations*, §§ 2223, 2240, 2244.— *Loss of exemption*, § 2224.— *Certain tax in lieu of all others*, § 2225.— *General bounty law to encourage manufactures*, § 2226.— *Exemption not amounting to a contract*, § 2228.— *Exemption without qualification is an exemption forever*, § 2229.— *Consideration for an exemption*, § 2230.— *Exemption of swamp lands; rights of purchasers*, § 2232.— *Exemption of a railroad for a certain time*, § 2233.— *Taxing fran-*

chise and rolling stock of company whose property is exempt, § 2284.— Charter not to be repealed without making indemnity, § 2285.— Impairment of contract by new constitution, § 2286.— Street railway company required to keep street in repair, § 2287.— Requirement of equal and uniform taxation, § 2288.— Exemption held subject to repeal, § 2289.— Charter containing no stipulation for exemption, §§ 2241, 2244.— License fee paid by foreign insurance companies not a contract against further taxation, § 2242.— Intent to exempt must be clear, § 2243.— Conditional exemption; charter taken out of operation of reserved power, § 2245.

§ 2218. Where the state makes a contract with a corporation that it shall not be taxed beyond a certain rate, a subsequent law increasing the rate of taxation impairs the obligation of the contract. *State Bank of Ohio v. Knoop*, §§ 2246-58.

§ 2219. As to the power of a legislature to exempt property from taxation or make any other contract which will be binding on future legislatures. *Ibid.*; *Ohio Life Ins. & Trust Co. v. Debolt*, §§ 2254-65. See § 2342.

§ 2220. By an act of incorporation it was provided that no higher taxes shall be levied on the capital stock or dividends of the company than are or may be levied on the capital stock or dividends of incorporated banking companies in the state. The charter reserved the power to repeal, amend or alter after 1870. *Held*, that the company remained subject to the taxing power of the state without reference to the rates of taxes imposed upon other companies by special contracts contained in subsequent laws. *Ohio Life Ins., etc., Co. v. Debolt*, §§ 2254-65. See §§ 2080, 2032-37, 2049, 2051, 2057, 2198, 2344.

§ 2221. In chartering a street railway company it was provided that it should pay such license fee for each car run as was paid by other companies. *Held*, that this was not a contract that it should not be required to pay a higher license fee than was then imposed on other companies. *Railway Co. v. Philadelphia*, §§ 2266-72.

§ 2222. But if the charter could be regarded as a contract, the reserved power in the constitution to alter and amend would justify the legislature in exacting a higher fee. Rule stated as to the binding force of charters, and how far they may be altered under a reservation of power. *Ibid.* See §§ 2080, 2032-37, 2049, 2051, 2057, 2198, 2344.

§ 2223. A corporation whose property was exempt from taxation for a limited time was merged in another which had a perpetual exemption, the rights, privileges and property to vest in the latter, etc. *Held*, that the latter took the property of the former subject only to the limited exemption. *Tomlinson v. Branch*, §§ 2273-75.

§ 2224. Where a charter is specially exempted from the operation of a general statute, authorizing the repeal of all charters by the legislature, except as to future grants to the corporation, such exemption is not lost by obtaining subsequent legislation authorizing the company to issue bonds. *Ibid.*

§ 2225. The charter of a bank provided that the bank should pay an annual tax of one-half of one per cent. on each share of capital stock subscribed, which should be in lieu of all other taxes. *Held*, that a law imposing an additional tax impaired the obligation of the contract and was void. *Farrington v. Tennessee*, §§ 2276-84.

§ 2226. A general bounty and exemption law for the encouragement of salt manufacturing is not a contract within the constitutional provision. *Salt Co. v. East Saginaw*, §§ 2285-87.

§ 2227. A legislature has the power to make a contract exempting certain property from taxation. *Ibid.* See § 2342.

§ 2228. An act exempting the property of a corporation from taxation so long as it should belong to it, but which imposed no service or duty or other remunerative condition, is not a contract, but a mere privilege, protecting the corporation only so long as the legislature neglects to recall it, and extinguishable at its pleasure. *Christ Church v. County of Philadelphia*, § 2288.

§ 2229. A provision in the charter of a charitable institution, exempting it from taxation without qualification, exempts it forever; and a law imposing a tax impairs the obligation of the contract. *Home of the Friendless v. Rouse*, §§ 2239-94.

§ 2230. The question is settled, that a state may, by a contract based on a consideration, exempt property from taxation, either for a specified period or permanently; and there is no necessity for looking for the consideration of a legislative contract outside of the objects for which the corporation was created. *Ibid.* See § 2342.

§ 2231. By an act of the legislature of New Jersey a contract was made with certain Indians, by which it was agreed to purchase certain lands for the Indians on condition of a release by them of title to other lands, and providing that the lands purchased should be exempt from taxation, but that the Indians should not sell or lease them. Afterwards a law was passed permitting the Indians to sell the lands purchased for them. *Held*, that the

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exemption from taxation was a contract within the constitutional inhibition. *New Jersey v. Wilson*, § 2295.

§ 2232. A law exempting swamp lands from taxation for a certain period, and making certain scrip receivable for swamp land, is a contract; and a law taxing the land is, as against one who bought scrip before its enactment, but located it afterwards, void as impairing the obligation of the contract. *McGee v. Mathis*, §§ 2296-98.

§ 2233. A law exempting a railroad from taxation until its completion, and until it pays a dividend; the exemption not to continue more than two years after completion, is a contract; and a constitutional ordinance taxing the road before the contingency happens impairs the obligation of the contract. And it is not material that the sum raised is to be applied in payment of bonds issued to the company by the state. *Pacific R. Co. v. Maguire*, §§ 2299-2302.

§ 2234. A charter of a railroad company, exempting its "property and the shares therein" from taxation, is a contract the obligation of which is impaired by a subsequent law taxing the franchise and rolling stock of the company. *Wilmington Railroad v. Reid*, §§ 2303, 2304.

§ 2235. An act incorporating a charitable institution exempted its property from taxation. The law of the state provided that an act of incorporation should not be repealed or modified without making full indemnity. A cotton-press was devised to the institution, the revenues of which were applied in carrying on its work. This cotton-press was taxed under a subsequent act. *Held*, that this tax, being levied without making any provision for indemnity, impaired the obligation of the contract contained in the act of incorporation; that the act of incorporation applied to after-acquired property. *Asylum v. New Orleans*, §§ 2305-2307.

§ 2236. In incorporating a university, it was provided that all its property, of whatever kind or description, should be forever free from taxation. Subsequently a new constitution was adopted, and the courts of the state held that under a statute passed to enforce a provision of this constitution, no property of the institution was exempt except such as was in immediate use for school purposes. *Held*, that by this construction the obligation of the original contract was impaired. *University v. People*, §§ 2308-11.

§ 2237. Where an ordinance requires a street railway company, so far as respects grading, paving, macadamizing, etc., to keep a certain portion of the street in repair, the company is not liable to an assessment for an entirely new pavement. *Chicago v. Sheldon*, §§ 2312-15.

§ 2238. Although the constitution of Illinois provides for equal and uniform taxation, the legislature has power to commute the burdens of all taxation with individuals or corporate bodies for what they may deem an equivalent public benefit; and the construction of a horse railway is sufficient to empower the legislature to grant the corporation such exemption. *Ibid*. See § 2342.

§ 2239. A general law in force at the time a company was incorporated provided that the charter of every corporation subsequently granted, and any renewal, amendment or modification thereof, should be subject to amendment, alteration or repeal by legislative authority, unless the act granting the charter, or the renewal, amendment or modification, in express terms excepted it from the operation of that law. By an amendment of the charter the property of the company was exempted from taxation. *Held*, that this exemption was subject to repeal without impairing the obligation of the contract. *Tomlinson v. Jessup*, § 2316.

§ 2240. Two railroad companies were chartered, with a state law in force reserving the right to withdraw any franchise, "unless such right is expressly negatived in the charter." The companies were exempted from taxation above a certain rate. By an act consolidating the two companies it was provided that the several immunities, franchises and privileges granted to them respectively should continue in force, etc. *Held*, that a subsequent law, taxing the property of the new company the same as other property in the state, was valid. *Railroad Co. v. Georgia*, §§ 2317-20.

§ 2241. Where the charter of a bank contains no stipulation promising exemption from taxation, a subsequent law taxing the bank does not impair the obligation of a contract. *Providence Bank v. Billings*, §§ 2321-24.

§ 2242. Where an insurance company is permitted to transact business in a state on complying with the laws and paying a certain license fee, this does not amount to a contract that the company shall not be taxed. *Home Ins. Co. v. City Council*, §§ 2325-27.

§ 2243. An exemption from taxation in the charter of a corporation is a part of the contract, but the intent to confer the immunity must be clear beyond a reasonable doubt. The Delaware Railroad Tax, §§ 2328-35. See § 2343.

§ 2244. A provision in an act uniting two railroad companies, that the new company shall pay annually into the state treasury a tax of one quarter of one per cent. upon its capital stock, is not a contract that no further or different tax shall be imposed in the future. *Ibid*.

§ 2245. At the time a charter was granted there was a general law in force reserving the right to alter or repeal. By the terms of the charter the company was granted a condi-

tional exemption from taxation beyond a certain rate. The condition was complied with, and it was held that the whole transaction evidenced an intention on the part of the legislature to take the charter out of the operation of the general law, and that a subsequent law, imposing a higher rate of taxation, impaired the obligation of the contract. *New Jersey v. Yard*, §§ 2336-41.

[NOTES.— See §§ 2342-2356.]

STATE BANK OF OHIO *v.* KNOOP.

(16 Howard, 369-415. 1853.)

Opinion by MR. JUSTICE McLEAN.

STATEMENT OF FACTS.— This is a writ of error to the supreme court of the state of Ohio.

The proceeding was instituted to reverse a decree of that court, entered in behalf of Jacob Knoop, treasurer, against the Piqua Branch of the State Bank of Ohio, for a tax of \$1,266.63, assessed against the said branch bank for the year 1851. By the act of 1845, under which this bank was incorporated, any number of individuals, not less than five, were authorized to form banking associations to carry on the business of banking in the state of Ohio, at a place designated; the aggregate amount of capital stock in all the companies not to exceed \$6,150,000. In the fifty-first section it is provided that every banking company authorized under the act to carry on the business of banking, whether as a branch of the State Bank of Ohio, or as an independent banking association, "shall be held and adjudged to be a body corporate, with succession, until the 1st of May, 1866; and thereafter until its affairs shall be closed." It was made subject to the restrictions of the act. The fifty-ninth section requires "the directors of each banking company, semi-annually, on the first Mondays of May and November, to declare a dividend of so much of the net profits of the company as they shall judge expedient; and on each dividend day the cashier shall make out, and verify by oath, a full, clear and accurate statement of the condition of the company as it shall be on that day, after declaring the dividend, and similar statements shall also be made on the first Mondays of February and August in each year." This statement is required to be transmitted to the auditor of state.

The sixtieth section provides that each banking company under the act, or accepting thereof, and complying with its provisions, shall, semi-annually, on the days designated for declaring dividends, set off to the state six per cent. on the profits, deducting therefrom the expenses and ascertained losses of the company for the six months next preceding, which sum or amount so set off shall be in lieu of all taxes to which the company, or the stockholders therein, would otherwise be subject. The sum so set off to be paid to the treasurer on the order of the auditor of state. The Piqua Branch Bank was organized in the year 1847, under the above act, and still continues to carry on the business of banking, and continued to set off and pay the semi-annual amount as required; and on the first Mondays of May and November, in 1851, there was set off to the state six per cent. of the profits, deducting expenses and ascertained losses for the six months next preceding each of those days, and the cashier did, within ten days thereafter, inform the auditor of state of the amount so set off on the 15th of November, 1851, the same amounting to \$862.50; which sum was paid to the treasurer of state, on the order of the auditor; which payment the bank claims was in lieu of all taxes to which the company or its stockholders were subject for the year 1851.

On the 21st of March, 1851, an act was passed, entitled "An act to tax banks, and bank and other stocks, the same as property is now taxable by the laws of the state." This act provides that the capital stock of every banking company incorporated by the laws of the state, and having the right to issue bills or notes for circulation, shall be listed at its true value in money, with the amount of the surplus and contingent fund belonging to such bank; and that the amount of such capital stock, surplus and contingent fund should be taxed for the same purposes and to the same extent that personal property was or might be required to be taxed in the place where such bank is located; and that such tax should be collected and paid over in the same manner that taxes on other personal property are required by law to be collected and paid over. In pursuance of this act, there was assessed for the year 1851, on the capital stock, contingent and surplus fund of the Piqua Bank, a tax amounting to the sum of \$1,266.63. The bank refused to pay this tax on the ground that it was in violation of its charter. Suit was brought by the state against the bank for this tax. The defense set up by the bank was, that the tax imposed was in violation of its charter, which fixed the rate of taxation at six per cent. on its dividends, deducting expenses and losses; but the supreme court of the state sustained the act of 1851, against the provision of the charter by which, it is insisted, the contract in the charter was impaired.

We will first consider whether the specific mode of taxation, provided in the sixtieth section of the charter, is a contract. The operative words are, that the bank shall, "semi-annually, on the days designated in the fifty-ninth section for declaring dividends, set off to the state six per cent. on the profits, deducting therefrom the expenses and ascertained losses of the company for the six months next preceding, which sum or amount so set off shall be in lieu of all taxes to which such company or the stockholders thereof, on account of stock owned therein, would otherwise be subject." This sentence is so explicit that it would seem to be susceptible of but one construction. There is not one word of doubtful meaning when taken singly, or as it stands connected with the sentence in which it is used. Nothing is left to inference. The time, the amount to be set off, the means of ascertaining it, to whom it is to be paid, and the object of the payment, are so clearly stated, that no one who reads the provision can fail to understand it. The payment was to be in lieu of all taxes to which the company or stockholders would otherwise be subject. This is the full measure of taxation on the bank. It is in the place of any other tax which, had it not been for this stipulation, might have been imposed on the company or stockholders. This construction, I can say, was given to the act by the executive authorities of Ohio, by those who were interested in the bank, and generally by the public, from the time the bank was organized down to the tax law of 1851.

In the case of *Debolt v. Ohio Ins. & Trust Co.*, 1 Ohio St., 563, the supreme court, in considering the sixtieth section now before us, say: "It must be admitted the section contains no language importing a surrender of the right to alter the taxation prescribed, unless it is to be inferred from the words, 'shall be in lieu of all taxes to which such company, or the stockholders thereof, on account of stock owned therein, would otherwise be subject;' and it is frankly conceded that if these words had occurred in a general law they would not be open to such a construction. If the place where they are found is important, we have already seen this law is general in many of its provisions, and upon a general subject. Why may not this be classed with these provisions, especially

in view of the fact that in its nature it properly belongs there? We think it should be regarded as a law prescribing a rule of taxation, until changed, and not a contract stipulating against any change,—a legislative command, and not a legislative compact with these institutions.” And the court further say: “The taxes required by this act are to be in lieu of other taxes; that is, to take the place of other taxes. What other taxes? The answer is, such as the banks or the stockholders would otherwise be subject to pay. The taxes to which they would be otherwise subject were prescribed by existing laws, and this, in effect, operated as a repeal of them, so far as these institutions were concerned.”

With great respect, it may be suggested there was no general tax law existing, as supposed by the court, under which the banks chartered by the act of 1845 could have been taxed, and on which the above provision could, “in effect, operate to repeal.” The general tax law of the 12th of March, 1831, which raised the tax to five per cent. on dividends, and which operated on all the banks of Ohio, except the “Commercial Bank of Cincinnati,” was repealed by the small note act of 1836, and that could operate only on banks doing business at the time of its passage. The act of the 13th of March, 1838, repealed the act of 1836 so far “as it restricts or prohibits the issuing and circulation of small bills.” The act of 1836 authorized the treasurer of state to draw upon the banks for the amount of twenty per cent. upon their dividends as their proportion of the state tax; and provided that if any bank should relinquish its charter privilege of issuing bills of less denomination than \$3 and \$5, the tax should be reduced to five per cent. upon its dividends. As the prohibition of circulating small notes was repealed, the tax necessarily fell. Neither the twenty nor the five per cent. could be exacted. The five per cent. was a compromise for the twenty; as the twenty was repealed by the repeal of the prohibition of small notes, neither the one nor the other could be collected.

§ 2246. *The stipulation in a banking law that banks shall pay a certain per cent. of profits, in lieu of all taxes, is a contract, and the state cannot, during the term of the charter, impose any other tax on such banks.*

But if this were not so, the bank act of 1842, which imposed a tax of one-half per cent. on the capital stock of the bank, repealed, by its repugnancy, any part of the act of 1836 which, by construction or otherwise, could be considered in force. And the act of 1842 was repealed by the act of 1845. There is a general law in Ohio declaring that the repeal of an act shall not revive any act which had been previously repealed. Swan's Stat., 59.

If this statement be correct, as it is believed to be, the legislature could not have intended, by the special provision in the sixtieth section, to exempt the bank from tax by the existing law, as no such law existed, but to exempt from the operation of tax laws subsequently passed. This is the clear and fair import of the compact, which we think would not be rendered doubtful if a tax law had existed at the time the act of 1845 was passed. The sixtieth section is not found in a general law, as is intimated by the supreme court of the state. The act of 1845 is general only in the sense that all banking associations were permitted to organize under it; but the act is as special to each bank as if no other institution were incorporated by it. We suppose this cannot be controverted by any one. This view is so clear in itself that no illustration can make it clearer. Every valuable privilege given by the charter, and which conduced to an acceptance of it and an organization under it, is a contract which cannot be changed by the legislature, where the power to do so is not

reserved in the charter. The rate of discount, the duration of the charter, the specific tax agreed to be paid, and other provisions essentially connected with the franchise and necessary to the business of the bank, cannot, without its consent, become a subject for legislative action.

A municipal corporation in which is vested some portion of the administration of the government may be changed at the will of the legislature. Such is a public corporation, used for public purposes. But a bank, where the stock is owned by individuals, is a private corporation. This was not denied or questioned by the counsel in argument, although it has been controverted in this case elsewhere. But this court and the courts of the different states, not excepting the supreme court of Ohio, have so universally held that banks, where the stock is owned by individuals, are private corporations, that no legal fact is susceptible of less doubt. Mr. Justice Story, in his learned and able remarks in *Dartmouth College v. Woodward*, 4 Wheat., 669 (§§ 2099–2117, *supra*), says: "A bank created by the government for its own uses, where the stock is exclusively owned by the government, is, in the strictest sense, a public corporation." "But a bank whose stock is owned by private persons is a private corporation, although it is erected by the government, and its objects and operations partake of a public nature. The same doctrine," he says, "may be affirmed of insurance, canal, bridge and turnpike companies." There can be no doubt that these definitions are sound, and are sustained by the settled principles of law.

§ 2247. *No corporation is public merely because its purposes are to benefit the public.*

It by no means follows that because the action of a corporation may be beneficial to the public, therefore it is a public corporation. This may be said of all corporations whose objects are the administration of charities. But these are not public, though incorporated by the legislature, unless their funds belong to the government. Where the property of a corporation is private, it gives the same character to the institution, and to this there is no exception. Men who are engaged in banking understand the distinction above stated, and also that privileges granted in private corporations are not a legislative command, but a legislative contract, not liable to be changed. This fact is shown by the following circumstances: "An act to regulate banking in Ohio," passed the 7th of March, 1842. The first section provided: "That all companies or associations of persons desiring to engage in and carry on the business of banking within this state, which may hereafter be incorporated, shall be subject to the rules, regulations, limitations, conditions and provisions contained in this act, and such other acts to regulate banking as are now in force, or may hereafter be enacted, in this state." The twentieth section of that act provided that a tax of one-half per cent. per annum on its capital should be paid, and such other tax upon its capital or circulation as the general assembly may hereafter impose. An amendment to this act was passed the 21st February, 1843; but the act and the amendment remained a dead letter upon the statute book. No stock was subscribed under them, and they were both repealed by the act of 1845, under which nearly three-fourths of the banks in Ohio were organized. This act contained the express stipulation that "six per cent. on the dividends, after deducting expenses and losses, should be paid in lieu of all taxes."

This compact was accepted, and on the faith of it fifty banks were organized, which are still in operation. Up to the year 1851, I believe, the banks, the profession and the bench considered this as a contract and binding upon the state and the banks. For more than thirty-five years this mode of taxing

the dividends of banks had been sanctioned in the state of Ohio. With few exceptions the banks were so taxed where any tax on them was imposed. In the case of *State of Ohio v. Commercial Bank of Cincinnati*, 10 Ohio, 535, the supreme court of Ohio say, we take it to be well settled that the charter of a private corporation is in the nature of a contract between the state and the corporation. Had there ever been any doubts upon this subject, those doubts must have been removed by the decision of the supreme court of the United States in the case of *Woodward v. Dartmouth College*. And the court remark: "The general assembly say to such persons as may take the stock, you may enjoy the privilege of banking if you will consent to pay to the state of Ohio, for this privilege, four per cent. on your dividends, as they shall from time to time be made. The charter is accepted, the stock is subscribed, and the corporation pays, or is willing to pay, the consideration stipulated, to wit, the four per cent." And the court say: "Here is a contract, specific in its terms, and easy to be understood." "A contract between the state and individuals is as obligatory as any other contract. Until a state is lost to all sense of justice and propriety she will scrupulously abide by her contracts, more scrupulously that she will exact their fulfillment by the opposite contracting party."

This opinion commends itself to the judgment, both on account of its sound constitutional views and its elevated morality. It was pronounced at December term, 1835. That decision was calculated to give confidence to those who were desirous to make investments in banking operations or otherwise, in the state of Ohio. Ten years after this opinion, and after an ineffectual attempt had been made by the act of 1842, and its amendment in 1843, to organize banks in Ohio without a compact as to taxation, the act of 1845 was passed, containing a compact much more specific than that which had been sustained by the supreme court of the state. Under such circumstances, can the intentions of the legislature of Ohio in passing the act of 1845 be doubted, or the inducements of the stockholders to vest their money under it? Could either have supposed that the sixtieth section proposed a temporary taxation? Such a supposition does great injustice to the legislature of 1845. It is against the clear language of the section, which must ever shield them from the imputation of having acted inconsiderately or in bad faith. They passed the charter of 1845, which they knew would be accepted, as it removed the objections to the act of 1842.

Can the compact in the sixtieth section be "regarded as a law prescribing a rule of taxation until changed, and not a contract stipulating against any change; a legislative command, and not a legislative compact with these institutions?" We cannot but treat with great respect the language of the highest judicial tribunal of a state, and we would say that in our opinion it does not import to be a legislative command nor a rule of taxation until changed, but a contract stipulating against any change, from the nature of the language used and the circumstances under which it was adopted. According to our views, no other construction can be given to the contract than that the tax of six per cent. on the dividends is in lieu of all subsequent taxes which might otherwise be imposed; in other words, taxes to which the company or the stockholders would have been liable, had the specific tax on the dividends on the terms stated not been enacted.

In the opinion of the supreme court of the state it is said the sixtieth section, in effect, repealed the existing law under which the bank would have been taxed, and that this is the obvious application of the language used; and they

add: "That the general assembly intended only this, and did not intend it to operate upon the sovereign power of the state, or to tie up the hands of their successors, we feel fully assured. To suppose the contrary would be to impeach them of gross violation of public duty, if not usurpation of authority." So far as regards the effect of the sixtieth section to repeal existing laws, if no such laws existed, it would follow that no such effect was produced, and we may presume that this was in the knowledge of the legislature of 1845; and in saying that the compact was intended to run with the charter, we only impute to the legislature a full knowledge of their own powers, and the highest regard to the public interest. The idea that a state, by exempting from taxation certain property, parts with a portion of its sovereignty, is of modern growth; and so is the argument that if a state may part with this in one instance it may in every other, so as to divest itself of the sovereign power of taxation. Such an argument would be as strong and as conclusive against the exercise of the taxing power. For if the legislature may levy a tax upon property, they may absorb the entire property of the tax-payer. The same may be said of every power where there is an exercise of judgment.

The legislature of Ohio passes a statute of limitations to all civil and criminal actions. Is there no danger that in the exercise of this power it may not be abused? Suppose a year, a month, a week or a day should be fixed as the time within which all actions shall be brought on existing demands, and, if not so brought, the remedy should be barred. This is a supposition more probable under circumstances of great embarrassment, when the voice of the debtor is always potent, than that the legislature will inconsiderately exempt property from taxation.

Under a statute of limitation, as supposed, the remedy of the creditor would be cut off, unless the courts should decide that a limitation to bar the right must be reasonable, but this power could not be exercised under any constitutional provision. It could rest only on the great and immutable principles of justice, unless the time was so short as manifestly to have been intended to impair or destroy the contract. To carry on a government, a more practical view of public duties must be taken. When the state of Ohio was admitted into the Union by the act of the 30th of April, 1802 (2 Stats. at Large, 173), it was admitted under a compact that "the lands within the state sold by congress shall remain exempt from any tax laid by or under the authority of the state, whether for state, county, township or any other purpose whatever, for the term of five years from and after the day of sale." And yet by the same law the state "was admitted into the Union upon the same footing with the original states in all respects whatever." Now, if this new doctrine of sovereignty be correct, Ohio was not admitted into the Union on the footing of the other sovereign states. Whatever may be considered of such a compact now, it was not held to be objectionable at the time it was made.

§ 2248. *A state, in exempting certain property from taxation, relinquishes no part of its sovereign power. Such exemption is merely a contract by which the legislature may bind the state.*

The assumption that a state, in exempting certain property from taxation, relinquishes a part of its sovereign power, is unfounded. The taxing power may select its objects of taxation; and this is generally regulated by the amount necessary to answer the purposes of the state. Now the exemption of property from taxation is a question of policy and not of power. A sound currency should be a desirable object to every government; and this in our

country is secured generally through the instrumentality of a well-regulated system of banking. To establish such institutions as shall meet the public wants and secure the public confidence, inducements must be held out to capitalists to invest their funds. They must know the rate of interest to be charged by the bank, the time the charter shall run, the liabilities of the company, the rate of taxation, and other privileges necessary to a successful banking operation. These privileges are proffered by the state, accepted by the stockholders, and in consideration funds are invested in the bank. Here is a contract by the state and the bank, a contract founded upon considerations of policy required by the general interests of the community, a contract protected by the laws of England and America, and by all civilized states where the common or the civil law is established. In *Fletcher v. Peck*, 6 Cranch, 135 (§§ 1805-12, *supra*), Chief Justice Marshall says: "The principle asserted is, that one legislature is competent to repeal any act which a former legislature was competent to pass, and that one legislature cannot abridge the powers of a succeeding legislature."

"The correctness of this principle," he says, "so far as respects general legislation, can never be controverted. But if an act be done under a law, a succeeding legislature cannot undo it. When, then, a law is in its nature a contract, a repeal of the law cannot divest those rights, and the act of annulling them, if legitimate, is rendered so by a power applicable to the case of every individual in the community." And in another part of the opinion he says: "Whatever respect might have been felt for the state sovereignties, it is not to be disguised that the framers of the constitution viewed, with some apprehension, the violent acts which might grow out of the feelings of the moment, and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed. The restrictions on the legislative power of the states are obviously founded on this sentiment, and the constitution of the United States contains what may be deemed a bill of rights for the people of each state." "No state shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts. A bill of attainder may affect the life of an individual, or may confiscate his property, or may do both." In this form he says: "The power of the legislature over the lives and fortunes of individuals is expressly restrained. What motive, then, for implying, in words which import a general prohibition to impair the obligation of contracts, an exception in favor of the right to impair the obligations of those contracts into which the state may enter?" The history of England affords melancholy instances where bills of attainder were prosecuted in parliament to the destruction of the lives and fortunes of some of its most eminent subjects. A knowledge of this caused a prohibition in the constitution against such a procedure by the states.

§ 2249. *Authorities reviewed.*

In the case of *New Jersey v. Wilson*, 7 Cranch, 164 (§ 2295, *infra*), it was held: "That a legislative act, declaring that certain lands, which should be purchased for the Indians, should not thereafter be subject to any tax, constituted a contract which could not be rescinded by a subsequent legislative act. Such repealing act being void under that clause of the constitution of the United States which prohibits a state from passing any law impairing the obligation of contracts." In 1758 the government of New Jersey purchased the Indians' title to lands in that state, in consideration of which the government

bought a tract of land on which the Indians might reside, an act having previously been passed that "the lands to be purchased for them shall not hereafter be subject to any tax, any law, usage or custom to the contrary thereof in anywise notwithstanding." The Indians continued in possession of the lands purchased until 1801, when they applied for and obtained an act of the legislature, authorizing a sale of their lands. This act contained no provision in regard to taxation; under it the Indian lands were sold. In October, 1804, the legislature repealed the act of August, 1758, which exempted these lands from taxes; the lands were then assessed and the taxes demanded. The court held the repealing law was unconstitutional, as impairing the obligation of the contract, although the land was in the hands of the grantee of the Indians. This case shows that although a state government may make a contract to exempt property from taxation, yet the sovereignty cannot annul that contract.

In the case of *Gordon v. The Appeal Tax*, 3 How., 133, Mr. Justice Wayne, giving the opinion of the court, held: "That the charter of a bank is a franchise, which is not taxable as such, if a price has been paid for it, which the legislature accepted. But that the corporate property of the bank, being separable from the franchise, may be taxed, unless there is a special agreement to the contrary." And the court say, the language of the eleventh section of the act of 1821 is: "And be it enacted, that upon any of the aforesaid banks accepting and complying with the terms and conditions of this act, the faith of the state is hereby pledged not to impose any further tax or burden upon them during the continuance of their charters under this act." This, the court say, is the language of grave deliberation, pledging the faith of the state for some purpose, some effectual purpose. Was that purpose the protection of the banks from what that legislature and succeeding legislatures could not do, if the banks accepted the act, or from what they might do in the exercise of the taxing power? The terms and conditions of the act were, that the banks should construct the road and pay annually a designated charge upon their capital stocks, as the price of the prolongation of their franchise of banking. The power of the state to lay any further tax upon the franchise was exhausted. That is the contract between the state and the banks. It follows, then, as a matter of course, when the legislature go out of the contract, proposing to pledge its faith, if the banks shall accept the act, not to impose any further tax or burden upon them, that it must have meant by these words an exemption from some other tax than a further tax upon the franchise of the banks. The latter was already provided against; and the court held that the exemption extended to the respective capital stocks of the banks as an aggregate, and to the stockholders as persons on account of their stocks. The judgment of the court of appeals of Maryland, which sustained the act imposing an additional tax on the banks, was reversed.

It will be observed that the above compact was applied to the stocks of the bank and the interest of the stockholders by construction. The supreme court of Ohio say in relation to this case that "the power to tax, and the right to limit the power, were both admitted by counsel, and taken for granted in the consideration of the case; and that a very large consideration had been paid for the extension of the franchise and the exemption of the stock from taxation." In relation to the admissions of the counsel, it may be said that they were men not likely to admit anything to the prejudice of their clients, which could be successfully opposed; nor would the court, on a constitutional question, rest their judgment on the admissions of counsel. Whether the considera-

tion paid by the banks was large or small, we suppose was not a matter for the court, as the motives or consideration which induced a sovereign state to make a contract cannot be inquired into, as affecting the validity of the act.

In the argument, the case of *Providence Bank v. Billings* was referred to (4 Pet., 561; §§ 2321-24, *infra*). This reference impresses me with the shortness and uncertainty of human life. Of all the judges on this bench, when that decision was given, I am the only survivor. From several circumstances, the principles of that case were strongly impressed upon my memory, and I was surprised when it was cited in support of the doctrines maintained in the case before us. The principle held in that case was that where there was no exemption from taxation in the charter, the bank might be taxed. This was the unanimous opinion of the judges, but no one of them doubted that the legislature had the power, in the charter or otherwise, from motives of public policy, to exempt the bank from taxation, or by compact to impose a specific tax on it. And this is clear from the language of the court. The chief justice in that case says: "That the taxing power is of vital importance, that it is essential to the existence of government, are truths which it cannot be necessary to reaffirm. They are acknowledged and asserted by all. It would seem that the relinquishment of such a power is never to be presumed. No one can controvert the correctness of these axioms." The relinquishment of such a power is never to be presumed; but this implies it may be relinquished, or taxable objects may be exempted, if specially provided for in the charter. And this is still more clearly expressed, as follows: "We will not say that a state may not relinquish it; that a consideration sufficiently valuable to induce a partial release of it may not exist; but as the whole community is interested in retaining it undiminished, that community has a right to insist that its abandonment ought not to be presumed in a case in which the deliberate purpose of a state to abandon it does not appear."

Such a case was not then before the court. There was no provision in the *Providence Bank* charter which exempted it from taxation, and in that case the court could presume no such intention. But suppose, in the language of that great man, "a consideration sufficiently valuable to induce a partial release of it, and such release had been contained in the charter," would not that have been held sufficient? And of the sufficiency of the consideration, whether it was a bonus paid by the bank, or in supplying a sound currency, the legislature would be the exclusive judges. This would constitute a contract which a legislature could not impair. The above case is a strong authority against the defendants. The chief justice further says: "Any privileges which may exempt the corporation from the burdens common to individuals do not flow necessarily from the charter, but must be expressed in it, or they do not exist." But if so expressed, do they not exist?

A case is cited from *Stourbridge Canal v. Wheeley*, 2 Barn. & Ad., 793, to show that no implications in favor of chartered rights are admissible. Lord Tenterden says: "That any ambiguity in the terms of the contract must operate against the adventurers, and in favor of the public; and the plaintiffs can claim nothing that is not clearly given them by the act." In the same opinion his lordship said: "Now it is quite certain that the company have no right expressly to receive any compensation, except the tonnage paid for goods carried through some of the canals, or the locks on the canal, or the collateral cuts, and it is therefore incumbent upon them to show that they have a right clearly given by inference from some of the other clauses." Neither this,

the Rhode Island Bank case, nor *Charles River Bridge v. Warren Bridge*, 11 Pet., 420 (§§ 2058–82, *supra*), affords any aid to the doctrines maintained, with the single exception that a right set up under a grant must clearly appear, and cannot be presumed; and this has not been controverted.

That a state has power to make a contract which shall bind it in future is so universally held by the courts of the United States and of the states that a general citation of authorities is unnecessary on the subject. *Dartmouth College v. Woodward*, 4 Wheat., 518 (§§ 2099–2117, *supra*); *Terrett v. Taylor*, 9 Cranch, 43; *Town of Pawlet*, 9 Cranch, 292. Mr. Justice Blackstone says, 2 Bl. Com., 37: "That the same franchise that has before been granted to one cannot be bestowed on another, because it would prejudice the former grant." In *The King v. Pasmore*, 3 Term R., 240, Lord Kenyon says that an existing corporation cannot have another charter obtruded upon it, or accept the whole or any part of the new charter. The reason of this, it is said, is obvious. A charter is a contract, to the validity of which the consent of both parties is essential, and therefore it cannot be altered or added to without consent.

§ 2250. *The power to make a contract is an inherent power in a state.*

There is no constitutional objection to the exercise of the power to make a binding contract by a state. It necessarily exists in its sovereignty, and it has been so held by all the courts in this country. A denial of this is a denial of state sovereignty. It takes from the state a power essential to the discharge of its functions as sovereign. If it do not possess this attribute, it could not communicate it to others. There is no power possessed by it more essential than this. Through the instrumentality of contracts, the machinery of the government is carried on. Money is borrowed and obligations given for payment. Contracts are made with individuals who give bonds to the state. So in the granting of charters. If there be any force in the argument it applies to contracts made with individuals the same as with corporations. But it is said the state cannot barter away any part of its sovereignty. No one ever contended that it could.

§ 2251. *A state legislature has absolute power to select the objects and amount of taxation.*

A state, in granting privileges to a bank, with a view of affording a sound currency or of advancing any policy connected with the public interest, exercises its sovereignty, and for a public purpose, of which it is the exclusive judge. Under such circumstances, a contract made for a specific tax, as in the case before us, is binding. This tax continues, although all other banks should be exempted from taxation. Having the power to make the contract, and rights becoming vested under it, it can no more be disregarded nor set aside by a subsequent legislature than a grant for land. This act, so far from parting with any portion of the sovereignty, is an exercise of it. Can any one deny this power to the legislature? Has it not a right to select the objects of taxation and determine the amount? To deny either of these is to take away state sovereignty. It must be admitted that the state has the sovereign power to do this, and it would have the sovereign power to impair or annul a contract so made, had not the constitution of the United States inhibited the exercise of such a power. The vague and undefined and indefinable notion that every exemption from taxation or a specific tax, which withdraws certain objects from the general tax law, affects the sovereignty of the state, is indefensible.

There has been rarely, if ever, it is believed, a tax law passed by any state in the Union which did not contain some exemptions from general taxation.

The act of Ohio of the 25th of March, 1851, in the fifty-eighth section, declared that "the provisions of that act shall not extend to any joint-stock company which now is or may hereafter be organized, whose charter or act of incorporation shall have guarantied to such company an exemption from taxation, or has prescribed any other as the exclusive mode of taxing the same." Here is a recognition of the principle now repudiated. In the same act, there are eighteen exemptions from taxation. The federal government enters into an arrangement with a foreign state for reciprocal duties on imported merchandise from the one country to the other. Does this affect the sovereign power of either state? The sovereign power in each was exercised in making the compact, and this was done for the mutual advantage of both countries. Whether this be done by treaty or by law is immaterial. The compact is made and it is binding on both countries. The argument is, and must be, that a sovereign state may make a binding contract with one of its citizens, and, in the exercise of its sovereignty, repudiate it. The constitution of the Union, when first adopted, made states subject to the federal judicial power. Could a state, while this power continued, being sued for a debt contracted in its sovereign capacity, have repudiated it in the same capacity? In this respect, the constitution was very properly changed, as no state should be subject to the judicial power generally.

Much stress was laid on the argument, and in the decisions of the supreme court, on the fact that the banks paid no bonus for their charters, and that no contract can be binding which is not mutual. This is a matter which can have no influence in deciding the legal question. The state did not require a bonus, but other requisitions are found in the charter, which the legislature deemed sufficient, and this is not questionable by any other authority. The obligation is as strong on the state from the privileges granted and accepted as if a bonus had been paid.

Another assumption is made that the banks are taxed as property is taxed in the hands of individuals. No deduction, it appears, is made from banks on account of debts due to depositors or others, whilst debts due by an individual are deducted from his credits. If this be so, it places banks on a very different footing from individuals. The power of taxation has been compared to that of eminent domain, and it is said, as regards the question before us, they are substantially the same. These powers exist in the same sovereignty, but their exercise involves different principles. Property may be appropriated for public purposes, but it must be paid for. Taxes are assessed on property for the support of the government under a legislative act.

We were not prepared for the position taken by the supreme court of Ohio, that "no control over the right of taxation by the states was intended to be conferred upon the general government by the section referred to, or any other, except in relation to duties upon imports and exports." This has never been pretended by any one. The section referred to gives the federal government no power over taxation by a state. Such an idea does not belong to the case, and the argument used, we submit, is not legitimate. We have power only to deal with contracts under the tenth section of the first article of the constitution, whether made by a state or an individual; if such contract be impaired by an act of the state, such act is void, as the power is prohibited to the state. This is the extent of our jurisdiction. As well might it be contended, under the above section, that no power was given to the federal government to regulate the numberless internal concerns of a state which are the subjects of contracts.

With those concerns we have nothing to do; but when contracts growing out of them are impaired by an act of the state, under the federal constitution, we inquire whether the act complained of is in violation of it.

§ 2252. *When the supreme court will follow the decisions of state courts.*

The rule observed by this court, to follow the construction of the statute of the state by its supreme court, is strongly urged. This is done when we are required to administer the laws of the state. The established construction of a statute of the state is received as a part of the statute. But we are called in the case before us, not to carry into effect a law of the state, but to test the validity of such a law by the constitution of the Union. We are exercising an appellate jurisdiction. The decision of the supreme court of the state is before us for revision, and if their construction of the contract in question impairs its obligation, we are required to reverse their judgment. To follow the construction of a state court, in such a case, would be to surrender one of the most important provisions in the federal constitution.

There is no jurisdiction which we are called to exercise, of higher importance, nor one of deeper interest to the people of the states. It is, in the emphatic language of Chief Justice Marshall, a bill of rights to the people of the states, incorporated into the fundamental law of the Union. And whilst we have all the respect for the learning and ability which the opinions of the judges of the supreme court of the state command, we are called upon to exercise our own judgments in the case. In the discussion of the principles of this case, we have not felt ourselves at liberty to indulge in general remarks on the theory of our government. That is a subject which belongs to a convention for the formation of a constitution; and, in a limited view, to the law-making power. Theories depend so much on the qualities of the human mind, and these are so diversified by education and habit, as to constitute an unsafe rule for judicial action. Our prosperity, individually and nationally, depends upon a close adherence to the settled rules of law, and especially to the great fundamental law of the Union.

Having considered this case in its legal aspects, as presented in the arguments of counsel, and in the views of the supreme court of the state, and especially as regards the rights of the bank under the charter, we are brought to the conclusion that in the acceptance of the charter, on its terms, and the payment of the capital stock, under an agreement to pay six per cent. semi-annually on the dividends made, deducting expenses and ascertained losses, in lieu of all taxes, a contract was made binding on the state and on the bank; and that the tax law of 1851, under which a higher tax has been assessed on the bank than was stipulated in its charter, impairs the obligation of the contract, which is prohibited by the constitution of the United States, and, consequently, that the act of 1851, as regards the tax thus imposed, is void. The judgment of the supreme court of Ohio, in giving effect to that law, is therefore reversed.

Dissenting opinion by MR. JUSTICE CATRON.

This is a contest between the state of Ohio and a portion of her banking institutions, organized under a general banking law, passed in 1845. She was then a wealthy and prosperous community, and had numerous banks which employed a large capital, and were taxed by the general laws five per cent. on their dividends, being equal to thirty cents on each hundred dollars' worth of stock, supposing it to be at par value. But this was merely a state tax payable into the state treasury. The old banks were liable to taxes for county pur-

poses besides; and when located in cities or towns, for corporation taxes also. These two items usually amounted to much more than the state tax. Such was the condition of Ohio when the general banking law was passed in 1845. By this act, any number of persons not less than five might associate together, by articles, to carry on banking. The state was laid off into districts, and the law prescribes the amount of stock that may be employed in each. Every county was entitled to one bank, and some to more. Commissioners were appointed to carry the law into effect. It was the duty of this board of control to judge of the articles of association, and other matters necessary to put the banks into operation. Any company might elect to become a branch of the state bank, or to be a separate bank disconnected with any other. Fifty thousand dollars was the minimum, and \$500,000 the maximum, that could be employed in any one proposed institution.

By the fifty-first section, each of the banking companies authorized to carry on business was declared to be a body corporate with succession to the 1st day of May, 1866, with general banking powers; with the privilege to issue notes of \$1 and upwards to \$100; and each bank was required to have "on hand in gold and silver coin, or their equivalent, one-half at least of which shall be in gold and silver coin in its vault, an amount equal to thirty per cent. of its outstanding notes of circulation; and whenever the specie on hand or its equivalent shall fall below twenty per cent. of the outstanding notes, then no more notes shall be circulated." The equivalent to specie meant deposits that might be drawn against in the hands of eastern banks, or bankers of good credit. In this provision consisted the great value of the franchise. The fifty-ninth section declares that semi-annual dividends shall be made by each bank of its profits after deducting expenses; and the sixtieth section provides that six per cent. per annum of these profits shall be set off to the state, "which sum or amount so set off shall be in lieu of all taxes to which such company, or the stockholders thereof on account of stock owned therein, would otherwise be subject." This was equal to thirty-six cents per annum on each \$100 of stock subscribed, supposing it to yield six per cent. interest.

By an act of 1851, it was declared that bank stock should be assessed at its true value, and that it should be taxed for state, county and city purposes, to the same extent that personal property was required to be taxed at the place where the bank was located. As this rate was much more than that prescribed by the sixtieth section of the act of 1845, the bank before us refused to pay the excess, and suffered herself to be sued by the tax collector, relying on the sixtieth section, above recited, as an irrevocable contract which stood protected by the constitution of the United States.

It is proper to say that the trifling sum in dispute in this cause is the mere ground of raising the question between the state of Ohio and some fifty of her banks, claiming exemption under the act of 1845. The taxable property of these banks is about \$18,000,000 according to the auditor's report of last year, and which was used on the argument of this cause by both sides. Of course the state officers and other tax-payers assailed the corporations claiming the exemption, and various cases were brought before the supreme court of Ohio, drawing in question the validity of the act of 1851, in so far as it increased the taxes of the banks beyond the amount imposed by the sixtieth section of the act of 1845. The state court sustained the act of 1851, from which decision a writ of error was prosecuted, and the cause brought to this court.

The opinions of the state court have been laid before us for our consideration;

and on our assent or dissent to them the case depends. The first question made and decided in the supreme court of Ohio was whether the sixtieth section of the act of 1845 purported to be, in its terms, a contract not further to tax the banks organized under it during the entire term of their existence. The court held that it imported no such contract; and with this opinion I concur.

The question was examined by the judge who delivered the unanimous opinion of the court, in the case of *Debolt v. Ohio Life Ins. & Trust Co.*, 1 Ohio St., 564, with a fairness, ability and learning calculated to command the respect of all those who have his opinion to review; and which opinion has, as I think, construed the sixtieth section truly. But, as my brother Campbell has rested his opinion on this section without going beyond it, and as I concur in his views, I will not further examine that question, but adopt his opinion in regard to it.

§ 2253. *The legislature of a state has no power by a contract to permanently surrender the right to tax any portion of the property of its citizens and bind future legislatures by such surrender.*

The next question decided by the state court is of most grave importance; I give it in the language of the state court: "Had the general assembly power, under the constitution then in force, permanently to surrender, by contract, within the meaning and under the protection of the constitution of the United States, the right of taxation over any portion of the property of individuals otherwise subject to it?" On which proposition the court proceeds to remark: "Our observations and conclusions upon this question must be taken with reference to the unquestionable facts, that the act of 1851 was a *bona fide* attempt to raise revenue by an equal and uniform tax upon property, and contained no covert attack upon the franchise of these institutions. That the surrender did not relate to property granted by the state, so as to make it a part of the grant for which a consideration was paid; the state having granted nothing but the franchise, and the tax being upon nothing but the money of individuals invested in the stock; and that no bonus or gross sum was paid in hand for the surrender, so as to leave it open to controversy that reasonable taxes, to accrue in future, were paid in advance of their becoming due. What effect a different state of facts might have, we do not stop to inquire. Indeed, if the attempt has here been made, it is a naked release of sovereign power without any consideration or attendant circumstance to give it strength or color; and, so far as we are advised, is the first instance where the rights and interests of the public have been entirely overlooked."

"Under these circumstances, we feel no hesitation in saying the general assembly was incompetent to such a task. This conclusion is drawn from a consideration of the limited authority of that body, and the nature of the power claimed to be abridged. That political sovereignty, in its true sense, exists only with the people, and that government is 'founded on their sole authority,' and subject to be altered, reformed or abolished only by them, is a political axiom upon which all the American governments have been based, and is expressly asserted in the bill of rights. Such of the sovereign powers with which they were invested as they deem necessary for protecting their rights and liberties, and securing their independence, they have delegated to governments created by themselves, to be exercised in such manner and for such purposes as were contemplated in the delegation. That these powers can neither be enlarged or diminished by these repositories of delegated authority, would

seem to result, inevitably, from the fundamental maxim referred to, and to be too plain to need argument or illustration.

"If they could be enlarged, government might become absolute; if they could be diminished or abridged, it might be stripped of the attributes indispensable to enable it to accomplish the great purposes for which it was instituted. And, in either event, the constitution would be made either more or less than it was when it came from the hands of its authors; being changed and subverted without their action or consent. In the one event its power for evil might be indefinitely enlarged; while in the other its capacity for good might be entirely destroyed; and thus become either an engine of oppression, or an instrument of weakness and pusillanimity.

"The government created by the constitution of this state (Ohio), although not of enumerated, is yet one of limited, powers. It is true, the grant to the general assembly of 'legislative authority' is general; but its exercise within that limit is necessarily restrained by the previous grant of certain powers to the federal government, and by the express limitations to be found in other parts of the instrument. Outside of that boundary, it needed no express limitations, for nothing was granted. Hence this court held, in *Cincinnati, etc., R. R. v. Clinton Co.*, 1 Ohio St., 77, that any act passed by the general assembly not falling fairly within the scope of 'legislative authority,' was as clearly void as though expressly prohibited. So careful was the convention to enforce this principle, and to prevent the enlargement of the granted powers by construction or otherwise, that they expressly declared in article 8, section 28: 'To guard against the transgression of the high powers we have delegated, we declare that all powers, not hereby delegated, remain with the people.' When, therefore, the exercise of any power by that body is questioned, its validity must be determined from the nature of the power, connected with the manner and purpose of its exercise. What, then, is the taxing power? And to what extent, and for what purposes, has it been conferred upon the legislature? That it is a power incident to sovereignty — 'a power of vital importance to the very existence of every government' — has been as often declared as it has been spoken of. Its importance is not too strongly represented by Alexander Hamilton, in the thirtieth number of the *Federalist*, when he says: 'Money is with propriety considered as the vital principle of the body politic; as that which sustains its life and motion, and enables it to perform its most important functions. A complete power, therefore, to procure a regular and adequate supply of revenue, as far as the resources of the community will permit, may be regarded as an indispensable ingredient in every constitution. From a deficiency in this particular, one of two evils must ensue; either the people must be subjected to continual plunder, as a substitute for a more eligible mode of supplying the public wants, or the government must sink into a fatal atrophy, and in a short course of time perish.'

"This power is not to be distinguished, in any particular material to the present inquiry, from the power of eminent domain. Both rest upon the same foundation,—both involve the taking of private property,—and both, to a limited extent, interfere with the natural right guaranteed by the constitution, of acquiring and enjoying it. But as this court has already said, in the case referred to, 'neither can be classed amongst the independent powers of government, or included in its objects and ends.' No government was ever created for the purpose of taking, taxing or otherwise interfering with the private property of its citizens. 'But charged with the accomplishment of great

objects' necessary to the safety and prosperity of the people, these rights attach as incidents to those objects, and become indispensable means to the attainment of those ends.' They can only be called into being to attend the independent powers, and can never be exercised without an existing necessity.

"To sustain this power in the general assembly would be to violate all the great principles to which I have alluded. It would affirm its right to deal in, and barter away, its sovereign right of the state, and thereby, in effect, to change the constitution. When the general assembly of 1845 convened, it found the state in the unquestionable possession of the sovereign right of taxation, for the accomplishment of its lawful objects, extending to 'all the persons and property belonging to the body politic.'"

When its successor convened in 1846, under the same constitution, and to legislate for the same people, if this defense is available, it found the state shorn of this power over fifteen or twenty millions of property, still within its jurisdiction and protected by its laws. This and each succeeding legislature had the same power to surrender the right as to any and all other property; until at length the government, deprived of everything upon which it could operate to raise the means to attain its necessary ends, by the exercise of its granted powers, would have worked its own inevitable destruction, beyond all power of remedy, either by the legislature or the people. It is no answer to this to say that confidence must be reposed in the legislative body, that it will not thus abuse the power.

"But in the language of the court, in *McCulloch v. State of Maryland*, 4 Wheat., 316 (§§ 380-398, *supra*), 'is this a case of confidence?'" "For every surrender of the right to tax particular property not only tends to paralyze the government, but involves a direct invasion of the rights of property of the balance of the community; since the deficiency thus created must be made up by larger contributions from them to meet the public demand."

The foregoing are some of the reasonings of the state court on the consideration here involved. With these views I concur, and will add some of my own. The first is: "That acts of parliament derogatory from the power of subsequent legislatures are not binding. Because (as Blackstone says) the legislature being in truth the sovereign power, is always equal, always absolute; and it acknowledges no superior on earth, which the prior legislature must have been, if its ordinances could bind a subsequent parliament. And upon the same principle Cicero, in his letters to Atticus, treats with proper contempt these restraining clauses which endeavor to tie up the hands of succeeding legislatures. When you repeal the law itself, says he, you at the same time repeal the prohibitory clause which guards against repeal."

If this is so under the British government, how is it in Ohio? Her supreme court holds that the state constitution of 1802 expressly prohibited one legislature from restraining its successors by the indirect means of contracts exempting certain property from taxation. The court says: Power to exempt property was reserved to the people; they alone could exempt by an organic law. That is to say, by an amended constitution. The clause mainly relied on declares "that all powers not delegated remain with the people." Now it must be admitted that this clause has a meaning; and it must also be conceded, as I think, that the supreme court of Ohio has the uncontrollable right to declare what that meaning is; and that this court has just as little right to question that construction as the supreme court of Ohio has to question our construction

of the constitution of the United States. In my judgment, the construction of the court of Ohio is proper; but, if I believed otherwise, I should at once acquiesce. Let us look at the matter fairly and truly as it is, and see what a different course on the part of this court would lead to; nay, what Ohio is bound to do in self-defense and for self-preservation under the circumstances.

In 1845 a general banking law is sought at the hands of the legislature, where five dollars in paper can be circulated for every dollar in specie in the bank, or on deposit in eastern banks or with brokers. One dollar notes are authorized; every county in the state is entitled to a bank, and the large ones to several; the tempting lure is held out of six per cent. interest on five hundred dollars for every hundred dollars paid in as stock: thus obtaining a profit of twenty-four dollars on each hundred dollars actually paid in. That such a bill would have advocates enough to pass it through the legislature, all experience attests; and that the slight tax of thirty-six cents on each hundred dollars' worth of stock subscribed and paid was deemed a privilege, when the existing banks and other property were taxed much higher, is plainly manifest. As was obvious, when the law passed, banks sprang up at once — some fifty in number, having a taxable basis last year of about eighteen millions. The elder and safer banks were, of course, driven out, and new organizations sought, under the general law, by the stockholders. From having constructed large public works, and made great expenditures, Ohio has become indebted so as to require a very burdensome tax on every species of property; this was imposed by the act of 1851, and on demanding from these institutions their equal share, the state is told that they were protected by a contract made with the legislature of 1845, to be exempt from further taxation, and were not bound by the late law, and, of course, they were sued in their own courts. The supreme court holds that, by the express terms of the state constitution, no such contract could be made by the legislature of 1845, to tie up the hands of the legislature of 1851. And then the banks come here and ask our protection against this decision, which declares the true meaning of the state constitution. It expressly guaranties to the people of Ohio the right to assemble, consult "and instruct their representatives for their common good;" and then "to apply to the legislature for a redress of grievances." It further declares that all powers not conferred by that constitution on the legislature are reserved to the people. Now, of what consequence or practical value will these attempted securities be, if one legislature can restrain all subsequent ones by contracting away the sovereign power to which instructions could apply?

The question whether the people have reserved this right so as to hold it in their own hands, and thereby be enabled to regulate it by instructions to a subsequent legislature (or by a new constitution), is a question that has been directly raised only once, in any state of the Union, so far as I know. In the case of *Brewster v. Hough*, 10 N. H., 138, it was raised, and Chief Justice Parker, in delivering the opinion of the court in a case in all respects like the one before us, says: "That it is as essential that the public faith should be preserved inviolate as it is that individual grants and contracts should be maintained and enforced. But there is a material difference between the right of a legislature to grant lands, or corporate powers, or money, and a right to grant away the essential attributes of sovereignty or rights of eminent domain. These do not seem to furnish the subject-matter of a contract."

This court sustained the principle announced by the supreme court of New Hampshire, in the *West River Bridge Co. v. Dix*, 6 How., 507 (§§ 2188-90,

supra). A charter for one hundred years, incorporating a bridge company, had been granted; the bridge was built and enjoyed by the company. Then another law was passed authorizing public roads to be laid out, and free bridges to be erected; the commissioners appropriated the West River Bridge and made it free; the supreme court of Vermont sustained the proceeding on a review of that decision. And this court held that the first charter was a contract securing the franchises and property in the bridge to the company, but that the first legislature could not cede away the sovereign right of eminent domain, and that the franchises and property could be taken for the uses of free roads and bridges on compensation being made.

Where the distinction lies, involving a principle, between that case and this, I cannot perceive, as every tax-payer is compensated by the security and comfort government affords. The political necessities for money are constant and more stringent in favor of the right of taxation; its exercise is required daily to sustain the government. But in the essential attributes of sovereignty the right of eminent domain and the right of taxation are not distinguishable. If the West River Bridge Case can be sound constitutional law (as I think it is), then it must be true that the supreme court of Ohio is right in holding that the legislature of 1845 could not deprive the legislature of 1851 of its sovereign powers or of any part of them. It is insisted that the case of *The State of Ohio v. Commercial Bank of Cincinnati*, 7 Ohio, 125, has held otherwise. This is clearly a mistake. The state in that case raised no question as to the right of one legislature to cede the sovereign power to a corporation, and tie up the hands of all subsequent legislatures; no such constitutional question entered into the decision; nor is any allusion made to it in the opinion of the court. It merely construed the acts of assembly, and held that a contract did exist, on the ground that by the charter the bank was taxed four per cent.; and therefore the charter must be enforced, as this rate of taxation adhered to the charter and excluded a higher imposition.

It would be most unfortunate for any court, and especially for this one, to hold that a decision affecting a great constitutional consideration, involving the harmony of the Union (as this case obviously does), should be concluded by a decision in a case where the constitutional question was not raised by counsel; and so far from being considered by the court, was never thought of; such a doctrine is altogether inadmissible. And in this connection I will say that there are two cases decided by this court (and relied on by the plaintiff in error), in regard to which similar remarks apply. The first one is that of *New Jersey v. Wilson*, 7 Cranch, 164 (§ 2295, *infra*). An exchange of lands took place in 1758 between the British colony of New Jersey and a small tribe of Indians residing there. The Indians had the land granted to them by an act of the colonial legislature which exempted it from taxes. They afterwards sold it and removed. In 1804 the state legislature taxed these lands in the hands of the purchasers; they were proceeded against for the taxes, and a judgment rendered declaring the act of 1804 valid. In 1812 the judgment was brought before this court, and the case submitted on the part of the plaintiff in error without argument, no one appearing for New Jersey. This court held the British contract with the Indians binding; and, secondly, that it run with the land, which was exempt from taxation in the hands of the purchasers. No question was raised in the supreme court of New Jersey, nor decided there, or in this court, as to the constitutional question of one legislature having authority to deprive a succeeding one of sovereign power. The

question was not considered, nor does it seem to have been thought of in the state court or here.

The next case is Gordon's Case, 3 How., 144. What questions were there presented on the part of the state of Maryland does not appear in the report of the case, but I have turned to them in the record to see how they were made in the state courts. They are as follows:

"1. That at the time of passing the general assessment law of 1841 there was no contract existing between the state and the banks, or any of them, or the stockholders therein, or any of them, by which any of the banks or stockholders can claim an exemption from the taxation imposed upon them by the said act of 1841."

"2. That the contract between the state and the old banks, if there be any contract, extends only to an exemption from further 'taxes or burdens' of the corporate privileges of banking, and does not exempt the property, either real or personal, of said banks, or the individual stockholders therein."

"3. That even if the contract should be construed to exempt the real and personal property of the old banks, and the property of the stockholders therein, yet such exemption does not extend to the new banks, or those chartered since 1830, and, moreover, that the power of revocation in certain cases in these charters reserves to the state the power of passing the general assessment law."

"4. That the imposition of a tax of twenty cents upon every \$100 worth of property, upon both the old and new banks, under the said assessment law, is neither unequal nor oppressive, nor in violation of the bill of rights."

"5. That taxation upon property within the state, wherever the owners may reside, is not against the bill of rights."

On these legal propositions the opinion here given sets out by declaring that "the question, however, which this court is called on to decide, and to which our decision will be confined, is, Are the shareholders in the old and new banks liable to be taxed under the act of 1841 on account of the stock which they own in the banks?" The following paragraph is the one relied on as adjudging the question that the taxing power may be embodied in a charter and contracted away as private property, to wit: "Such a contract is a limitation on the taxing power of the legislature making it, and upon succeeding legislatures, to impose any further tax on the franchise." "But why, when bought, as it becomes property, may it not be taxed as land is taxed which has been bought from the state, was repeatedly asked in the course of the argument. The reason is that every one buys land subject, in his own apprehension, to the great law of necessity, that we must contribute from it and all of our property something to maintain the state. But a franchise for banking, when bought, the price is paid for the use of the privilege whilst it lasts, and any tax upon it would substantially be an addition to the price."

As the case came up from the supreme court of Maryland, this court had power merely to re-examine the questions raised in the court below and decided there. All that is asserted in the opinion beyond this is outside of the case of which this court had jurisdiction, and is only so far to be respected as it is sustained by sound reasoning; but its *dicta* are not binding as authority; and so the supreme court of Maryland held in the case of *The Mayor, etc., of Baltimore v. Baltimore & Ohio R. Co.*, 6 Gill, 288. The state of Maryland merely asked to have her statutes construed, and if by their true terms she had prom-

ised to exempt the stockholders of her banks from taxation, then she claimed no tax of them. She took no shelter under constitutional objections, but guardedly avoided doing so.

If an expression of opinion is authority that binds, regardless of the case presented, then we are as well bound the other way by another quite equal authority. In the case of *East Hartford v. Hartford Bridge Co.*, 10 How., 535 (§§ 2033–86, *supra*), Mr. Justice Woodbury, delivering the opinion of the court, says: The case of *Goszler v. Corporation of Georgetown*, 6 Wheat., 596, 598, “appears to settle the principle that a legislative body cannot part with its powers by any proceeding so as not to be able to continue the exercise of them. It can, and should, exercise them again and again, as often as the public interests require.” . . . “Its members are made by the people agents or trustees for them on this subject, and can possess no authority to sell or grant their power over the trust to others.” The *Hartford* case was brought here from the supreme court of Connecticut, by a writ of error, on the ground that *East Hartford* held a ferry right secured by a legislative act that was a private contract. But this court held, among other things, that, by a true construction of the state laws, no such contract existed; so that this case cannot be relied on as binding authority more than *Gordon’s* case. If fair reasoning and clearness of statement are to give any advantage, then the *Hartford* case has that advantage over *Gordon’s* case.

It is next insisted that the state legislature have in many instances, and constantly, discriminated among the objects of taxation; and have taxed and exempted according to their discretion. This is most true. But the matter under discussion is aside from the exercise of this undeniable power in the legislature. The question is whether one legislature can, by contract, vest the sovereign power of a right to tax in a corporation as a franchise, and withhold the same power that legislature had to tax, from all future ones? Can it pass an irrevocable law of exemption? General principles, however, have little application to the real question before us, which is this: Has the constitution of Ohio withheld from the legislature the authority to grant, by contract with individuals, the sovereign power; and are we bound to hold her constitution to mean as her supreme court has construed it to mean? If the decisions in Ohio have settled the question in the affirmative, that the sovereign political power is not the subject of an irrevocable contract, then few will be so bold as to deny that it is our duty to conform to the construction they have settled; and the only objection to conformity that I suppose could exist with any one is, that the construction is not settled. How is the fact?

The refusal of some fifty banks to pay their assessed portion of the revenue for the year 1851 raised the question for the first time in the state of Ohio; since then the doctrine has been maintained in various cases, supported unanimously by all the judges of the supreme court of that state, in opinions deeply considered, and manifesting a high degree of ability in the judges, as the extract from one of them, above set forth, abundantly shows. If the construction of the state constitution is not settled, it must be owing to the recent date of the decisions. An opinion proceeding on this hypothesis will, as I think, involve our judgment now given in great peril hereafter; for if the courts of Ohio do not recede, but firmly adhere to their construction until the decisions now existing gain maturity and strength by time, and the support of other adjudications conforming to them, then it must of necessity occur that this

court will be eventually compelled to hold that the construction is settled in Ohio, when it must be followed to avoid conflict between the judicial powers of that state and the Union, an evil that prudence forbids.

1. The result of the foregoing opinion is, that the sixtieth section of the general banking law of 1845 is, in its terms, no contract professing to bind the legislature of Ohio not to change the mode and amount of taxation on the banks organized under this law; and for this conclusion I rely on the reasons stated by my brother Campbell, in his opinion, with which I concur. 2. That, according to the constitution of all the states of this Union, and even of the British parliament, the sovereign political power is not the subject of contract so as to be vested in an irrevocable charter of incorporation, and taken away from, and placed beyond the reach of, future legislatures; that the taxing power is a political power of the highest class, and each successive legislature having vested in it, unimpaired, all the political powers previous legislatures had, is authorized to impose taxes on all property in the state that its constitution does not exempt. It is undeniably true that one legislature may, by a charter of incorporation, exempt from taxation the property of the corporation in part, or in whole, and with or without consideration; but this exemption will only last until the necessities of the state require its modification or repeal.

3. But if I am mistaken in both these conclusions, then I am of opinion that, by the express provisions of the constitution of Ohio of 1802, the legislature of that state had withheld from its powers the authority to tie up the hands of subsequent legislatures in the exercise of the powers of taxation, and this opinion rests on judicial authority that this court is bound to follow; the supreme court of Ohio having held, by various solemn and unanimous decisions, that the political power of taxation was one of those reserved rights intended to be delegated by the people to each successive legislature, and to be exercised alike by every legislature according to the instructions of the people. This being the true meaning of the nineteenth and twenty-eighth sections of the bill of rights, forming part of the constitution of 1802; one section securing the right of instructing representatives, and the other protecting reserved rights held by the people. Whether this construction given to the state constitution is the proper one is not a subject of inquiry in this court; it belongs exclusively to the state courts, and can no more be questioned by us than state courts and judges can question our construction of the constitution of the United States. For these reasons, I am of opinion that the judgment of the supreme court of Ohio should be affirmed.

JUSTICES DANIEL and CAMPBELL dissented.

OHIO LIFE INSURANCE AND TRUST COMPANY v. DEBOLT.

(16 Howard, 416-451. 1853.)

ERROR to the Supreme Court of Ohio.

Opinion by TANNEY, C. J.

STATEMENT OF FACTS.—In this case the judgment of the supreme court of the state of Ohio is affirmed. But the majority of the court who give this judgment do not altogether agree in the principles upon which it ought to be maintained. I proceed, therefore, to state my own opinion, in which I am authorized to say my brother Grier entirely concurs.

In 1851 the legislature of Ohio passed an act "to tax banks, and bank and

other stocks, the same as other property." The act makes it the duty of the president and cashier of every banking institution having the right to issue bills or notes for circulation, annually to list and return to the assessor in the township or ward where the bank is located, the amount of capital and stock at its true value in money, together with the amount of surplus and contingent fund belonging to such institution, upon which the same amount of tax is to be levied and paid as upon the property of individuals. And by the third section of this act, the Ohio Life Insurance and Trust Company (the plaintiff in error) was brought within its provisions, and subjected to the payment of a like tax in all the several counties where its capital stock was loaned, according to the amount loaned and the average rate of taxation in each. The payment of this tax was resisted by the plaintiff in error, upon the ground that the law imposing it impaired the obligation of certain contracts previously made between the state and the corporation. On the other hand, it was insisted, on behalf of the state, that the right of taxation cannot be so aliened by mere statute as to prevent its resumption by the legislature whenever the public necessities require; and that the legislature was the judge of the public necessity in such cases.

And, further, if it should be held that the legislature of Ohio had the power to aliene its right of taxation, yet it had not exercised it in this instance; and when the tax in question was levied, there was no previous contract between the state and the corporation by which the state had relinquished the right to impose it. The company having refused to pay the tax, upon the ground above stated, the defendant in error, who is the treasurer of Hamilton county, in which the corporation is located, instituted proceedings to enforce its collection. And upon final hearing of the parties, the supreme court of Ohio decided in favor of the state, and directed the tax to be paid, together with the penalty which the law inflicted for its detention. It is to revise this decree of the state court that the present writ of error is brought. This brief statement will show that the questions which arise on this record are very grave ones. They are the more important, because, from the multitude of corporations chartered in the different states, and the privileges and exemptions granted to them, questions of a like character are continually arising, and ultimately brought here for final decision. These controversies between a state and its own corporations necessarily embarrass the legislation of the state, and are injurious to the individuals who have an interest in the company. And as the principles upon which this case is decided will, for the most part, equally apply to all of them, it is proper that they should be clearly and distinctly stated. I proceed to express my own opinion on the subject.

§ 2254. *Sovereignty of the states.*

It will be admitted on all hands that, with the exception of the powers surrendered by the constitution of the United States, the people of the several states are absolutely and unconditionally sovereign within their respective territories. It follows that they may impose what taxes they think proper upon persons or things within their dominion, and may apportion them according to their discretion and judgment. They may, if they deem it advisable to do so, exempt certain descriptions of property from taxation, and lay the burden of supporting the government elsewhere. And they may do this in the ordinary forms of legislation or by contract, as may seem best to the people of the state. There is nothing in the constitution of the United States to forbid it, nor any authority given to this court to question the right of a state to bind itself by such contracts, whenever it may think proper to make them.

§ 2255. *Restraints upon the states.*

There are undoubtedly fixed and immutable principles of justice, sound policy, and public duty, which no state can disregard without serious injury to the community, and to the individual citizens who compose it. And contracts are sometimes incautiously made by states, as well as individuals; and franchises, immunities and exemptions from public burdens improvidently granted. But whether such contracts should be made or not is exclusively for the consideration of the state. It is the exercise of an undoubted power of sovereignty which has not been surrendered by the adoption of the constitution of the United States, and over which this court has no control. For it can never be maintained in any tribunal in this country, that the people of a state, in the exercise of the powers of sovereignty, can be restrained within narrower limits than those fixed by the constitution of the United States, upon the ground that they may make contracts ruinous or injurious to themselves. The principle that they are the best judges of what is for their own interest is the foundation of our political institutions.

§ 2256. *Legislative power to bind the state by contracts.*

It is equally clear, upon the same principle, that the people of a state may, by the form of government they adopt, confer on their public servants and representatives all the powers and rights of sovereignty which they themselves possess; or may restrict them within such limits as may be deemed best and safest for the public interest. They may confer on them the power to charter banks or other companies, and to exempt the property vested in them from taxation by the state for a limited time during the continuance of their charters, or accept a specified amount less than its fair share of the public burdens. This power may be indiscreetly and injudiciously exercised. Banks and other companies may be exempted, by contract, from their equal share of the taxes, under the belief that the corporation will prove to be a public benefit. Experience may prove that it is a public injury. Yet, if the contract was within the scope of the authority conferred by the constitution of the state, it is, like any other contract made by competent authority, binding upon the parties. Nor can the people or their representatives, by any act of theirs afterwards, impair its obligation. When the contract is made, the constitution of the United States acts upon it, and declares that it shall not be impaired, and makes it the duty of this court to carry it into execution. That duty must be performed.

This doctrine was recognized in the case of *Billings v. Providence Bank*, 4 Pet., 514 (§§ 2321-24, *infra*), and again in the case of *Charles River Bridge Co. v. Warren Bridge*, 11 Pet., 420 (§§ 2058-82, *supra*). In both of these cases the court, in the clearest terms, recognized the power of a state legislature to bind the state by contract; and the cases were decided against the corporations, because, according to the rule of construction in such cases, the privilege or exemption claimed had not been granted. But the power to make the contract was not questioned. And I am not aware of any decision in this court calling into question any of the principles maintained in either of these two leading cases. On the contrary, they have since, in the case of *Gordon v. Appeal Tax Court*, 3 How., 133, been directly reaffirmed. The question in that case was precisely the same with the present one; that is to say, whether the state had relinquished its right of taxation, to a certain extent, in its charter to a bank? The court held that it had, and reversed the judgment of the state court, which had decided to the contrary. And this opinion appears to have been unanimous — for no dissent is entered.

Again, in the case of *Richmond R. Co. v. Louisa R. Co.*, 13 How., 71, the question was whether the state had not, by its charter to the former, contracted not to authorize a road like the latter, which would tend to diminish the number of passengers traveling upon the former between Richmond and Washington. The case, therefore, in principle, was the same with that of *Charles River Bridge v. Warren Bridge*; and it was decided on the same ground; that is, that the contract, according to the rule of construction laid down in *Charles River Bridge* case, did not extend to such a road as was authorized by the charter to the Louisa Railroad Company. But the opinion of the majority of the court is founded expressly upon the assumption that the legislature might bind the state by such a contract; and the three judges who dissented were of opinion not only that the legislature might bind it, but that it had bound it; and that the charter to the Louisa Railroad Company violated the contract and impaired its obligation. They adopted a rule of construction more favorable to the corporation than the one sanctioned in *Charles River Bridge v. Warren Bridge*. It seemed proper, on this occasion, to remark more particularly upon this case, and the case of *Gordon v. Appeal Tax Court*, because the last mentioned case was a restriction upon the taxing power of the state, and the other a restriction upon its power to authorize useful internal improvements,—the two together illustrating and confirming the principles upon which *Providence Bank v. Billings* and the *Charles River Bridge* case were decided. There are other cases upon the same subject, but it is not necessary to extend this opinion by referring to them. It is sufficient to say that they will all be found to maintain the same principles with the cases above mentioned, and that there is no one case in which this court has sanctioned a contrary doctrine.

I have dwelt upon this point more at length because, while I concur in affirming the judgment of the supreme court of the state of Ohio, I desire that the grounds upon which I give that opinion should not be misunderstood; for I dissent most decidedly, as will appear by this opinion, from many of the doctrines contained in the opinions of some of my brethren who concur with me in affirming this judgment. I speak of the opinions they have expressed in the case of *The Piqua Bank*, as well as in this.

§ 2257. *Unless authorized to do so by the constitution, the legislature of a state cannot deprive a future legislature of the power to impose any tax they think expedient.*

The powers of sovereignty confided to the legislative body of a state are undoubtedly a trust committed to them, to be executed to the best of their judgment for the public good; and no one legislature can, by its own act, disarm their successors of any of the powers or rights of sovereignty confided by the people to the legislative body, unless they are authorized to do so by the constitution under which they are elected. They cannot, therefore, by contract, deprive a future legislature of the power of imposing any tax it may deem necessary for the public service—or of exercising any other act of sovereignty confided to the legislative body, unless the power to make such a contract is conferred upon them by the constitution of the state. And in every controversy on this subject the question must depend on the constitution of the state, and the extent of the power thereby conferred on the legislative body. This brings me to the question more immediately before the court: Did the constitution of Ohio authorize its legislature, by contract, to exempt this company from its equal share of the public burdens during the continuance of its charter? The supreme court of Ohio, in the case before us, has decided

that it did not. But this charter was granted while the constitution of 1802 was in force; and it is evident that this decision is in conflict with the uniform construction of that constitution during the whole period of its existence. It appears, from the acts of the legislature, that the power was repeatedly exercised while that constitution was in force, and acquiesced in by the people of the state. It was directly and distinctly sanctioned by the supreme court of the state in the case of *State v. Commercial Bank of Cincinnati*, 7 Ohio, 125.

§ 2258. *When a contract is given certain effect at one time by the judicial tribunals of a state, no subsequent action, legislative or judicial, can affect its validity.*

And when the constitution of a state, for nearly half a century, has received one uniform and unquestioned construction by all the departments of the government, legislative, executive and judicial, I think it must be regarded as the true one. It is true that this court always follows the decision of the state courts in the construction of their own constitution and laws. But where those decisions are in conflict, this court must determine between them. And certainly a construction acted on as undisputed for nearly fifty years by every department of the government, and supported by judicial decision, ought to be regarded as sufficient to give to the instrument a fixed and definite meaning. Contracts with the state authorities were made under it. And upon a question as to the validity of such a contract, the court, upon the soundest principles of justice, is bound to adopt the construction it received from the state authorities at the time the contract was made.

It was upon this ground that the court sustained contracts, made in good faith, in the state of Mississippi, under an existing construction of its constitution, although a subsequent and contrary construction, given by the courts of the state, would have made such contracts illegal and void. The point arose in the case of *Rowan v. Runnels*, 5 How., 134. And the court then said, that it would always feel itself bound to respect the decisions of the state courts, and, from time to time as they were made, would regard them as conclusive in all cases upon the construction of their own constitution and laws; but that it ought not to give them a retroactive effect, and allow them to render invalid contracts entered into with citizens of other states, which, in the judgment of this court, were lawful at the time they were made. It is true, the language of the court is confined to contracts with citizens of other states, because it was a case of that description which was then before it. But the principle applies with equal force to all contracts which come within its jurisdiction. Indeed, the duty imposed upon this court to enforce contracts honestly and legally made would be vain and nugatory if we were bound to follow those changes in judicial decisions which the lapse of time and the change in judicial officers will often produce. The writ of error to a state court would be no protection to a contract if we were bound to follow the judgment which the state court had given, and which the writ of error brings up for revision here. And the sound and true rule is, that if the contract when made was valid by the laws of the state, as then expounded by all the departments of its government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent act of the legislature of the state or decision of its courts altering the construction of the law.

It remains to inquire whether the act of 1851 impaired the obligation of any existing contract or contracts with the plaintiff in error. Before, however, I speak more particularly of the acts of the legislature of Ohio, which the com-

pany rely on as contracts, it is proper to state the principles upon which acts of that description are always expounded by this court.

§ 2259. *Though this court usually follows the decisions of state courts in their exposition of state statutes, it must decide for itself whether such statutes are contracts and whether the obligation of such contracts has been impaired.*

It has been contended, on behalf of the defendant in error (the treasurer of the state), that the construction given to these acts of assembly by the state courts ought to be regarded as conclusive. It is said that they are laws of the state, and that this court always follows the construction given by the state courts to their own constitution and laws. But this rule of interpretation is confined to ordinary acts of legislation, and does not extend to the contracts of the state, although they should be made in the form of a law. For it would be impossible for this court to exercise any appellate power in a case of this kind, unless it was at liberty to interpret for itself the instrument relied on as the contract between the parties. It must necessarily decide whether the words used are words of contract, and what is their true meaning, before it can determine whether the obligation the instrument created has or has not been impaired by the law complained of. And in forming its judgment upon this subject it can make no difference whether the instrument claimed to be a contract is in the form of a law passed by the legislature or of a covenant or agreement by one of its agents acting under the authority of the state. It is very true that, if there was any controversy about the construction and meaning of the act of 1851, this court would adopt the construction given by the state court. And if that construction did not impair the obligation of the contract as interpreted by this court, there would be no ground for interfering with the judgment. For then the contract, as expounded here, would not be impaired by the state law. But if we were bound to follow not only the interpretation given to the law, but also to the instrument claimed to be a contract, and alleged to be violated, there would be nothing left for the judgment and decision of this court. There would be nothing open which a writ of error or appeal could bring here for consideration and judgment; and the duty imposed upon this court under this clause of the constitution would, in effect, be abandoned.

§ 2260. *The act in question construed.*

I proceed, therefore, to examine whether there is any contract in the acts of the legislature, relied on by the plaintiff in error, which deprives the state of the power of levying upon the stock and property of the company its equal share of the taxes deemed necessary for the support of the government. The company was chartered by the legislature of Ohio on the 12th of February, 1834. The purposes for which it was incorporated and the character of the business it was authorized to transact are defined in the second section. It confers upon the company the power, 1. To make insurance on lives. 2. To grant and purchase annuities. 3. To make any other contracts involving the interest or use of money and the duration of life. 4. To receive money in trust, and to accumulate the same at such rate of interest as may be obtained or agreed on, or to allow such interest thereon as may be agreed on. 5. To accept and execute all such trusts of every description as may be committed to them by any person or persons whatsoever, or may be transferred to them by order of any court of record whatever. 6. To receive and hold lands under grants with general or special covenants, so far as may be necessary for the transaction of their business, or where the same may be taken in payment of

their debts, or purchased upon sales made under any law of the state, so far as the same may be necessary to protect the rights of said company, and the same again to sell, convey and dispose of. 7. To buy and sell drafts and bills of exchange.

In addition to these powers, it was authorized by the twenty-third section of the charter to issue bills or notes until the year 1843,—subject to certain restrictions and limitations therein specified. And the twenty-fifth section provides that no higher taxes shall be levied on the capital stock or dividends of the company than are or may be levied on the capital stock or dividends of incorporated banking institutions in the state. The last section of the charter reserved the right to the state to repeal, amend or alter it after the year 1870. These are the only provisions material to the question before us.

At the time this charter was granted, the act of March 31, 1831, was in force, which imposed a tax of five per cent. on the dividends declared by any banks, insurance or bridge companies. Subsequently, on the 14th of March, 1836, after this company was incorporated, another law was passed to prohibit the circulation of small bills; and by this law a tax of twenty per cent. was imposed upon dividends, with a proviso, "that should any bank, prior to the 4th of July next following, with the consent of its stockholders, by an instrument of writing under its corporate seal, addressed to the auditor of the state, surrender the right conferred by its charter to issue or circulate notes or bills of a less denomination than \$3, after the 4th of July, 1836, and any notes or bills of a less denomination than \$5, after the 4th of July, 1837, then the auditor of the state should be authorized to draw on such bank only for the amount of five per cent. upon its dividends declared after the surrender."

As the plaintiff in error had the usual banking power of issuing notes and bills for circulation until 1843, it justly considered itself within the provisions of this law, and filed the surrender required; and ever since, until 1851, has paid the tax of five per cent., and no more, upon the dividends it declared. The act of 1836 was repealed in 1838, and permission again given to the banks to issue small notes and bills; but it does not appear that the Life Insurance and Trust Company ever availed itself of the privilege. Afterwards, in 1845, another law was passed, incorporating the State Bank of Ohio, and such banking companies as might afterwards organize themselves under and according to the provisions of that act. And the sixtieth section of this law provided that each banking company organized under that act should pay, semi-annually, six per cent. on its profits, which should be in lieu of all taxes to which such companies, or the stockholders thereof, on account of stocks owned therein, would otherwise be subject.

Upon these acts of assembly, the plaintiff in error defends itself against the tax imposed by the act of 1851, upon two grounds: 1. That by the act of 1836, the state agreed to relinquish the right to impose a higher tax than five per cent. upon the dividends declared by the corporation, during the continuance of its charter, upon the surrender of its right to issue small bills or notes. 2. That if this proposition is decided against it, yet as the act of 1845 established a general banking system, by which the state agreed to receive from each bank organized under it, six per cent. upon its profits, in lieu of all taxes to which it would otherwise be subject, the state could not impose a higher tax upon this company under the contract contained in the twenty-fifth section of its charter hereinbefore mentioned.

§ 2261. *Grants of privileges and exemptions to a corporation are strictly construed.*

The rule of construction in cases of this kind has been well settled by this court. The grant of privileges and exemptions to a corporation are strictly construed against the corporation, and in favor of the public. Nothing passes but what is granted in clear and explicit terms. And neither the right of taxation, nor any other power of sovereignty which the community have an interest in preserving undiminished, will be held by the court to be surrendered, unless the intention to surrender is manifested by words too plain to be mistaken. This is the rule laid down in the case of *Billings v. The Providence Bank*, and reaffirmed in the case of *The Charles River Bridge Company*. Nor does the rule rest merely on the authority of adjudged cases. It is founded in principles of justice, and necessary for the safety and well-being of every state in the Union. For it is a matter of public history, which this court cannot refuse to notice, that almost every bill for the incorporation of banking companies, insurance and trust companies, railroad companies, or other corporations, is drawn originally by the parties who are personally interested in obtaining the charter; and that they are often passed by the legislature in the last days of its session, when, from the nature of our political institutions, the business is unavoidably transacted in a hurried manner, and it is impossible that every member can deliberately examine every provision in every bill upon which he is called on to act.

On the other hand, those who accept the charter have abundant time to examine and consider its provisions before they invest their money. And if they mean to claim under it any peculiar privileges, or any exemption from the burden of taxation, it is their duty to see that the right or exemption they intend to claim is granted in clear and unambiguous language. The authority which this court is bound, under the constitution of the United States, to exercise in cases of this kind, is one of the most delicate and important duties. And if individuals choose to accept a charter in which the words used are susceptible of different meanings, or might have been considered by the representatives of the state as words of legislation only, and subject to future revision and repeal, and not as words of contract, the parties who accept it have no just right to call upon this court to exercise its high power over a state upon doubtful or ambiguous words, nor upon any supposed equitable construction or inferences made upon other provisions in the act of incorporation. If there are equitable considerations in their favor, the application should be made to the state and not to this court. If they come here to claim an exemption from their equal share of the public burdens, or any peculiar exemption or privilege, they must show their title to it; and that title must be shown by plain and unequivocal language. Applying this rule of construction to the laws hereinbefore referred to, it is evident that the first ground of defense cannot be maintained.

When the act of 1836 was passed, the state had an undoubted right, if it deemed proper, to impose the tax of twenty per cent. upon the incorporated companies therein mentioned, and to include the Life Insurance and Trust Company among them. Indeed, the right of the state in this respect is not disputed, and the argument on behalf of the plaintiff in error upon this point necessarily admits it. And we see nothing in the proviso which can fairly be construed as a contract on the part of the state, that it would not afterwards

change the policy which that law was intended to carry into operation; nor anything like a pledge that the state would not thereafter impose a tax of more than five per cent. upon the dividends of such banks as complied with the specified condition. The law is not a proposition addressed to the banks, but an ordinary act of legislation addressed to its own officer, and prescribing his duty in levying and collecting taxes from the corporations it mentions. It was the policy of the state, at that time, to infuse more gold and silver in the circulating currency, and to put an end to the circulation of small notes. The act of 1836 was manifestly intended to accomplish that object. And the tax is accordingly so regulated as to make it the interest of the banks to abstain from issuing them. But the insolvency of the Bank of the United States, and many of the state banks, and the general stoppage of specie payments, which happened soon afterwards, made it impossible to carry out the policy which the state deemed best for the public interests. The prohibition to issue small notes was therefore repealed in 1838, and the privilege of issuing them again restored to the banks. Now, without resorting to the established rule of construction, above stated, no fair interpretation of the words of these laws can make them other than ordinary acts of legislation, which the state might modify or change according to the necessities of the public service. It would be straining the words beyond their just import and meaning to construe the reduced taxes levied, while the banks were prohibited from issuing small notes, as a perpetual contract not to levy more, although the privilege for which the reduction was intended, as an equitable compensation, should be restored. If it could be regarded as a contract, it evidently meant nothing more than that the tax should not be raised while the banks were prohibited from issuing small notes.

§ 2262. *The general power granted to a bank to issue notes and bills, without any express grant as to small notes, is subordinate to the power of the state to regulate the amount for which they may be issued.*

But the subject-matter of these laws shows that no contract could have been intended. Every contract of this kind presupposes that some consideration is given, or supposed to be given, by the corporation — that the community is to receive from it some public benefit, which it could not obtain without the aid of the company. But in this instance the consent or co-operation of this company was not necessary to enable the state to carry out the policy indicated by the act of 1836. It had, indeed, at that time the power to issue notes and bills for circulation. But the grant of this right to the corporation, in general terms, was not a surrender of the right of the state to prescribe by law the lowest denomination for which notes or bills should be allowed to circulate. No such surrender is expressed, and none such, therefore, can be implied or presumed. For it is not only the right, but the duty, of the state to secure to its citizens, as far as it is able, a safe and sound currency, and to prevent the circulation of small notes when they become depreciated and are a public evil. And the community have as deep an interest in preserving this right undiminished as they have in the taxing power. And, like the taxing power, it will not be construed to be relinquished unless the intention to do so is clearly expressed. The general power to issue notes and bills, without any express grant as to small notes, is subordinate to the power of the state to regulate the amount for which they may be issued.

Moreover, the power of the Life Insurance and Trust Company to issue notes or bills of any description terminated by the express provision in its charter in

1843. And if the acceptance of the condition contained in the proviso in the act of 1836 made that law a contract on the part of the state, the reduced tax was the consideration for the surrender of the privilege. It surrendered the privilege until 1843. It had nothing to surrender after that time. And of course there was nothing for which the state was to give an equivalent, or for which the company had even an equitable claim to require compensation. It would be a most unreasonable construction of such an agreement to say that, in consideration that the company would abstain from embarrassing the community with a small note circulation for seven years, the state contracted not only to exempt it from its equal share of taxation during the time it abstained, but also for twenty-seven years afterwards, during which period the corporation would be exercising every privilege originally conferred on it by its charter, and giving no equivalent for the exemption. Before such a conclusion can be arrived at, the rule hereinbefore stated must be reversed, and every intendment made in favor of the exclusive privileges of the corporation, and against the community; and that intendment, too, must be pushed beyond the fair and just construction of the language used, or the subject-matter and object of the agreement. In every view of the subject, therefore, the defense taken under the act of 1836 cannot be maintained.

§ 2263. *The twenty-fifth section of the charter of the corporation merely protected it against discrimination in the future, and was a contract only to that extent.*

The second proposition of the plaintiff in error is equally untenable. The contract with this company in relation to taxation is contained in the twenty-fifth section of the charter hereinbefore set forth. Its obvious meaning is, that the tax upon this company should be regulated by the taxes which the policy or the wants of the state might induce it to impose by its general laws upon banking institutions. And in the legislation of Ohio, the words "banking institutions," or "banks," appear always to be confined to corporations which were authorized to issue bills or notes for circulation as currency. This company, therefore, was to be subject to the taxes then levied, or which its policy or necessities might afterwards induce it to levy, on banking institutions. The tax is not to be regulated by any special contract that the state had made, or might afterwards make, with a particular bank or banks. Nor is there any pledge on the part of the state that it will not afterwards enter into such contracts, and reserve in them a higher or lower rate of interest than that prescribed by its general laws. There is no provision in relation to such contracts contained in its charter. Its taxes are to be raised or lessened as the legislature may from time to time prescribe in cases of banks where no special contract intervenes to forbid it. This, in my opinion, is the true interpretation of the words used. At the time the charter was granted, the act of March 12, 1831, was in force, which imposed a tax of five per cent. on the dividends of banks, insurance and bridge companies. Of course, the plaintiffs in error were subject to that tax, and no more, while the law of 1831 continued in force; and it was not affected by any special contracts which the state had previously made. And it would have been liable to the tax of twenty per cent. imposed by the general act of 1836, if it had not complied with the condition in the proviso. But having complied, it remained, like other banking institutions which had no special contract, subject to the tax of five per cent.

Then came the act of 1845, which incorporated the State Bank, and authorized individuals to form banking companies in the manner and upon the terms

therein specified. The sixtieth section provided that the banking companies organized under it should each pay, semi-annually, six per cent. on its profits, which sum should be in lieu of all taxes to which the company or stockholders would otherwise be subject. It will be observed that this provision does not extend to all the banks in the state, but is, in express terms, confined to those which should be organized under that act of assembly; that is to say, to such banks only as should be organized in the manner authorized by that law, and become liable to all the restrictions, provisions and duties prescribed in it.

The court has already decided at the present term that the state has, by this section, relinquished the right to impose a higher tax than the one therein mentioned, upon any bank organized under that law. But that decision does not affect this case. For this company was not organized under the act of 1845, and is not therefore embraced by the sixtieth section. It remained under the regulation of the general law, and was still subject to a tax of five per cent. on its dividends, and nothing more. It was not liable to the increased tax of six per cent. upon profits levied upon these banks. For that tax was the result of a special agreement, and not of the repeal of former laws. And so it appears to have been understood and construed by the parties interested. The plaintiff in error continued to pay five per cent. on its dividends; while the banks organized under the act of 1845 paid the increased tax of six per cent. on their profits. Neither was the duration of its charter shortened. It still was to continue until 1870, while the corporate existence of these banks was to terminate in 1866. Nor was it subject to the restrictions, limitations or duties imposed upon them, when they differed from those of its own charter.

This being the case, there is no reason why the tax to be paid by the plaintiff in error should not be regulated by the general rule prescribed by the act of 1851. It was regulated by the general act of 1836 until this law was passed. Its tax was then lower than that levied on the banking companies organized under the act of 1845. And, as the special contract on which these banks were chartered did not apply to this corporation before the act of 1851, we do not see upon what ground it can be applied afterwards. As the tax levied on the Life Insurance and Trust Company was regulated by the general rule before, it would seem to follow that it should continue to be so regulated, as there is nothing in that law to alter its original charter. The increased amount of the tax can make no difference.

It is said, however, that when the act of 1851 was passed, there was no solvent bank in the state except those brought into existence by the act of 1845; that those previously established had all failed, and consequently there was no banking institution upon which the increased tax could operate. There is some difference as to this fact between the counsel. But I do not deem it material to institute a particular inquiry upon the subject. The provisions of the act of 1851 are general, and expressly apply to all banks then in existence, if any, or which have since been established, unless they were exempted from its operation by contract with the state. And it is by this general rule or policy that this company is bound by its charter to abide. Besides, it has been stated in the argument, and seems to have been admitted, that in 1845 there was no banking institution in the state upon which a tax was levied. They had all, it is said, stopped payment and made no dividends, and consequently no tax was paid. And this fact was strongly urged in the case of *The Piqua Branch of the State Bank of Ohio* against Jacob Knoop, Treasurer, 16 How., 369, in order to support the construction of the contract

which has been sanctioned by the court. Yet the fact that there was no bank then in existence paying the tax did not withdraw the Life Insurance and Trust Company from the operation of the general law, nor subject it to the increased taxation of the act of 1845.

Again, it is said that forty or fifty banks were organized under the act of 1845, and that that act formed the general banking system of the state; and the rule of taxation then prescribed ought, therefore, to be applied to this corporation, under the terms of its charter. But as I have already said, the charter to the Life Insurance and Trust Company does not prohibit the state from granting charters under any special limitation as to taxation which it may deem advisable and for the public interest. And if it may grant one, it may grant as many as it may suppose the public interest requires, upon the same or upon different conditions from each other. The state has not contracted that this company shall have the benefit of all or any of such agreements, or shall pay only the lowest tax levied on a bank, or the tax levied on the greater number of them. It has agreed that it shall have the benefit of its general regulations and laws in this respect, but not of its special contracts. And when the owners of property vested in the stocks of a corporation come here to claim a privilege or franchise which exempts them from their equal share of the public burdens borne by the rest of the community, they are entitled to receive what is expressly or plainly granted to them, and nothing more. Upon the whole, I am of opinion that the act of 1851 does not impair the obligation of any contract with the plaintiff in error, and the judgment of the supreme court of Ohio ought, therefore, to be affirmed.

Opinion by MR. JUSTICE CATRON.

I stated my views as to the character and effect of the sixtieth section of the act of 1845 in the case of *The Piqua Bank v. Knoop*; there I came to the conclusion that no restraint was intended to be imposed on a future legislature to impose different and additional taxes on the banks to which the act applies, if that was deemed necessary for the public welfare. (See §§ 2246-53, *supra*.)

§ 2264. *A legislature cannot by contract deprive succeeding legislatures of the power to exercise fully the sovereign power of taxation.*

2. My conclusion also was, in the above case, that if such restraint had been attempted, it was inoperative for want of authority in a legislature to vest in a corporation by contract, to be held as a franchise and as corporate property, a general political power of legislation, so that it could not be resumed and exercised by each future legislature. That a different doctrine would tend to sap and eventually might destroy the state constitutions and governments; as every grant of the kind, to corporations or individuals, would expunge so much of the legislative power from the state constitution as the contract embraced; and if the same process was applied to objects of taxation, first one and then another might be exempted, until all were covered, and subject to the same immunity, when the government must cease to exist for want of revenue.

3. That the constitution of Ohio of 1802 forbid such tying up of the hands of future legislatures acting under its authority, it being so construed by her own courts, whose decisions we were bound to follow. Nor has any law or decision of a court in Ohio construed its late constitution of 1802 in this regard, until the decisions, lately made on the tax laws here in controversy, settled its true meaning.

These principles will equally apply in this case as they did in that of *The*

Piqua Bank v. Knoop; even admitting that the sixtieth section of the act of 1845 is in effect and fact a general provision applicable to the existing banks of Ohio, and embraces the Insurance and Trust Company.

§ 2265. *Sovereign political power is in no respect the subject-matter of contract with private persons.*

It is proper that I should say my object here is not to express an opinion in this case further than to guard myself against being committed in any degree to the doctrine that the sovereign political power is the subject-matter of a private contract that cannot be impaired or altered by a subsequent legislature; that such act of incorporation is superior to subsequent state laws affecting the corporators injuriously; and that the corporation holds its granted franchises under the constitution of the United States, in effect, and holds and maintains the portion of sovereign power vested in it by force of the authority of this court; thus standing off from and above the local state authorities, political and judicial, and setting them at defiance, as has been most signally done in one instance, brought to our consideration from Ohio at this term, in the case of *Deshler v. Dodge*, 16 How., 622. There the tax collector distrained nearly \$40,000 worth of property from four of these banks claiming exemption. On the same day an assignment was made by the four banks of the property in the collector's hands to *Deshler*, a citizen of New York. He sued out a writ of replevin in the circuit court of the United States founded on these assignments. The marshal of that court, by its process, retook the property from the tax collector's hands and delivered it to the non-resident assignee, as the legal and true owner, who now holds it.

No other or further step is required to secure our protection to corporations setting up claims to exemption from state laws. I have become entirely convinced that the protection of state legislation and independence supposed to be found in a liberal construction of state laws in favor of the public and against monopolies, as asserted in the *Charles River Bridge* case, is illusory and nearly useless, as almost any beneficial privilege, property or exemption, claimed by corporations or individuals in virtue of state laws, may be construed into a contract, presenting itself as unambiguous and manifestly plain to one mind, whereas to another it may seem obscure and not amounting to a contract. No better example can be found than is here furnished. When I take into consideration this fact, and, in connection with it, the unparalleled increase of corporations throughout the Union within the last few years; the ease with which charters containing exclusive privileges and exemptions are obtained; the vast amount of property, power and exclusive benefits, prejudicial to other classes of society that are vested in and held by these numerous bodies of associated wealth, I cannot but feel the grave importance of being called on to sanction the conclusion that they hold their rights of franchise and property under the constitution of the United States, and practically under this court, and stand above the state government creating them.

My opinion is that the judgment of the state court should be affirmed for the reasons here suggested, and stated by me at large in the case of *The Piqua Bank v. Knoop*.

Opinion by MR. JUSTICE DANIEL.

In the conclusion adopted by the opinion of the court that the judgment of the supreme court of Ohio should be affirmed, I entirely concur; but from the reasoning by which the court has reached its conclusion, I am constrained to

dissent. I never can believe in that, to my mind, suicidal doctrine, which confers upon one legislature, the creatures and limited agents of the sovereign people, the power, by a breach of duty and by transcending the commission with which they are clothed, to bind forever and irrevocably their creator, for whose benefit and by whose authority alone they are delegated to act, to consequences however mischievous or destructive.

The argument of the court in this case leading, in my apprehension, to the justification of abuses like those just referred to, I must repudiate that argument whilst I concur in the conclusion that the decision of the supreme court of the state of Ohio should be affirmed, both for the reasons assigned in support of their judgment by that court, and for the further reason that this court cannot rightfully take cognizance of the parties to this controversy.

Opinion by MR. JUSTICE CAMPBELL.

My opinion is that the act of the general assembly of Ohio, entitled "An act to tax banks, and bank and other stocks, the same as other property is now taxable by the laws of this state, of March, 1851," does not impair the obligation of any contract contained in the act of incorporation of the plaintiff, or in any other act of the general assembly of the state with which the plaintiff is concerned. I concur in the opinion of the chief justice concerning the interpretation of the statutes of Ohio involved in this case, and the doctrines of interpretation applicable to these and statutes of a similar description, and in the conclusions to which they conduct.

In the decision of the cases which have been brought to this court from the supreme court of Ohio, I have not found it necessary to declare an opinion upon the powers of the general assembly to modify or to repeal an act of incorporation like the one held by these banking institutions; nor of the limitations upon the general assembly in administering the power of taxation,—much less to consider the powers of the people of Ohio to reform all the proceedings and acts of their government, or whether those powers of the people can be controlled in their exercise by any jurisdiction or authority lodged in this court.

The questions pressing upon us involve interests of such a magnitude, and consequences so important, that I feel constrained to stop at the precise limit at which I find myself unable to decide the case at law or equity before me—that being the limit of my constitutional power and duty. I file this opinion merely to say that I do not concur in the opinion which has been delivered on the points wherein any of these questions are directly or indirectly considered.

Opinion by MR. JUSTICE CURTIS, NELSON, J., concurring.

I dissent from the judgment of the majority of the court in this case. I consider the twenty-fifth section of the charter of the company to be a contract by the state with the corporation that the rate of taxation of this company shall not at any time be higher than the rate of taxation actually and legitimately imposed on banking institutions; that this contract is not complied with by passing an act to tax banks, which could not and did not operate, in point of fact, to tax the banking institutions of the state; that what was bargained for and granted was not conformity to an inoperative general law, but conformity to the actual and legal rate of taxation of banks for the time being; and consequently, as, when the tax in question was levied, the banking institutions existing in the state were not subject to the law under which the

Life and Trust Company was taxed, and were not liable to pay the rate of taxation imposed on that company, the obligation of the contract of the state to impose on the Life and Trust Company no higher taxes than are or may be imposed on banking institutions has been impaired; because when this tax was imposed it was a higher tax than was or could be legitimately imposed on the then existing banking institutions of the state. I do not go into an extended examination of this subject, because it involves only a construction of this particular contract, and, though important to the parties, is not of general interest. Upon the other questions involved in the case, namely, as to the power of the legislature of Ohio to make a contract fixing the rate of taxation of certain property for a term of years,—as to the duty of this court to expound the contract whose obligation is alleged to be impaired, and the propriety of accepting the construction of the constitution of the state which had been practiced on by all the branches of its government, and acquiesced in by the people for many years, when the contract in question was made,—I fully concur in the views of the chief justice, as expressed in his opinion.

MR. JUSTICE WAYNE dissented.

RAILWAY COMPANY v. PHILADELPHIA.

(11 Otto, 528-540. 1879.)

ERROR to the Supreme Court of Pennsylvania.

§ 2266. *A provision exempting a corporation from taxation is a contract.*

Opinion by MR. JUSTICE CLIFFORD.

Stipulations, in a statute of a state, exempting certain property, rights or franchises from taxation, or engaging that the same shall be taxed only at a certain rate, if made for a valuable consideration received by the state whose legislature enacted the stipulation, is a contract, and as such comes within the rules of decision specifying the description of contracts entitled to protection from modification or repeal under the guaranty of the tenth section of the first article of the constitution. Exemptions of the kind, however, are to be strictly construed, the rule being that the right of taxation exists unless the exemption is expressed in clear and unambiguous terms, and that in order that it may be effectual it must appear that the contract was made in consequence of some beneficial equivalent received by the state, it being conceded that if the exemption was granted *only* as a privilege it may be recalled at the pleasure of the legislature. Cooley, Const. Lim. (4th ed.), 342; Cooley, Taxation, 146.

STATEMENT OF FACTS.—Companies were created by the legislature of the state, more than thirty years ago, for running street cars in the streets of the plaintiff city, whose charters made it necessary that the managers should obtain the consent of the city councils before they commenced to use and occupy the streets for that purpose. Ordinances were accordingly passed by the city authorities which required companies organized under such statutes to pay for the use of the city a license fee of \$30 for each car intended to be run. Subsequent charters of the kind were granted by the legislature which did not contain any provision requiring the companies or their agents to procure the consent of the authorities of the city before they could use the public streets for the running of their passenger cars. These companies denied the validity of the license charge, which gave rise to litigation and to new legislation, by which authority was given to the city councils to provide by ordinance for the

proper regulation of omnibuses, or vehicles in the nature thereof, and to that end it was enacted that they might from time to time pass ordinances to provide for the issuing of licenses to as many persons as may apply to keep and use omnibuses, or vehicles in the nature thereof, and to charge a reasonable annual or other sum therefor, and to provide for the punishment of the owners and drivers of the same for any violation of the provisions of the ordinances to be created by virtue of the authority conferred. Sess. Laws Penn. (1850), 469. Authority was by that act expressly vested in the city authorities to pass ordinances upon the subject therein described and to charge a reasonable annual license fee for the license or other sum for the same. Pending the period during which that enactment continued to be in operation, the legislature of the state passed the act incorporating the defendant company, with the powers, privileges, duties and obligations expressed in the act of incorporation. Id. (1864), 300.

Corporate privileges of the usual character are by the charter granted to the company, and the tenth section provides that whenever their dividends shall exceed six per cent. per annum on the par value of the capital stock, the company shall pay for the use of the city a tax of six per cent. on such excess over six per cent. on the par value, and that they shall also pay "such license fee for each car run by the company as is now paid by other passenger railway companies." Railway companies running cars on the streets of the city were required to pay, at the time the defendant company was incorporated, for each and every car intended to be run, the annual license fee of \$30, as appears by the ordinance then in force and fully set forth in the agreed statement of facts. Annual payments to that amount, it seems, were made by the defendant company, which may be inferred from the fact that the plaintiff city makes no claim for any deficit during that period.

Coming to the matter in controversy, it appears that the legislature, on the 11th of April, 1868, passed the act which is the principal subject of controversy. Section 1 provides that the passenger railway corporations of the city shall pay annually to the city, in the month of January, the sum of \$50, as required by their charters, for each car intended to run over their roads during the year, and that they shall not be obliged to pay any larger sum; and the same section provides that the city shall have no power to regulate such companies unless so authorized by the laws of the state. Sess. Laws Penn. (1868), 849. Regular payments, as required, were made by the defendant company until the year 1875, when they refused to pay any greater sum than \$30 per year for each car run. Payment of the excess beyond \$30 being refused, the authorities of the city instituted the present suit in the common pleas to recover the balance as claimed. Service was made, and the parties having appeared, filed the agreed statement of facts exhibited in the transcript. Hearing was had, and the court of original jurisdiction rendered judgment in favor of the plaintiff city for the sum of \$4,218.60. Dissatisfied with the judgment, the defendant company removed the cause into the supreme court of the state, where the judgment was affirmed. Still not satisfied, the defendant company removed the cause into this court, and assigns for error the following causes: 1. That the act of the legislature defining the duties and liabilities of railway companies is in conflict with that provision of the constitution which prohibits a state from passing any law impairing the obligation of contracts. 2. That the judgment of the court below is in conflict with that provision of the constitution.

Attempt was made about the time the defendant company was incorporated to support the theory that a street passenger car was not a vehicle in the nature of an omnibus, and that the street passenger cars were not taxable in any form under the legislative act which authorized the city authorities to issue licenses to persons to keep and use omnibuses, or vehicles in the nature thereof, upon the ground that the street passenger car was not a vehicle in the nature of an omnibus. Controversy arose, and the supreme court of the state effectually disposed of the question in favor of the city. Questions of importance were decided by the court in that case, most or all of which are more or less applicable to the case before the court. They are as follows: 1. That a grant to a corporation to carry passengers in cars over the streets of a city does not necessarily involve exemption from liability to municipal regulations, the right granted being neither greater nor less than that possessed by a natural person. 2. That when a corporation is authorized to pursue a specified business within a municipality it is intended that the business shall be conducted under the rules, restrictions and regulations which govern others transacting the same business. 3. That the right to construct cars and own a railway neither enlarges nor diminishes the right to run cars and carry passengers, and that a reasonable charge for the use of the privilege to transact such a business is not a denial of the right. 4. That an ordinance requiring passenger cars to be numbered and pay a stipulated sum when licensed is a valid police regulation, and that such an ordinance might be passed under the act which authorized the city authorities to pass ordinances for the licensing of omnibuses and other vehicles of conveyance of a like nature. Since that decision it is not doubted that the subject of imposing license fees, in cases like the present, is within the jurisdiction of the city authorities, if the statute under which they have exercised such jurisdiction is a valid act passed in pursuance of the constitution.

§ 2267. *The act of the legislature of Pennsylvania of April 8, 1864, chartering a street railway company, was not a contract fixing the amount of license fee that might be exacted.*

When the company was incorporated the charter, as before remarked, contained the provision providing for the payment of a six per cent. tax on the excess of dividends over six per cent. on the par value of the stock, and the further provision that the company shall also pay such license for each car run as is now paid by other passenger railway companies in the city. What the defendants contend is that the closing enactment of the section amounts to a contract that the railway company shall never be required to pay any greater license fee than was then required of such companies running passenger cars on the streets of the city. Other railway companies at that time paid an annual license of \$30, and the defendants insist that the act of the legislature increasing the license to \$50 per annum is unconstitutional and void. Two answers are made to that proposition by the plaintiff city, either of which is sufficient to show that the judgment must be affirmed: 1. That the language of the act of incorporation referred to does not amount to a contract of any kind, and certainly not to such a contract as that attempted to be set up by the defendants. 2. That even if the language employed in the charter is sufficient to amount to a contract that the license charge should not exceed the amount paid at that date by other such companies, still it cannot benefit the defendants, for the reason that the constitution of the state in force when the act of incorporation was passed provides that the legislature shall have the power to alter, revoke or annul any charter of incorporation hereafter conferred by or

under any special or general law, whenever in their opinion it may be injurious to the citizens, subject only to the condition that the alteration, revocation or annulment shall be made in such manner "that no injustice shall be done to the corporators." Art. 1, sec. 26; Purdon, Dig., 9th ed., p. 17.

Exemptions of the kind set up are to be strictly construed, but it is unnecessary to invoke that canon of construction to any considerable extent, as the language employed is not sufficient to take the case out of the rule that the alleged exemption will not be sustained unless it be expressed in clear and unambiguous terms. Taken in their widest sense, the words employed are no more than sufficient to warrant the construction that the legislature intended that the corporation should not then be required to pay any greater charge as license than other companies were required to pay for the same privilege, and it may perhaps be regarded as a guaranty against invidious exemptions adverse to the corporators in future legislation upon the subject; but it is plain that there is nothing in the language of the section to warrant the court in holding that the legislature intended to contract that the license charged for such passenger cars should never exceed the annual sum of \$30. Railway companies of the kind, it appears, were first required to pay an annual sum of \$50 for each car run the year previous to the passage of the act which is the subject of controversy in the present litigation. Neither party refers to that act as of any importance in this case, except as a part of the state legislation upon the subject. Then comes the act in controversy, to which reference has already been made. 9 Sess. Laws Penn. (1868), 848.

When the street railway system of the city was comparatively in its infancy, the city authorities, under the legislative act empowering them as such authorities to charge reasonable fees for granting licenses to such companies, fixed the sum at \$30 per annum for each car run. Regulations of the kind were in force and operation when the charter of the defendant company was granted. Other companies previously incorporated were at the time paying only that sum per annum for each car, and the tenth section of the charter granted to the defendant company provided that the then new company should pay the same as was paid by the other passenger railway companies. Beyond doubt they were required to pay the same amount as was paid by the other companies, and it is perhaps a reasonable construction that without further legislation they could not be required to pay any greater sum, but the language of the section does not in terms contain any such prohibition. None of the other companies have any such immunity from increased taxation, and if construed to have that effect in favor of the defendant company, it would have an extremely invidious operation at the expense of all other similar companies. Invidious exemptions are not favored, nor ought they to be, as they are in principle utterly opposed to the rule of equality, which ought always to prevail in imposing public burdens. Taxation is an act of sovereignty to be performed, so far as it conveniently can be, with justice and equality to all. *Crawford v. Burrell Township*, 53 Penn. St., 219; *Cooley, Taxation*, 152. Common burdens should be sustained by common contributions, regulated by fixed rules, and be apportioned, as far as possible, in the ratio of justice and equity. *Sutton v. Louisville*, 5 Dana (Ky.), 28, 31. Viewed in the light of these suggestions, it is clear that the state never made such a contract with the defendant company as that supposed in the assignment of errors.

§ 2268. *Imposing a license fee is an exercise of police power.*

It seems that the supreme court of the state, when it became their duty at

an earlier period to examine the question, came to the conclusion that the power to impose the license or tax might be supported as a police power derived under the act passed for the regulation of omnibuses or vehicles in the nature of the same, it appearing that at that time no legislative act had conferred the express power to tax the cars of the company. *Frankford, etc., R. Co. v. City of Philadelphia*, 58 Penn. St., 119-124. Since that the act in question in this case has been enacted, which itself requires all such companies, without discrimination, to pay the annual license or tax of \$50 for each car intended to be run over the city roads during the year.

Stress, it appears, was laid in the court below upon the words of the act "as required by their charters," as if the obligation did not arise unless it was created by the terms of the charter; but the supreme court showed conclusively that the act of the legislature, when properly construed, did not sustain the proposition, and it appears to have been abandoned. Charters of the kind, as the supreme court showed in the opinion given in this case, required obedience to the lawful ordinances of the city under the exercise of its municipal powers, which, as the supreme court there say, is plainly evidenced by the remainder of the section imposing the tax of \$50, by which the legislature took away from the city all power by ordinance or otherwise to regulate passenger railways, "unless authorized by the express terms of a law referring directly to such corporations." Voluntary payments of the amount imposed by the new act were made by the company for sixty or seventy cars, from which the supreme court of the state held that it followed as a legal conclusion that the company had accepted the act.

§ 2269. *To construe a provision into an exemption, the intent of the legislature must be expressed in plain, unambiguous terms.*

All power to regulate such companies by ordinance or otherwise was taken away from the city during that period, and the court held that inasmuch as the company had enjoyed the benefit of that prohibition ever since it was enacted, it must be understood that they have accepted the act. Some weight is doubtless to be given to that argument, but it is clear that the right of the state to impose such a tax, rate or imposition in the future cannot be taken away by mere implication arising from a direction to pay a certain sum, the universal rule being that it requires some plainer negative of the power of the state to levy moneys for public purposes than is found in such a direction. Indications of such an intention might perhaps be found in other statutory provisions, sufficient, when added to such a direction, and when taken together as a whole, to amount to a contract to relinquish the power; but when it is sought to prove such an exemption, the statutory evidence of the same must be plain and unambiguous, and if not direct it must at least be such as is inconsistent with any other hypothesis, and conclusive that such was the intention of the legislature. *Cooley, Const. Lim.* (4th ed.), 341.

§ 2270. *Rules for the construction of charters with reference to contracts embodied in them.*

Much discussion of the second proposition, in view of the conclusive support given to the first, is quite unnecessary. Power to alter, revoke or annul any charter of incorporation was vested in the legislature by the constitution more than a quarter of a century before the defendant company was incorporated. Even when the language of the charter is sufficient to amount to a contract, it was twice admitted by Mr. Justice Story, in *Dartmouth College v. Woodward*, that alterations and amendments may be made in the charter, where the power

for that purpose is reserved to the legislature in the act of incorporation. 4 Wheat., 518, 708, 712 (§§ 2099–2117, *supra*). Acts of incorporation granted subsequently to the adoption of the constitution must be construed as if the provision of the instrument in question was embodied in the charter. Private charters of the kind importing such an exemption are held to be contracts, because they are based for their consideration on the liabilities and duties which the corporators assume by accepting the terms therein specified; and the general rule is that the grant of the franchise on that account can no more be resumed by the legislature, or its benefits be diminished or impaired without the assent of the corporators, than any other grant of property or legal estate, unless the right to do so is reserved in the act of incorporation, or by some immemorial usage or general law of the state in operation at the time the charter was granted. *Holyoke Co. v. Lyman*, 15 Wall., 500, 511 (§§ 2170–76, *supra*).

§ 2271. *Charters are strictly construed against the grantees.*

Charters of private corporations, duly accepted, it must be admitted, are in general executed contracts, but the different provisions, unless they are clear, unambiguous and free of doubt, are subject to construction, and their true intent and meaning must be ascertained by the same rules of interpretation as apply to other legislative grants, the universal rule being that whenever the privileges granted to such a corporation come under revision in the courts, the grant is to be strictly construed against the corporation and in favor of the public, and that nothing passes to the corporation but what is granted in clear and explicit terms. *Rice v. Railroad Co.*, 1 Black, 358; *Charles River Bridge v. Warren Bridge*, 11 Pet., 420 (§§ 2058–82, *supra*). Whatever is not unequivocally granted in such charters is taken to have been withheld, as all such charters and acts extending the privileges of corporate bodies are to be taken most strongly against the corporators. *Sedgwick*, Stats. (2d ed.), 292; *Lees v. Manchester & Ashton Canal Co.*, 11 East, 644.

§ 2272. *Vested rights cannot be impaired under a reserved power to alter, etc.*

Vested rights, it is conceded, cannot be impaired under such a reserved power, but it is clear that the power may be exercised, and to almost any extent, to carry into effect the original purposes of the grant and to protect the rights of the public and of the corporators, or to promote the due administration of the affairs of the corporation. *Pennsylvania College Cases*, 13 Wall., 190, 218 (§§ 2118–26, *supra*). Tested by these considerations, it is clear, even if it be admitted that the language of the charter is sufficient to import a contract, that the power of the legislature under the constitution is amply sufficient to justify that department of the state to pass the act raising the license for each car from thirty to fifty dollars.

Judgment affirmed.

TOMLINSON v. BRANCH.

(15 Wallace, 460–470. 1872.)

APPEAL from U. S. Circuit Court, District of South Carolina.

Opinion by MR. JUSTICE BRADLEY.

STATEMENT OF FACTS.—The South Carolina Canal & Railroad Company was chartered by the legislature of South Carolina in December, 1827, for the purpose of constructing a railroad or canal, or both, from Charleston to each of the towns of Columbia, Camden and Hamburg, with the exclusive right for that purpose for thirty-six years. In a supplement of January, 1828, amongst

other things, it was enacted as follows, viz.: "That during the first period of thirty-six years the stock of the company, and the real estate that may be purchased by them and connected with, and be subservient to, the works herein authorized, shall be exempted from taxation."

Under this charter the company constructed a railroad from Charleston to Hamburg only, a distance of nearly one hundred and forty miles. This road was completed in 1833, and it is admitted that the thirty-six years of exemption from taxation expired in 1869, and cannot be invoked in support of the present suit. In 1835 the Cincinnati & Charleston Railroad Company was incorporated by the legislature of South Carolina, for the purpose of establishing a communication by railroad between Cincinnati and Charleston, through the states of Kentucky, Tennessee, North Carolina and South Carolina, with power to construct branches not conflicting with any chartered rights, and with power to use any section of the said railroad before the whole should be completed. By the forty-third section of this charter it was enacted that the capital stock of this company, the dividends thereon, and all the property and estate, real and personal, belonging to said company, should be forever exempt from taxation, unless the dividends should exceed lawful interest. Subsequently the project of extending the road into other states was abandoned, and the name of the company was changed, first to that of the Louisville, Cincinnati & Charleston Railroad Company, and afterwards to that of the South Carolina Railroad Company. The company never built any portion of the railroad authorized by its charter, except from Branchville to Columbia and a branch to Camden. The exclusive privileges conceded to the South Carolina Canal & Railroad Company rendered it difficult, if not impracticable, to effect a communication with Charleston without the consent of that company. Hence negotiations for an amalgamation of interests between the two companies took place as early as 1837, and it was practically effected in that and the ensuing years. The mode in which it was done was that the stockholders of the South Carolina Canal & Railroad Company exchanged their stock in that company for an equal number of shares in the Louisville, Cincinnati & Charleston Railroad Company (afterwards called the South Carolina Railroad Company), and received in addition a bonus of twenty-five per cent. By this means the latter company acquired the entire control of the former, and used the road of the former company between Branchville and Charleston, instead of building a separate road of their own.

In 1843, by an act of the legislature passed the 19th of December, this amalgamation was formally legalized. The section relating to this subject was expressed in the following terms: "That whenever the written consent of all the stockholders of the South Carolina Canal & Railroad Company shall have been obtained, the said South Carolina Canal & Railroad Company shall be *merged* in the said South Carolina Railroad Company, and thereupon and thereafter all the rights, privileges and property belonging to the said South Carolina Canal & Railroad Company shall be vested in the said South Carolina Railroad Company, and the said South Carolina Railroad Company shall be liable for all the debts and contracts of the said South Carolina Canal & Railroad Company; and the stock and property of the said South Carolina Railroad Company shall be subject to the same liens and charges to which the stock and property of the said South Carolina Canal & Railroad Company may be liable, and in the same relative order in which the said liens and charges now stand."

§ 2273. *Where a corporation, having an exemption from taxation for a limited time, is merged in one having a perpetual exemption, the latter takes the property of the former subject only to the limited exemption.*

It is conceded that the terms of this law were complied with. And now the defendants in error contend that by the "merger" of the South Carolina Canal & Railroad Company in the South Carolina Railroad Company, the property of the former is held by the latter, with all the rights and privileges of its own charter attaching thereto, including the right of perpetual exemption from taxation. If this is so, the state, by giving the latter company the power to acquire the property of the former, has lost a valuable prerogative in reference to that property, which it possessed up to the time when the act of 1843 was passed,—namely, the right to tax the property after the expiration of the thirty-six years. Such a conclusion of the rights of the state ought not to be admitted without a clear expression of the legislative assent. It does not seem to us that the section in question contains such clear assent. In declaring that the one company shall be merged in the other, and that the rights, privileges and property of the one shall be vested in the other, the legislature cannot be understood to mean that the restrictions, limitations and burdens affecting that property, and imposed for the benefit of the public or of individuals, shall not go with it. The rights and privileges go with it, and those rights and privileges can with difficulty be separated from the restrictions and duties by which they are measured and qualified. For example, the right to charge toll and freight can hardly be separated from the limitation of the rates of toll and freight which the charter of the merged company imposed. If the rates of freight were limited in that charter to five cents per ton per mile, can it be claimed that the new company is discharged from that limitation altogether? Or, if its own charter allows a charge of ten cents per ton per mile, can it claim the right to charge ten cents for freight transported on the old road?

If the hypothesis were reversed, and the old charter allowed ten cents, whilst the new allowed but five, the company would not hesitate, under the grant of the rights and privileges of the old, to continue to charge ten cents, as the former company had done. And they would have reason on their side. Had it been intended that the road and property of the old company should be owned and controlled by the new company under its own charter, in the same manner as its other property, it would have been easy to have so declared. Not having so declared, we cannot presume that such was the intent. The keeping alive of the rights and privileges of the old company, and transferring them to the new company in connection with the property, indicates the legislative intent that such property was to be holden in the same manner and subject to the same rights as before. The owners of the property were to lose no rights by the transfer, nor was the public to lose any rights thereby. Of course, these remarks do not apply to those corporate rights and franchises of the old company, which appertain to its existence and functions as a corporation. These became merged and extinct. But all its rights and duties, its privileges and obligations, as related to the public or to third persons, remain, and devolve upon the new company. This seems to us the most obvious and natural construction of the act, and leads to the conclusion that, as to the road, property and works appertaining to the main line from Charleston to Hamburg, the South Carolina Railroad Company has no claim to exemption from taxation.

§ 2274. *Authorities examined.*

This view of the subject is corroborated by the decision of this court in the case of Philadelphia, etc., R. Co. v. Maryland, 10 How., 376. It there appeared that the railroad line between Baltimore and Philadelphia had originally belonged to several distinct organizations chartered by the states of Maryland, Delaware and Pennsylvania. One of these companies was exempt from certain taxation, and it was claimed by the consolidated company that this exemption was transferred to it and affected all parts of the line. The act authorizing the union of the several companies provided that the "said body corporate so formed should be entitled . . . to all the powers and privileges and advantages then belonging to the former corporations." And the new company claimed the exemption from taxes as one of the privileges and exemptions acquired. But the court held that the exemption did not extend to a portion of the line to which it had not extended before the union. It considered the evident meaning of the law to be that whatever privileges and advantages either of the former companies possessed should in like manner be held and possessed by the new company, to the extent of the road which the said former companies had respectively occupied before the union; that it should stand in their place, and possess the power, rights and privileges they had severally enjoyed in the portions of the road which had previously belonged to them. It seems to us that this decision is directly in point, and governs that branch of the case now under consideration.

Reference is made, however, to certain decisions of the courts of South Carolina, which, it is contended, settle the question the other way. The first case referred to is South Carolina R. Co. v. Blake, 9 Rich., 233, which arose out of an attempt of the South Carolina Railroad Company to condemn certain land for its purposes in Charleston. The owner disputed the right of condemnation on the ground that the road and works had long before been located, and that, therefore, the power was gone. But the court held that the power existed under both charters, and might be exercised under either—first showing by affidavit the necessity of the use. The observations on the subject of taxation were *obiter dicta*; but, as far as the judgment goes, it does not seem to us to militate against the views we have taken, but rather to confirm them by recognizing the continued vitality of the powers contained in the old charter. These cannot fairly be claimed without accepting also its duties and burdens.

Another case was that of The State v. Hood, 15 Rich., 177, in which the company claimed exemption from a state income tax imposed in 1867, under a law passed the year preceding, taxing the gross incomes of all railroads *not exempt by law*. The court of appeals held that the company was exempt by law, both under the thirty-six years' exemption in the old charter (which had not then expired) and under the exemption in the charter of 1835; and expressly waived the consideration of the effect of the act of union passed in 1843. This case, therefore, furnishes no authority on the subject.

The remaining case is that of South Carolina R. Co. v. Columbia & Augusta R. Co., 13 Rich. Eq., 339, decided in 1867. The defendant company in that case was chartered in 1858 with authority to construct a railroad from Columbia to Augusta. The South Carolina Railroad Company claimed that this would be an invasion of its exclusive privileges, as guaranteed in the charter of the South Carolina Canal & Railroad Company and in that of the Cincinnati & Charleston Railroad Company. The learned chancellor by whom the case

was decided assumed that the South Carolina Railroad Company was entitled to both guaranties; but he held that the projected road would not be an infringement of either. The guaranty given to the old company was that of an exclusive right (for thirty six years from the completion of its road) of having a railroad between Charleston as one terminus, and the towns of Columbia, Camden and Hamburg, respectively; and the guaranty given to the Cincinnati & Charleston Railroad Company was, that for thirty-six years from January 1, 1836, the state should not authorize any other road within twenty miles of its road, which should connect any points thereon, or should run in the general direction thereof; which exclusive privilege was not to extend to branches, but only to the main road. The chancellor held that the first guaranty secured the company only against other roads leading to Charleston, which the projected road did not do; and that the second guaranty secured the company only against roads interfering with the main line of the Cincinnati and Charleston company, which the projected road did not do, because this main line, as originally contemplated, was to extend from Charleston, *via* Branchville and Columbia, to Cincinnati; and the only part of it ever constructed was the road from Charleston *via* Branchville to Columbia; with which the projected road did not interfere. This was all that the chancellor decided. It is true that, in the course of his opinion, he does say that after the acquisition of the old road, extending from Charleston to Hamburg, the charter of the South Carolina Railroad Company extended over it, the same as if that company had built it. But that proposition was not material to the conclusion to which he came. And when he assumed that the guaranty of the old charter still subsisted with regard to the old road, and based his judgment upon that assumption as one of its grounds, his opinion is virtually an authority for the other proposition, that the company must be regarded as holding the old road, so far as the rights of the public are concerned, subject to the conditions and limitations of that charter, as well as with its privileges and immunities. Be this, however, as it may, we find nothing in this case or the other cases referred to, which, in our view, affects the authority of the case of Philadelphia, etc., R. Co. v. Maryland, or the soundness of the conclusion to which we have come, as before expressed.

· § 2275. *Where a charter is specially exempted from the operation of a general statute authorizing the repeal of all charters by the legislature, except as to future grants to the corporation, such exemption is not lost by obtaining subsequent legislation authorizing the company to issue bonds.*

The next inquiry relates to the line of railroad constructed by the South Carolina Railroad Company under its own charter; being that portion between Branchville and Columbia and Camden. We have seen that the company, by its original charter granted in 1835, had the grant of a perpetual exemption from taxation. We have already decided that it is competent for the legislative power to grant such an exemption. But it is contended on the part of the state that this exemption, and all other chartered privileges of the company, are subject to alteration and repeal, by virtue of the forty-first section of an act, passed in December, 1841, by which it is declared: "That it shall become part of the charter of every corporation, which shall, at the present or any succeeding session of the general assembly, receive a grant of a charter, or any renewal, amendment or modification thereof (unless the act granting such charter, renewal, amendment or modification shall, in express terms, except it), that every charter or incorporation granted, renewed or modified as aforesaid, shall

at all times remain subject to amendment, alteration or repeal, by the legislative authority."

Now, there can be no doubt but that the act of 1843, authorizing the consolidation of the two companies, or the merger of the one into the other, was an act modifying the charter of the South Carolina Railroad Company; but the third section of that act withdrew the charter from the operation of the act of 1841. It was in these words: "Section 3. The said South Carolina Railroad Company is hereby excepted from the provisions of the forty-first section of an act entitled an act to incorporate certain villages, etc. [referring to the act in question], but nothing herein contained shall be construed as exempting the said company from the provisions of the said forty-first section, upon any future grant, renewal or modification of their charter."

The allegation on the part of the state is, that subsequent legislation was obtained by the company, which modified its charter, and thus rendered the whole charter liable to subsequent alteration and repeal. The legislation referred to consists of two several acts, namely: "An act to lend the credit of the state to secure certain bonds, *to be issued* by the South Carolina Railroad Company, and for other purposes, passed December 21, 1865;" and "An act to amend the act last aforesaid, passed the 19th day of September, 1866." It is very doubtful whether these acts can be regarded as amending or modifying the charter of the company. They merely authorize the extension of certain bonds made by the company (which the state had guarantied), by the issue of new bonds of like character, and the continuation of the mortgage for securing the payment of said bonds. But whatever may be thought on this point, the third section of the act of 1843 clearly withdraws from the operation of the act of 1841 (by which power to amend and repeal is reserved) the entire charter of the company except as to future grants, renewals and modifications. Such future grants only were to be subject to alteration and repeal. This seems to us conclusive of the point raised, and no further argument is necessary. It is our opinion, therefore, that the part of the line now under consideration is exempt from taxation, and that so much of the decree as relates thereto is correct.

Decree reversed, with directions to enter a decree making the injunction perpetual as to all that part of the line and railroad of said South Carolina Railroad Company, which extends from Branchville to Columbia and Camden, and as to all property and stock of said company, properly apportionable and applicable to the said portion of line and railroad, and dismissing the bill as to all the residue of the railroad property and stock of said company, and that such further proceedings be had as may be necessary to perfect and carry out said decree. (a)

FARRINGTON v. TENNESSEE.

(5 Otto, 679-694. 1877.)

ERROR to the Supreme Court of Tennessee.

Opinion by MR. JUSTICE SWAYNE.

STATEMENT OF FACTS.—This case lies within narrow limits. The question to be decided arises under the constitution of the United States. The ground of

(a) In *City of Charleston v. Branch*,* 15 Wall., 470, a bill was filed to prevent the collection of a tax on the property of the railroad. The lower court held that the property was free from taxation, but its judgment was reversed in the supreme court on the principles announced in the above case.

the discussion has been well trodden by our predecessors. Little is left for us but to apply the work of other minds. The facts are agreed by the parties, and may be briefly stated.

The Union and Planters' Bank of Memphis was duly organized, under a charter granted by the legislature of Tennessee, by two acts, bearing date respectively on the 20th of March, 1858, and the 12th of February, 1869. Since its organization it has been doing a regular banking business. Its capital stock subscribed and paid in amounts to \$675,000, divided into six thousand seven hundred and fifty shares of \$100 each. Farrington, the plaintiff in error, was, throughout the year 1872, the owner of one hundred and fifty shares, of the value of \$15,000. The tenth section of the charter of the bank declares "that the said company shall pay to the state an annual tax of one-half of one per cent. on each share of the capital stock subscribed, which shall be in lieu of all other taxes."

The state of Tennessee and the county of Shelby claiming the right, under the revenue laws of the state, to tax the stock of the plaintiff in error, assessed and taxed it for the year 1872. It was assessed at its par value. The tax imposed by the state was forty cents on the \$100, making the state tax \$60. The county tax was \$1.20 on the \$100, making the county tax \$180. The plaintiff in error denies the right of the state and county to impose these taxes. He claims that the tenth section of the charter was a contract between the state and the bank; that any other tax than that therein specified is expressly forbidden; and that the revenue laws imposing the taxes in question impair the obligation of the contract. The supreme court of the state adjudged the taxes to be valid. The case was thereupon removed to this court by the plaintiff in error for review.

A compact lies at the foundation of all national life. Contracts mark the progress of communities in civilization and prosperity. They guard, as far as is possible, against the fluctuations of human affairs. They seek to give stability to the present and certainty to the future. They gauge the confidence of man in the truthfulness and integrity of his fellow-man. They are the springs of business, trade and commerce. Without them, society could not go on. Spotless faith in their fulfillment honors alike communities and individuals. Where this is wanting in the body politic the process of descent has begun, and a lower plane will be speedily reached. To the extent to which the defect exists among individuals, there is decay and degeneracy. As are the integral parts, so is the aggregated mass. Under a monarchy or an aristocracy, order may be upheld and rights enforced by the strong arm of power. But a republican government can have no foundation other than the virtue of its citizens. When that is largely impaired all is in peril. It is needless to lift the veil and contemplate the future of such a people. *Trist v. Child*, 21 Wall., 441; 1 Montesquieu's *Spirit of Laws*, 25. History but repeats itself. The trite old aphorism, that "honesty is the best policy," is true alike of individuals and communities. It is vital to the highest welfare.

The constitution of the United States wisely protects this interest, public and private, from invasion by state laws. It declares that "no state shall . . . pass any . . . law impairing the obligation of contracts." Art. 1, sec. 10. This limitation no member of the Union can overpass. It is one of the most important functions of this tribunal to apply and enforce it upon all proper occasions. This controversy has been conducted in a spirit of moderation and fairness eminently creditable to both parties. The state is obviously seek-

ing only what she deems to be right. The judges of her own highest court, whence the case came here, were divided in opinion.

§ 2276. *Executed and executory contracts defined. The constitutional prohibition applies to each, and prohibits any impairment.*

Contracts are executed or executory. A contract is executed where everything that was to be done is done, and nothing remains to be done. A grant actually made is within this category. Such a contract requires no consideration to support it. A gift consummated is as valid in law as anything else. *Dartmouth College v. Woodward*, 4 Wheat., 518 (§§ 2099–2117, *supra*). An executory contract is one where it is stipulated by the agreement of minds, upon a sufficient consideration, that something is to be done or not to be done by one or both the parties. Only a slight consideration is necessary. *Pillans v. Van Mierop*, 3 Burr., 1663; *Forth v. Stanton*, 1 Saund., 210, note 2, and the cases there cited. The constitutional prohibition applies alike to both executory and executed contracts, by whomsoever made. The amount of the impairment of the obligation is immaterial. If there be any, it is sufficient to bring into activity the constitutional provision and the judicial power of this court to redress the wrong. *Von Hoffman v. City of Quincy*, 4 Wall., 535 (§§ 1877–82, *supra*).

§ 2277. *Vested rights sacred.*

The doctrine of the sacredness of vested rights has its root deep in the common law of England, whence so much of our own has been transplanted. Kent, then chief justice, said: It is a principle of that law, “as old as the law itself, that a statute even of its omnipotent parliament is not to have a retrospective effect. *Nova constitutio futuris formam imponere debet et non preteritis*. Bracton, lib. 228; 2 Inst., 292.” *Dash v. Van Kleeck*, 7 Johns. (N. Y.), 477. See, also, *Society for Propagation of Gospel v. Wheeler*, 2 Gall., 105, and *Broom’s Legal Maxims*, 34. It was settled at an early period that it was the prerogative of the king to create corporations; but he could not grant the same identical powers to a second corporation while the prior one subsisted, and, unless the power was reserved, he could not alter, amend or annul a charter without the consent of the corporate body to which it belonged. To the extent of such assent amendments were effectual, and no further. *Dartmouth College v. Woodward*, *supra*; *The King v. Passmore*, 3 Term R., 199, and the cases cited. In the worst times of English history no attempt was made by the crown to do either of these things *in invitum*.

Near the close of the reign of Charles the Second, the charters of many cities were wrested from them. The case of the city of London was the most memorable. It was done under the forms of law, by means of a corrupt judiciary. After the revolution of 1688, and the accession of William and Mary to the throne, the charter of the metropolis was restored, and immunity was given to it, by an act of parliament, against such assaults in future. 3 Bl. Com., 264; 2 Campbell’s *Lives of the Chief Justices*, 41. It is the theory of the British constitution that parliament is omnipotent. It can pass bills of attainder and acts of confiscation. Gibbon’s *Autobiography*, 14. It can also create and destroy corporations. But these things involve the exercise, not of its ordinary, but of an extraordinary power, not unlike that of the Roman emperors, sometimes applied in moulding and administering the civil law in special cases. In *The King v. Passmore*, *supra*, Justice Buller said he “considered the grant of incorporation to be a compact between the crown and a certain number of the

subjects, the latter of whom undertake, in consideration of the privileges which are bestowed, to exert themselves to" carry out the objects of the grant.

§ 2278. *A grant of incorporation is a contract.*

The question whether there is in such cases a contract within the meaning of the contract clause of the constitution of the United States came for the first time before this court in the Dartmouth College Case. A college charter was granted by the king before the American Revolution. The state of New Hampshire, by several acts of her legislature, of the 27th of June and of the 18th and 26th of December, 1816, attempted materially to change the original charter and modify the government of the institution which had grown up under it. The college resisted. The case was brought here for final decision. It was argued at the bar with consummate ability. The judgments of the justices of this court who delivered opinions were characterized by a wealth of learning and force of reasoning rarely equalled. Perhaps the genius of Marshall never shone forth in greater power and lustre. It was said, among other things, that the ingredients of a contract are parties, consent, consideration and obligation. The case presented all these. The parties were the king and the donees of the powers and privileges conferred. Consent was shown by what they did. The consideration was the investment of moneys for the purposes of the foundation, the public benefits expected to accrue, and an implied undertaking of the corporation faithfully to fulfil the duties with which it was charged. The obligation was to do the latter under the penalty of forfeiture in case of "non-user, misuser or abuser." On the part of the king there was an implied obligation that the life of the compact should be subject to no other contingency. The question decided in that case has since been considered as finally settled in the jurisprudence of the entire country. Murmurs of doubt and dissatisfaction are occasionally heard; but there has been no reargument here, and none has been asked for. The same doctrine has been often reaffirmed in later cases. The last one is *New Jersey v. Yard*, decided at this term, 5 Otto, 104 (§§ 2336-41, *infra*). In none of them has there been a dissent upon this point.

§ 2279. *The constitution is the supreme law of the land.*

In cases involving federal questions affecting a state the state cannot be regarded as standing alone. It belongs to a union consisting of itself and all its sister states. The constitution of that union, and "the laws made in pursuance thereof, are the supreme law of the land, . . . anything in the constitution or laws of any state to the contrary notwithstanding;" and that law is as much a part of the law of every state as its own local laws and constitution. *Farmers' & Mechanics' Bank v. Dearing*, 91 U. S., 29. Yet every state has a sphere of action where the authority of the national government may not intrude. Within that domain the state is as if the Union were not. Such are the checks and balances in our complicated but wise system of state and national polity. This case turns upon the construction to be given to the tenth section of the charter of the bank. Our attention has been called to nothing else.

§ 2280. *An exemption from taxation must be shown beyond all well-founded doubts.*

The exercise of the taxing power is vital to the functions of government. Except where specially restrained, the states possess it to the fullest extent. *Prima facie* it extends to all property, corporeal and incorporeal, and to every

business by which livelihood or profit is sought to be made within their jurisdiction. When exemption is claimed it must be shown indubitably to exist. At the outset every presumption is against it. A well-founded doubt is fatal to the claim. It is only when the terms of the concession are too explicit to admit fairly of any other construction that the proposition can be supported. *West Wisconsin R'y Co. v. Board of Supervisors*, 93 U. S., 595; *Tucker v. Ferguson*, 22 Wall., 527. Can the exemption here in question, examined by the light of these rules, be held valid? Upon looking into the section several things clearly appear: 1. The tax specified is upon each share of the capital stock, and not upon the capital stock itself. 2. It is upon each share subscribed. Nothing is said about what is paid in upon it. That is immaterial. The fact of subscription is the test, and that alone is sufficient. 3. This tax is declared to be "in lieu of all other taxes." Such was the contract of the parties.

§ 2281. *Distinction between the capital stock and the shares of the capital stock of a bank.*

The capital stock and the shares of the capital stock are distinct things. The capital stock is the money paid or authorized or required to be paid in as the basis of the business of the bank and the means of conducting its operations. It represents whatever it may be invested in. If a large surplus be accumulated and laid by, that does not become a part of it. The amount authorized cannot be increased without proper legal authority. If there be losses which impair it, there can be no formal reduction without the like sanction. No power to increase or diminish it belongs inherently to the corporation. It is a trust fund held by the corporation as a trustee. It is subject to taxation like other property. If the bank fail equity may lay hold of it, administer it, pay the debts, and give the residuum, if there be any, to the stockholders. If the corporation be dissolved by judgment of law, equity may interpose and perform the same functions. *Wood v. Dummer*, 3 Mason, 308; *Curran v. State of Arkansas*, 15 How., 304 (CORPORATIONS, §§ 1316-29); *Gordon v. Appeal Tax Court*, 3 id., 133; *People v. The Commissioners*, 4 Wall., 244; *Van Allen v. The Assessors*, 3 id., 573; *Queen v. Arnaud*, 9 Ad. & E., N. S., 806; *Bank Tax Cases*, 2 Wall., 200 (§§ 414-416, *supra*). The shares of the capital stock are usually represented by certificates. Every holder is a *cestui que trust* to the extent of his ownership. The shares are held and may be bought and sold and taxed like other property. Each share represents an aliquot part of the capital stock. But the holder cannot touch a dollar of the principal. He is entitled only to share in the dividends and profits. Upon the dissolution of the institution, each shareholder is entitled to a proportionate share of the residuum after satisfying all liabilities. The liens of all creditors are prior to his. The corporation, though holding and owning the capital stock, cannot vote upon it. It is the right and duty of the shareholders to vote. They in this way give continuity to the life of the corporation, and may thus control and direct its management and operations. The capital stock and the shares may both be taxed, and it is not double taxation. The bank may be required to pay the tax out of its corporate funds, or be authorized to deduct the amount paid for each stockholder out of his dividends. *Angell & A. on Corp.*, secs. 556, 557; *Union Bank v. The State*, 9 Yerg. (Tenn.), 490; *Van Allen v. The Assessors*, *supra*; *Bradley v. The People*, 4 Wall., 459; *Queen v. Arnaud*, *supra*; *National Bank v. Commonwealth*, 9 Wall., 353; *The State v. Branin*, 3 Zab. (N. J.), 484; *M'Culloch v. State of Maryland*, 4 Wheat., 316 (§§ 380-398, *supra*).

§ 2282. *Objects of taxation in connection with corporations.*

There are other objects in this connection liable to taxation. It may be well to advert to some of them. 1. The franchise to be a corporation and exercise its powers in the prosecution of its business. *Burroughs on Taxation*, sec. 85; *Hamilton v. Massachusetts*, 6 Wall., 632; *Wilmington Railroad v. Reid*, 13 id., 264 (§§ 2303, 2304, *infra*). 2. Accumulated earnings. *The State v. Utter*, 34 N. J. L., 493; *St. Louis Mut. Ins. Co. v. Charles*, 47 Mo., 462. 3. Profits and dividends. *Attorney-General v. Bank, etc.*, 4 Jones (N. C.) Eq., 287. 4. Real estate belonging to the corporation and necessary for its business. *Wilmington Railroad v. Reid*, *supra*; *Bank of Cape Fear v. Edwards*, 5 Ired. (N. C.) L., 516. 5. Banks and bankers are taxed by the United States: (1) On their deposits. (2) On the capital employed in their business. (3) On their circulation. (4) On the notes of every person or state bank used and paid out for circulation. R. S., 673 *et seq.*

The states are permitted, in addition, to tax the shares of the national banks. *Id.*, 1015. This enumeration shows the searching and comprehensive taxation to which such institutions are subjected, where there is no protection by previous compact. Unrestrained power to tax is power to destroy. *McCulloch v. Maryland*, *supra*.

§ 2283. *When, in the charter of a bank, a rate of taxation is stipulated to be "in lieu of all other taxes," a contract is made, and the imposition of any other tax impairs its obligation.*

When this charter was granted, the state might have been silent as to taxation. In that case, the power would have been unfettered. *Providence Bank v. Billings*, 4 Pet., 514 (§§ 2321-24, *infra*). It might have reserved the power as to some things, and yielded it as to others. It had the power to make its own terms, or to refuse the charter. It chose to stipulate for a specified tax on the shares, and declared and bound itself that this tax should be "in lieu of all other taxes." There is no question before us as to the tax imposed on the shares by the charter. But the state has by her revenue law imposed another and an additional tax on these same shares. This is one of those "other taxes" which it had stipulated to forego. The identity of the thing doubly taxed is not affected by the fact that in one case the tax is to be paid vicariously by the bank, and in the other by the owner of the share himself. The thing thus taxed is still the same, and the second tax is expressly forbidden by the contract of the parties. After the most careful consideration, we can come to no other conclusion. Such, we think, must have been the understanding and intent of the parties when the charter was granted and the bank organized. Any other view would ignore the covenant that the tax specified should be "in lieu of all other taxes." It would blot those terms from the context, and construe it as if they were not a part of it.

There is no reservation or discrimination as to any "other tax." All are alike included. Such is the natural effect of the language used. The most subtle casuistry to the contrary is unavailing. Under such a contract between individuals, a doubt could not have existed. It may as well be said the power is reserved to tax anything else, as further to tax the shares. We cannot so hold, without interpolating into the clause a term which it does not contain. This we may not do. Our duty is to enforce the contract as we find it, and not to make a new one. If it was intended to make the exception claimed from the universality of the exemption as expressed, it would have been easy to

say so, and it is fairly to be presumed this would have been done. In the absence of this expression, we can find no evidence of such an intent. Our view is fully sustained by the leading authorities upon the subject. We will refer to a few of them.

§ 2284. *Analogous cases cited.*

In *The Binghamton Bridge*, 3 Wall., 51 (§§ 2093-98, *supra*), it was declared by the act of the legislature authorizing the bridge to be built that it should not be lawful to build any other bridge within two miles above or below the one so authorized. This court held the inhibition to be a covenant, and upheld and enforced the restriction against the authority conferred by a later act of the legislature authorizing a bridge to be so built. In *Wilmington Railroad v. Reid*, *supra*, the charter declared that "the property of said company and the shares therein shall be exempt from any public charge or tax whatsoever." The legislature passed laws taxing the entire franchise and rolling-stock, and certain lots of land necessary to the business of the company. This court held the exemption to be a contract, and adjudged the laws to be void. *The Union Bank v. The State*, 9 Yerg. (Tenn.), 490, is a case marked by eminent judicial ability and careful thought. There it was stipulated, "that, in consideration of the privileges granted by this charter, the bank agrees to pay to the state annually the one-half of one per cent. on the amount of the capital stock paid in by stockholders other than the state." It was held that a further tax on the capital stock was void, but that the state might tax the shares in the hands of individuals.

In the case before us, the charter tax is upon the shares. The tax complained of is a further tax on those shares. Without the phrase, "in lieu of all other taxes," the parallelism is complete. A further tax could no more be imposed upon the shares in one case than upon the capital stock in the other. The same negative considerations apply to both.

In *Bank of Cape Fear v. Edwards*, *supra*, the charter provided "that a tax of twenty-five cents on each share of stock owned by individuals in said bank shall be annually paid into the treasury of the state by the president or cashier of the said bank on or before the 1st day of October in each year, and the said bank shall not be liable to any further tax." It was held that the bank was liable to no other tax, state or county, and that the banking-house and the lot upon which it stood was within the exemption. *Gordon v. Appeal Tax Court* seems to us conclusive of the case in hand. The legislature of Maryland continued the charters of certain banks on condition that they would make a road and pay a school tax; and it was provided that, upon any of the banks complying, the faith of the state was pledged not to impose any further tax or burden upon them during the continuance of their charters under the act. It was held by this court that this was a contract, and that it exempted the stockholders from a tax levied upon them as individuals, according to the amount of their stock.

Comment here is unnecessary. The points of analogy are too obvious and cogent to require remark. See, also, *State Bank of Ohio v. Knoop*, 16 How., 369 (§§ 2246-53, *supra*); *Dodge v. Woolsey*, 18 id., 381 (CORPORATIONS, §§ 565-573); and *Home of the Friendless v. Rouse*, 8 Wall., 430 (§§ 2289-94, *infra*). The decree of the supreme court of Tennessee will be reversed, and the case remanded with directions to enter a decree in favor of the plaintiff in error; and it is so ordered.

MR. JUSTICE STRONG dissented, holding (1) that the rule, that all presumptions are against the legislative intent to relinquish the power of taxation, was not properly applied. *Providence Bank v. Billings*, 4 Pet., 514; *Ohio Life Ins. Co. v. Debolt*, 16 How., 416, cited. (2) That the provision in the charter only exempted the company from any other or additional tax, and did not prohibit a different tax on the stock. *Delaware Railroad Tax*, 18 Wall., 206 (§§ 2328–35, *infra*); *Van Allen v. The Assessors*, 3 id., 573; *Gordon v. Appeal Tax Court*, 3 How., 133; *People v. Commissioners*, 4 Wall., 244, cited. JUSTICES CLIFFORD and FIELD concurred in the dissent.

SALT COMPANY v. EAST SAGINAW.

(13 Wallace, 378–379. 1871.)

ERROR to the Supreme Court of Michigan.

STATEMENT OF FACTS.—The state of Michigan in 1859 exempted from taxation property used in the manufacture of salt. In 1861 it modified and partially repealed the law, and afterwards East Saginaw levied a tax upon the property of the Salt Company. The supreme court held that the law of 1859 was not a contract, but a bounty law, and sustained the tax, and the Salt Company brought up the case by writ of error.

§ 2285. *A state legislature can by contract exempt property from taxation.*

Opinion by MR. JUSTICE BRADLEY.

It is unnecessary at this time to discuss the question of power on the part of a state legislature to make a contract exempting certain property from taxation. Such a power has been frequently asserted and sustained by the decisions of this court. *New Jersey v. Wilson*, 7 Cranch, 164 (§ 2295, *infra*); *Gordon v. Appeal Tax Court*, 3 How., 133; *State Bank of Ohio v. Knoop*, 16 id., 369 (§§ 2246–53, *supra*); *Ohio Life and Trust Co. v. Debolt*, id., 416 (§§ 2254–65, *supra*); *Dodge v. Woolsey*, 18 id., 331 (CORPORATIONS, §§ 565–573); *Jefferson Bank v. Skelly*, 1 Black, 436; *McGee v. Mathis*, 4 Wall., 143 (§§ 2296–98, *infra*); *Home of the Friendless v. Rouse*, 8 id., 430 (§§ 2289–94, *infra*); *Wilmington Railroad v. Reid*, 13 Wall., 264 (§§ 2303, 2304, *infra*).

§ 2286. *A general law, giving a bounty and exempting from taxation property employed in the manufacture of salt, is not a contract, and may be repealed.*

The question in this case is, whether any contract was made at all; and, if there was, whether it was a contract determinable at will, or of perpetual obligation? Had the plaintiff in error been incorporated by a special charter, and had that charter contained the provision that all its lands and property used in the manufacture of salt should forever, or during the continuance of its charter, be exempt from taxation, and had that charter been accepted and acted on, it would have constituted a contract. But the case before us is not of that kind. It declares, in purport and effect, that *all* corporations and individuals who shall manufacture salt in Michigan from water obtained by boring in that state, shall be exempt from taxation as to all property used for that purpose, and, after they shall have manufactured five thousand bushels of salt, they shall receive a bounty of ten cents per bushel. That is the whole of it. As the supreme court of Michigan says, it is a bounty law, and nothing more; a law dictated by public policy and the general good, like a law offering a bounty of fifty cents for the killing of every wolf or other destructive animal. Such a law is not a contract except to bestow the promised bounty upon those who earn it, so long as the law remains unrepealed. There is no pledge that it shall

not be repealed at any time. As long as it remains a law, every inhabitant of the state, every corporation having the requisite power, is at liberty to avail himself, or itself, of its advantages, at will, by complying with its terms, and doing the things which it promises to reward, but is also at liberty, at any time, to abandon such a course. There is no obligation on any person to comply with the conditions of the law. It is a matter purely voluntary, and, as it is purely voluntary on the one part, so it is purely voluntary on the other part; that is, on the part of the legislature, to continue, or not to continue, the law. The law in question says to all: You shall have a bounty of ten cents per bushel for all salt manufactured, and the property used shall be free from taxes. But it does not say how long this shall continue, nor do the parties who enter upon the business promise how long they will continue the manufacture. It is an arrangement determinable at the will of either of the parties, as much so as the hiring of a laboring man by the day.

If it be objected that such a view of the case exposes parties to hardship and injustice, the answer is ready at hand, and is this: It will not be presumed that the legislature of a sovereign state will do acts that inflict hardship and injustice.

§ 2287. *Characteristics of laws that are contracts.*

The case differs entirely from those laws and charters which have been adjudged to be irrevocable contracts. Charters granted to private corporations are held to be contracts. Powers and privileges are conferred by the state and corresponding duties and obligations are assumed by the corporation. And if no right to alter or repeal is reserved, stipulations as to taxation, or as to any other matter within the power of the legislature, are binding on both parties; and so corporations formed under general laws in place of special charters, like the Ohio banks under the general banking law of that state, are entitled to the benefit of specific provisions and exemptions contained in those laws, which are regarded in the same light as if inserted in special charters. "The act is as special to each bank," says Justice McLean, delivering the opinion of this court, "as if no other institution were incorporated under it." *State Bank of Ohio v. Knoop*, 16 How., 380 (§§ 2246-53, *supra*). In such cases the scope of the act takes in the whole period for which the corporation is formed. The language means that, during the existence of any corporation formed under the act, the stipulation or exemption specified in it is to operate.

The act under consideration cannot be interpreted on this principle. It applies to individuals as well as corporations, and to all corporations having power to manufacture salt. Now, in the case of individuals, must it be construed to mean that, as long as the individual lives and manufactures salt, the state will pay him the bounty of ten cents on the bushel, and exempt his property from taxation? Can the law never be repealed as to those who have once commenced the manufacture? Such a construction could never have been intended. In its nature it is a general law, regulative of the internal economy of the state, and as much subject to repeal and alteration as a law forbidding the killing of game in certain seasons of the year. Its continuance is a matter of public policy only, and those who rely on it must base their reliance on the free and voluntary good faith of the legislature. For the benefit of sheep growers in some states dogs are subjected to a severe tax. Could not the legislature repeal such a law? If congress establishes a tariff for the protection of certain manufactures, does that amount to a contract not to change it? In short, the law does not, in our judgment, belong to that class of laws which

can be denominated contracts, except so far as they have been actually executed and complied with. There is no stipulation, express or implied, that it shall not be repealed. General encouragements, held out to all persons indiscriminately, to engage in a particular trade or manufacture, whether such encouragement be in the shape of bounties or drawbacks, or other advantage, are always under the legislative control, and may be discontinued at any time.

Judgment affirmed.

RECTOR, ETC., OF CHRIST CHURCH v. COUNTY OF PHILADELPHIA.

(24 Howard, 300-308. 1860.)

Opinion by MR. JUSTICE CAMPBELL.

STATEMENT OF FACTS.—This cause comes before this court upon a writ of error to the supreme court of Pennsylvania, under the twenty-fifth section of the act of congress of the 24th September, 1789. In the year 1833 the legislature of Pennsylvania passed an act which recited "that Christ Church Hospital, in the city of Philadelphia, had for many years afforded an asylum to numerous poor and distressed widows, who would probably else have become a public charge; and it being represented that in consequence of the decay of the buildings of the hospital estate, and the increasing burden of taxes, its means are curtailed, and its usefulness limited," they enacted "that the real property, including ground rents, now belonging and payable to Christ Church Hospital, in the city of Philadelphia, so long as the same shall continue to belong to the said hospital, shall be and remain free from taxes."

§ 2288. *An exemption from taxation, by a legislative act, of the property of a charity, is not a contract, and may be repealed at the pleasure of the legislature.*

In the year 1851 the same authority enacted "that all property, real and personal, belonging to any association or incorporated company which is now by law exempt from taxation, other than that which is in the actual use and occupation of such association or incorporated company, and from which an income or revenue is derived by the owners thereof, shall hereafter be subject to taxation in the same manner and for the same purposes as other property is now by law taxable, and so much of any law as is hereby altered and supplied be and the same is hereby repealed." It was decided in the supreme court of Pennsylvania that the exemption conferred upon these plaintiffs by the act of 1833 was partially repealed by the act of 1851, and that an assessment of a portion of their real property under the act of 1851 was not repugnant to the constitution of the United States, as tending to impair a legislative contract they alleged to be contained in the act of assembly of 1833 aforesaid. The plaintiffs claim that the exemption conceded by the act of 1833 is perpetual, and that the act itself is in effect a contract. This concession of the legislature was spontaneous, and no service or duty, or other remunerative condition, was imposed on the corporation. It belongs to the class of laws denominated *privilegia favorabilia*. It attached only to such real property as belonged to the corporation, and while it remained as its property; but it is not a necessary implication from these facts that the concession is perpetual, or was designed to continue during the corporate existence. Such an interpretation is not to be favored, as the power of taxation is necessary to the existence of the state, and must be exerted according to the varying conditions of the commonwealth. The act of 1833 belongs to a class of statutes in which the narrowest meaning

is to be taken which will fairly carry out the intent of the legislature. All laws, all political institutions, are dispositions for the future, and their professed object is to afford a steady and permanent security to the interests of society. Bentham says, "that all laws may be said to be framed with a view to perpetuity; but perpetual is not synonymous to irrevocable, and the principle on which all laws ought to be, and the greater part of them have been, established, is that of defeasible perpetuity — a perpetuity defeasible by an alteration of the circumstances and reasons on which the law is founded." The inducements that moved the legislature to concede the favor contained in the act of 1833 are special, and were probably temporary in their operation. The usefulness of the corporation had been curtailed in consequence of the decay of their buildings and the burden of taxes.

It may be supposed that in eighteen years the buildings would be renovated, and that the corporation would be able afterwards to sustain some share of the taxation of the state. The act of 1851 embodies the sense of the legislature to this effect. It is in the nature of such a privilege as the act of 1833 confers, that it exists *bene placitum*, and may be revoked at the pleasure of the sovereign. Such was the conclusion of the courts in *Commonwealth v. Bird*, 12 Mass., 442; *Dale v. Governor*, 3 Stew., 387; *Alexander v. Wellington*, 2 Russ. & M., 35; 12 Harris, 232; *Lindley's Juris.*, sec. 42.

It is the opinion of the court that there is no error in the judgment of the supreme court, within the scope of the writ to that court, and its judgment is affirmed.

HOME OF THE FRIENDLESS v. ROUSE.

(8 Wallace, 430-439. 1869.)

ERROR to the Supreme Court of Missouri.

STATEMENT OF FACTS.—The legislature of Missouri incorporated the Home of the Friendless, a charitable association, exempted its property from taxation, and renounced in its case the power retained by the general state law of corporations of altering or repealing charters. Afterwards the constitution was amended and the legislature imposed a tax upon the real estate of the "Home." A bill having been filed to enjoin the collection of the tax, the supreme court of the state dismissed the bill and the case comes up on error.

Opinion by MR. JUSTICE DAVIS.

The case is relieved, by the certificate of the supreme court of Missouri, of all difficulty on the question of the jurisdiction of this court, and the important question raised by the record is whether the state of Missouri contracted with the plaintiff in error not to tax its property. If it did so contract, it is undisputed that the assumed legislation, under the authority of which the property in controversy was taxed, impaired the obligation of this contract.

The object for which the Home of the Friendless was incorporated was to enable those persons of the female sex, who were desirous of establishing a charitable institution in St. Louis for the relief of destitute and suffering females, to carry out their laudable undertaking. It can readily be seen that a charity of this kind would be of great benefit to the people of St. Louis, and that the legislature of the state would naturally be desirous of using all proper means to promote it. The purposes to be attained by such a charity are usually beyond the ability of individual effort, and require an association of persons who will themselves contribute pecuniary aid and are willing to become solicit-

ors for the contributions of others. Usually the initiation of such an enterprise is in the hands of a few persons, who need to be clothed with more than ordinary powers in order to obtain the successful co-operation of others. In no way could this co-operation be better secured than by conferring on the corporators the authority to say to the benevolent people of St. Louis, that their donations in money or lands, for the relief of the suffering female poor of the city, would be held by the institution undiminished by taxation.

§ 2289. *The charter of a charitable corporation is a contract, mutually binding the state and the corporation.*

It was doubtless under the influence of these considerations, and because every government wishes to encourage benevolent enterprises, that the legislature granted the charter for the Home of the Friendless, and said to the charitable persons engaged in this business, that if they would organize the society and conduct its affairs, would give themselves and solicit others to give for the common purpose, "that the property of the corporation shall be exempt from taxation." This charter is a contract between the state of Missouri and the corporators that the property given for the charitable uses specified in it shall, so long as it is applied to these uses, be exempted from taxation. It follows that any attempt to tax it impairs the obligation of the contract. It is proper to observe that the immunity from taxation does not attach to the property after the corporation has parted with it, but is operative on it while owned by the corporation, and devoted to the uses for which it was originally given.

§ 2290. *Consideration of a legislative contract.*

It is objected that there is no consideration stated in the act for the release from taxation, which it is claimed is necessary in order to uphold the contract. But this is a mistaken view of the law on this subject. There is no necessity of looking for the consideration for a legislative contract outside of the objects for which the corporation was created. These objects were deemed by the legislature to be beneficial to the community, and this benefit constitutes the consideration for the contract, and no other is required to support it. This has been the well-settled doctrine of this court on this subject since the case of *Dartmouth College v. Woodward*, 4 Wheat., 518 (§§ 2099-2117, *supra*).

§ 2291. *Construction of legislative contracts.*

It is contended that the rules of construction applicable to legislative contracts are more stringent than those which are applied to contracts between natural persons, and that, applying these rules to this contract, it cannot be sustained as a perpetual exemption from taxation. It is true that legislative contracts are to be construed most favorably to the state, if, on a fair consideration to be given the charter, any reasonable doubts arise as to their proper interpretation; but, as every contract is to be construed to accomplish the intention of the parties to it, if there is no ambiguity about it, and this intention clearly appears on reading the instrument, it is as much the duty of the court to uphold and sustain it, as if it were a contract between private persons.

§ 2292. *An exemption from taxation, without qualification, means an exemption forever.*

Testing the contract in question by these rules, there does not seem to be any rational doubt about its true meaning. "All property of said corporation shall be exempt from taxation," are the words used in the act of incorporation, and there is no need of supplying any words to ascertain the legislative intention. To add the word "forever" after the word "taxation" could not make the meaning any clearer. It was undoubtedly the purpose of the legislature

to grant to the corporation a valuable franchise, and it is easy to see that the franchise would be comparatively of little value if the legislature, without taking direct action on the subject, could, at its will, resume the power of taxation. This view is fortified by the provisions of the general law of the state regarding corporations, in force at the time this charter was granted, and which the legislature declared should not apply to this corporation. The seventh section of the act concerning corporations, approved March 19, 1845, provided that "the charter of every corporation that shall hereafter be granted by the legislature shall be subject to alteration, suspension and repeal, in the discretion of the legislature." As the charter in controversy was granted in 1853, it would have been subject to this general law if the legislature had not, in express terms, withdrawn from it this discretionary authority. Why the necessity of doing this if the exemption from taxation was only understood to continue at the pleasure of the legislature?

§ 2293. *A state may by contract exempt specific property from taxation.*

The validity of this contract is questioned at the bar on the ground that the legislature had no authority to grant away the power of taxation. The answer to this position is, that the question is no longer open for argument here, for it is settled by the repeated adjudications of this court that a state may by contract, based on a consideration, exempt the property of an individual or corporation from taxation, either for a specified period or permanently. And it is equally well settled that the exemption is presumed to be on sufficient consideration, and binds the state if the charter containing it is accepted. *New Jersey v. Wilson*, 7 Cranch, 164 (§ 2295, *infra*); *Gordon v. Appeal Tax Court*, 3 How., 133; *State Bank of Ohio v. Knoop*, 16 id., 369 (§§ 2246-53, *supra*); *Ohio Life and Trust Co. v. Debolt*, 16 id., 416 (§§ 2254-65, *supra*); *Dodge v. Woolsey*, 18 id., 331 (CORPORATIONS, §§ 565-573); *Mechanics' and Traders' Bank v. Thomas*, id., 384; *Mechanics' and Traders' Bank v. Debolt*, id., 380; *McGee v. Mathis*, 4 Wall., 143 (§§ 2296-98, *infra*). It is proper to say that the present constitution of Missouri prohibits the legislature from entering into a contract which exempts the property of an individual or corporation from taxation, but when the charter in question was passed there was no constitutional restraint on the action of the legislature in this regard.

§ 2294. *Taxation of property, exempt by contract, impairs the obligation of that contract.*

Without pursuing the subject further, we are of the opinion that the state of Missouri did make a contract on sufficient consideration with the Home of the Friendless, to exempt the property of the corporation from taxation, and that the attempt made on behalf of the state through its authorized agent, notwithstanding this agreement, to compel it to pay taxes, is an indirect mode of impairing the obligation of the contract, and cannot be allowed.

Judgment reversed, and the cause remanded to the court below, with directions to proceed in conformity with this opinion.

The CHIEF JUSTICE and JUSTICES MILLER and FIELD dissented.

NEW JERSEY v. WILSON.

(7 Cranch, 164-167. 1812.)

Opinion by MARSHALL, C. J.

STATEMENT OF FACTS.—This is a writ of error to a judgment rendered in the court of last resort, in the state of New Jersey, by which the plaintiffs allege

they are deprived of a right secured to them by the constitution of the United States.

The case appears to be this: The remnant of the tribe of Delaware Indians, previous to the 20th February, 1758, had claims to a considerable portion of lands in New Jersey, to extinguish which became an object with the government and proprietors under the conveyance from King Charles II. to the Duke of York. For this purpose a convention was held in February, 1758, between the Indians and commissioners appointed by the government of New Jersey, at which the Indians agreed to specify particularly the lands which they claimed, release their claim to all others, and to appoint certain chiefs to treat with commissioners on the part of the government for the final extinguishment of their whole claim. On the 9th of August, 1758, the Indian deputies met the commissioners, and delivered to them a proposition reduced to writing — the basis of which was, that the government should 'purchase a tract of land on which they might reside — in consideration of which they would release their claim to all other lands in New Jersey south of the River Raritan.

This proposition appears to have been assented to by the commissioners; and the legislature, on the 12th of August, 1758, passed an act to give effect to this agreement. This act, among other provisions, authorizes the purchase of lands for the Indians, restrains them from granting leases or making sales, and enacts "that the lands to be purchased for the Indians aforesaid shall not hereafter be subject to any tax, any law, usage or custom to the contrary thereof, in anywise notwithstanding." In virtue of this act, the convention with the Indians was executed. Lands were purchased and conveyed to trustees for their use, and the Indians released their claim to the south part of New Jersey. The Indians continued in peaceable possession of the lands thus conveyed to them, until some time in the year 1801, when, having become desirous of migrating from the state of New Jersey, and of joining their brethren at Stockbridge, in the state of New York, they applied for, and obtained, an act of the legislature of New Jersey, authorizing a sale of their land in that state. This act contains no expression in any manner respecting the privilege of exemption from taxation which was annexed to those lands by the act, under which they were purchased and settled on the Indians.

In 1803 the commissioners, under the last recited act, sold and conveyed the lands to the plaintiffs, George Painter and others. In October, 1804, the legislature passed an act repealing that section of the act of August, 1758, which exempts the lands therein mentioned from taxes. The lands were then assessed, and the taxes demanded. The plaintiffs, thinking themselves injured by this assessment, brought the case before the courts in the manner prescribed by the laws of New Jersey, and in the highest court of the state the validity of the repealing act was affirmed, and the land declared liable to taxation. The cause is brought into this court by writ of error, and the question here to be decided is, Does the act of 1804 violate the constitution of the United States?

§ 2295. *An act exempting certain lands from taxation, in consideration of a release of title to other lands, is a contract.*

The constitution of the United States declares that no state shall "pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts." In the case of *Fletcher v. Peck*, 6 Cranch, 87 (§§ 1805-12, *supra*), it was decided in this court, on solemn argument and much deliberation, that this provision of the constitution extends to contracts to which a state is a party, as well as to contracts between individuals. The question then is narrowed to the

inquiry whether, in the case stated, a contract existed, and whether that contract is violated by the act of 1804. Every requisite to the formation of a contract is found in the proceedings between the then colony of New Jersey and the Indians. The subject was, a purchase on the part of the government of extensive claims of the Indians, the extinguishment of which would quiet the title to a large portion of the province. A proposition to this effect is made, the terms stipulated, the consideration agreed upon, which is a tract of land with the privilege of exemption from taxation; and then, in consideration of the arrangement previously made, one of which this act of assembly is stated to be, the Indians execute their deed of cession. This is certainly a contract clothed in forms of unusual solemnity. The privilege, though for the benefit of the Indians, is annexed, by the terms which create it, to the land itself, not to their persons. It is for their advantage that it should be annexed to the land, because, in the event of a sale, on which alone the question could become material, the value would be enhanced by it.

It is not doubted but that the state of New Jersey might have insisted on a surrender of this privilege as the sole condition on which a sale of the property should be allowed. But this condition has not been insisted on. The land has been sold, with the assent of the state, with all its privileges and immunities. The purchaser succeeds, with the assent of the state, to all the rights of the Indians. He stands, with respect to this land, in their place, and claims the benefit of their contract. This contract is certainly impaired by a law which would annul this essential part of it.

McGEE v. MATHIS.

(4 Wallace, 143-158. 1866.)

ERROR to the Supreme Court of Arkansas.

STATEMENT OF FACTS.—The state of Arkansas, for the purpose of reclaiming swamp lands, provided by the act of 1851 for the sale of the lands, for the issue of scrip receivable for lands not taken up, and for the making of drains and levees to be paid for in scrip or otherwise. The act also exempted the lands from taxation for ten years, or until reclaimed. In 1855 and 1857 acts were passed taxing the lands, but prior to the act of 1855 the plaintiff in this case had obtained a large amount of scrip, with which he paid for land after the passage of the act of 1855. The plaintiff seeks to enjoin the tax.

§ 2296. *A conditional grant of land to a state, and its acceptance, constitute a contract.*

Opinion by CHASE, C. J.

The first question which requires consideration in the case before us is: Was the levee tax imposed in violation of any contract between the state and the United States?

It is not doubted that the grant by the United States to the state upon conditions, and the acceptance of the grant by the state, constituted a contract. All the elements of a contract met in the transaction,—competent parties, proper subject-matter, sufficient consideration and consent of minds. This contract was binding upon the state, and could not be violated by its legislation without infringement of the constitution. The contract required the state to appropriate the lands granted to the purpose of reclaiming them. The lands themselves might be conveyed to the levee contractors for work performed, or the contractors might be paid in money or in scrip representing land. If the

state, therefore, after acceptance of the grant, and without applying the lands or their proceeds in money or scrip to the purpose of reclamation, had sought, by means of taxation, to compel purchasers to pay for the levees and drains necessary to reclaim their land, it would certainly be difficult to say that the contract was not violated. But the case before us hardly comes within this description. The allegation and proofs do not show that the state had not applied all the lands granted and their proceeds to the making of levees and drains before proceeding to impose the special tax; and if this was done, and the work of reclamation remained still incomplete, the imposition of such a tax for the completion or preservation of the work cannot be regarded as inconsistent with the obligation of the contract between the state and the United States.

§ 2297. *A law exempting swamp land from taxation with a view to reclaiming it is a contract.*

The next and only remaining question is: Was the levee tax in violation of any contract between the state and the complainant? It seems quite clear that the act of 1851, authorizing the issue of transferable land scrip and its receipt from locators of land in payment, and the provision in the fourteenth section, offering inducements to purchasers and contractors by exempting from taxation, for ten years or until reclaimed, all the swamp or overflowed lands, constituted a contract between the state and the holders of the land scrip issued under the act. When the scrip was issued to a contractor, it represented a certain quantity of land untaxable for ten years, unless the land should be sooner made fit for cultivation. When transferred to another person, it represented to him a like quantity of like land. The contract of the state was to convey the land for the scrip, and to refrain from taxation for the time specified. Every piece of scrip was a contract between the state and the original holder and his assigns. Now what was the effect of that contract when made? Did it not bind the state to receive the scrip in payment for swamp land, exempted for a limited time from taxation? The scrip, if not receivable for lands, was worthless. To annul the quality of receivability was to annul the contract. But the exemption of the lands for which it was receivable from taxation was a principal element in its value; and repeal of the exemption was the destruction of this element of value. This was clearly an impairment of the contract. The state could no more change the terms of the contract by changing the stipulated character of the land to be conveyed in satisfaction of the scrip as to liability to taxation, than it could abrogate the contract altogether by refusing to receive the scrip at all in payment for land. We are constrained to regard the repeal of the exemption act, so far as it concerns lands paid for, either before or after the repeal, by scrip issued and paid out before repeal, as impairing the contract of the state with the holders of the scrip.

§ 2298. *The word "taxation," as employed in the act, embraces all forms of taxation, whether under general tax laws or local assessments.*

It was strenuously urged for the defendant that the exemption contemplated by the statute was exemption from general taxation, and not from special taxation for local improvements benefiting the land, such as the making of levees; and many authorities were cited in support of this view. The argument would have great force if the provision for exemption had been contained in a general tax law, or in a law in framing which the legislature might reasonably be supposed to have in view general taxation only. But the provision under consideration is found in a law providing for the construction of levees and drains,

and devoting to that object funds supposed to be more than adequate, derived from the very lands exempted, and the exemption is for ten years, or until reclaimed, and is offered as an inducement to take up the lands, and thus furnish those funds. It is impossible to say that this exemption was not from taxation for the purpose of making these levees and drains as well as from taxation in general. Any other construction would ascribe to the legislature an intention to take the whole land for the purposes of the improvement, and then to load it with taxation for the same object, in the hands of purchasers whom it had led to expect exemption from all taxation, at least until the land should be reclaimed.

The decree of the supreme court of Arkansas must, therefore, be reversed and the cause remanded, with instructions to enter a decree in conformity with this opinion.

PACIFIC RAILROAD COMPANY v. MAGUIRE.

(20 Wallace, 36-45. 1873.)

ERROR to the Supreme Court of Missouri.

The question involved in this case is as to the validity of a tax imposed on a railroad company, which had been exempted from taxation until completion of the road, and until it had paid a dividend, the exemption not to continue beyond two years after completion. The act containing the exemption was passed in 1852, and in 1865 an ordinance adopted with the constitution imposed a tax. The facts appear in the opinion.

Opinion by MR. JUSTICE HUNT.

The first question is this: By the acts organizing this company, and by the acts loaning the credit of the state and the proceedings under the same, was an agreement created on the part of the state that the Pacific road should not be taxed until it was built and finished and had declared a dividend, and that for two years after it was finished it should be liable to taxation only in common with other property of the state and at the same rate?

§ 2299. *A state's right to tax can only be waived in explicit language.*

The right of taxation is a sovereign right, and presumptively belongs to the state in regard to every species of property and to an unlimited extent. The right may be waived in particular instances, but this can only be done by a clear expression of the legislative will. The cases of *Tomlinson v. Branch*, 15 Wall., 469 (§§ 2273-75, *supra*), and *Tomlinson v. Jessup*, id., 454 (§ 2316, *infra*), in this court, and many others referred to in those cases, show that when a contract of exemption from taxation is thus established it is binding upon the state, and the action of the state in the passage of laws violating its terms will not be sustained. *Osborne v. Mobile*, 16 id., 481 (§ 1268, *supra*); *Humphrey v. Pegues*, id., 247, where the cases are collected. The principles of law are sufficiently settled. The real question arises upon their application to the facts of the case.

§ 2300. *An act exempting the railroad from taxation was a contract; and an ordinance imposing a tax on the railroad impairs the obligation of the contract.*

Upon the facts presented by the agreed case before us we are of the opinion: 1st. That the twelfth section of the act of 1852 created a contract between the state and the railroad company, by which the railroad was exempt from taxation until it was completed and put in operation, and until it should declare a dividend on its capital stock, not, however, extending longer than two years

after its completion. 2d. That the ordinance of 1865, imposing a tax of ten per cent. upon its gross earnings before the road was completed and in operation, and had declared a dividend, was a violation of this contract, and that the levy for its enforcement was illegal.

We omit a reference to other questions which have been argued and express no opinion upon them. We base our opinion upon the effect of the statutes already cited.

The authorities which have been referred to show that a state legislature may make a contract to exempt a corporation from taxation by which it will be bound. That the facts recited constitute such an agreement we think sufficiently plain. The Pacific corporation was unable to raise funds for completing its road. To induce it to go on with its work, and to induce individuals and counties to subscribe for what the legislature evidently deemed an enterprise of public benefit, it made loans of the credit of the state from time to time. To make the franchise still more valuable to the company, and to the end that individuals and counties should be induced to subscribe to the stock, the legislature added an exemption from taxation until the road should be completed and in operation, and should have declared a dividend. That the money value of this exemption was great is evident from the fact that the tax imposed for a single year, commencing October 1, 1866, amounted to \$253,644.

§ 2301. *The charter of a corporation is a contract which the state cannot violate.*

This transaction amounted to a contract between the state and the corporation that there should be no taxation of the company until the occurrence of the stipulated events. *Humphrey v. Pegues*, 16 Wall., 244; *Wilmington Railroad v. Reid*, 13 id., 264 (§§ 2303, 2304, *infra*). In delivering the opinion in *Wilmington Railroad v. Reid*, 13 Wall., 266, Mr. Justice Davis says: "It has been so often decided by this court that a charter of incorporation granted by a state creates a contract between the state and the corporators, which the state cannot violate, that it would be a work of supererogation to repeat the reasons on which the argument is founded. . . . If the contract is plain and unambiguous, and the meaning of the parties to it can be clearly ascertained, it is the duty of the court to give effect to it the same as if it were a contract between private persons, without regard to its supposed injurious effects upon the public interests."

The statute of 1852 provided for an exemption from taxation of the "Pacific Railroad," its bed, and of its "buildings, machinery, engines, cars, and other property." The tax imposed by the ordinance of 1865 was an "annual tax of ten per centum of all their gross receipts for the transportation of freight and passengers." It was directed "to be levied and collected from the Pacific Railroad." In *Wilmington Railroad v. Reid*, 13 Wall., 264, it was held that a statute exempting all the property of a railroad company from taxation exempts not only the rolling stock and real estate owned by it and required by the company for the successful prosecution of its business, but its franchise also. In the case before us the road-bed, buildings, machinery, cars and other property not only, but the "Pacific Railroad" is declared to be exempt from taxation. We cannot doubt that a contract not to tax a railroad company or its property is broken by the levy of a tax upon its gross receipts for the transportation of freight and passengers.

§ 2302. *A sum collected by a state from a corporation to pay state debts contracted on account of the corporation, and for which it is liable, is a tax.*

A suggestion is made that the imposition in question is not a tax, for the

reason that the ordinance imposing it provides that the same shall be appropriated by the general assembly in payment of the principal and interest due and to become due upon the bonds issued to the company by the state. The purpose to which the state shall apply the proceeds of a tax is not material so long as it is a public purpose, and that the payment of the debts of a state is a public purpose does not admit of doubt. It is called a tax both in the agreed statement of facts before us and in the ordinance imposing it. Thus, "there shall be levied and collected an annual tax of ten per centum of all their gross receipts," etc., "which tax shall be assessed and collected in the county of St. Louis in the same manner as other state taxes are assessed and collected." "The tax in this ordinance specified shall be collected from each company," etc. . . . "Should either of said companies refuse or neglect to pay said tax as herein required," etc. A tax upon receipts is one of the recognized modes of taxing corporations, as well under state laws as under the laws of the general government. The ordinance of 1865 was either the imposition of a tax or it was an act of high-handed violence, a forcible seizure of private property, without law or authority, an act which, if committed by an individual, would amount to robbery. The case before us will justify no such imputation upon the state of Missouri.

The result of these views is the reversal of the judgment below, and, in accordance with the stipulation in the record, judgment is ordered in favor of the plaintiff in error for six cents damages and for costs, and the case is remanded, with directions that a judgment be entered accordingly.

The CHIEF JUSTICE concurred in the judgment, not on the ground that the assessment was a tax, but because it was an exaction of a payment of the debt, in violation of the contract. JUSTICES CLIFFORD and MILLER dissented, because the act did not exempt the company from the tax imposed by the ordinance.

WILMINGTON RAILROAD v. REID:

(13 Wallace, 264-268. 1871.)

ERROR to the Supreme Court of North Carolina.

STATEMENT OF FACTS.—The state of North Carolina chartered a railroad company, and in its charter exempted its "property and the shares therein" from taxation. Afterwards, with the charter still in force, it assessed the franchise and rolling stock of the company for taxation. The tax was adjudged valid by the supreme court of the state.

§ 2303. *If there be a reasonable doubt that the state has relinquished its power of taxation, that doubt must be resolved in favor of the state.*

Opinion by MR. JUSTICE DAVIS.

It has been so often decided by this court that a charter of incorporation granted by a state creates a contract between the state and the corporators, which the state cannot violate, that it would be a work of supererogation to repeat the reasons on which the argument is founded. It is true that when a corporation claims an exemption from taxation, it must show that the power to tax has been clearly relinquished by the state, and if there be a reasonable doubt about this having been done, that doubt must be solved in favor of the state. If, however, the contract is plain and unambiguous, and the meaning of the parties to it can be clearly ascertained, it is the duty of the court to give effect to it, the same as if it were a contract between private persons, without

regard to its supposed injurious effects upon the public interests. It may be conceded that it were better for the interest of the state that the taxing power, which is one of the highest and most important attributes of sovereignty, should on no occasion be surrendered. In the nature of things, the necessities of the government cannot always be foreseen, and in the changes of time, the ability to raise revenue from every species of property may be of vital importance to the state; but the courts of the country are not the proper tribunals to apply the corrective to improvident legislation of this character. If there be no constitutional restraint on the action of the legislature on this subject, there is no remedy, except through the influence of a wise public sentiment, reaching and controlling the conduct of the law-making power.

§ 2304. *A charter exempting "property" from taxation is a contract which no subsequent legislation can impair. "Property" includes rolling stock, necessary real estate, and the franchise of a railroad.*

There is no difficulty whatever in this case. The general assembly of North Carolina told the Wilmington & Weldon Railroad Company, in language which no one can misunderstand, that, if they would complete the work of internal improvement for which they were incorporated, their property and the shares of their stockholders should be forever exempt from taxation. This is not denied, but it is contended that the subsequent legislation does not impair the obligation of the contract, and this presents the only question in the case. The taxes imposed are upon the franchise and rolling stock of the company, and upon lots of land appurtenant to and forming part of the property of the company, and necessary to be used in the successful operation of its business. It certainly requires no argument to show that a railroad corporation cannot perform the functions for which it was created without owning rolling stock, and a limited quantity of real estate, and that these are embraced in the general term property. Property is a word of large import, and in its application to this company included all the real and personal estate required by it for the successful prosecution of its business. If it had appeared that the company had acquired either real or personal estate beyond its legitimate wants, it is very clear that such acquisitions would not be within the protection of the contract. But no such case has arisen, and we are only called upon to decide upon the case made by the record, which shows plainly enough that the company has not undertaken to abuse the favor of the legislature.

It is insisted, however, that the tax on the franchise is something entirely distinct from the property of the corporation, and that the legislature, therefore, was not inhibited from taxing it. This position is equally unsound with the others taken in this case. Nothing is better settled than that the franchise of a private corporation — which in its application to a railroad is the privilege of running it and taking fare and freight — is property, and of the most valuable kind, as it cannot be taken for public use even without compensation. Redfield on R'ys, 129, § 70. It is true it is not the same sort of property as the rolling stock, road-bed and depot grounds, but it is equally with them covered by the general term "the property of the company," and, therefore, equally within the protection of the charter.

- It is needless to argue the point further. It is clear that the legislation in controversy did impair the obligation of the contract which the general assembly of North Carolina made with the plaintiff in error, and it follows that the judgment of the supreme court must be reversed, and the cause remanded for further proceedings in conformity with this opinion.

ASYLUM v. NEW ORLEANS.

(15 Otto, 362-370. 1881.)

ERROR to the Supreme Court of Louisiana.

Opinion by MR. JUSTICE BRADLEY.

STATEMENT OF FACTS.—This case comes before us for the purpose of reviewing the judgment of the supreme court of the state of Louisiana, which sustained the validity of a certain tax imposed by the authorities of the city of New Orleans upon the property of the plaintiff in error, the “St. Anna’s Asylum for the relief of destitute females and helpless children of all religious denominations,” a charitable institution which was incorporated by an act of the legislature of Louisiana, approved April 29, 1853, for the purposes indicated by its name. The charter gave it perpetual succession, and power to take, purchase, possess and enjoy all kinds of property whatever, real or personal, by gift, grant, sale, bequest, exchange, or by any other mode of conveyance or transfer whatsoever, and the same to sell, convey or dispose of under the restrictions therein provided, and directed that it should administer the same for the furtherance of the object of the incorporation, and in accordance with the conditions of the charter; with a provision that all acceptances of immovable property, and all alienations of immovable property and stocks, should be signed by the president and treasurer, after the declared will of a majority of the board of directors had been duly inscribed on the minutes of the corporation. It appointed a first board of directors, and provided for annual elections thereafter, and for the appointment of a president and other officers, and declared that the president and directors should superintend, manage and control the affairs and interests of the corporation.

The sixth section declared as follows: “Sec. 6. *Be it further enacted, etc., that the said corporation shall enjoy the same exemption from taxation as was enacted in favor of the ‘Orphan Boys’ Asylum of New Orleans,’ by the act approved March 12, 1836, entitled ‘An act for the relief of the Orphan Boys’ Asylum of New Orleans.’*”

The act relating to the “Orphan Boys’ Asylum of New Orleans,” referred to in this section, declared as follows: “That from and after the passage of this act all the property, real and personal, belonging to the Orphan Boys’ Asylum of New Orleans be, and the same is, hereby exempted from all taxation either by the state, parish, or city in which it is situated, any law to the contrary notwithstanding.”

The proofs show that under the charter thus granted the corporation was duly organized, and, by means of donations, erected an asylum, and has always fulfilled the objects of its organization. The property on which the tax in question was imposed was procured in 1874, and was assessed in the tax-list at \$90,000. The following admission with regard to it appears in the record: “Now, therefore, it is admitted (as was done in the lower court) that the defendant acquired said cotton-press mentioned in the tax-bill and answer filed by defendant, after 1874, by devise, bequest and legacy, from Dr. W. N. Mercer, and that they were the owners of the same when said assessment of \$1,350 of city taxes was made by the city. That no inmates of the asylum are kept upon the premises, and that the revenues of the cotton-press on which said assessment is made are applied to the keeping and maintaining the objects of charity mentioned in the defendant’s act of incorporation, viz., to the support and maintenance and relief of destitute females and helpless children of all relig-

ious denominations, as intended by the charter, and that said asylum is, and has been since its organization, in active and efficient operation (as shown by the evidence) in the city of New Orleans." The proofs further show that the corporation largely relies on the rents of this property for enabling it to carry on its benevolent work.

The tax in question was imposed in 1876 under the supposed authority of the constitution of 1868, and legislation adopted in pursuance thereof. Article 118 of that constitution declared as follows: "Taxation shall be equal and uniform throughout the state. All property shall be taxed in proportion to its value, to be ascertained as directed by law. The general assembly shall have power to exempt from taxation property actually used for church, school or charitable purposes."

In conformity with this provision the legislature of Louisiana, in 1871, passed a law declaring that all taxes levied by the city of New Orleans shall be assessed equally upon every description of property, both real and personal; but, by another act, passed at the same session, it was declared that public hospitals, asylums, poor-houses, and all other charitable institutions for the relief of indigent and afflicted persons, and the lots of ground appurtenant thereto and used therewith, and all their furniture and equipments, so long as the same shall be used for that purpose only, shall be exempt from taxation. The corporation resisted the payment of the tax, and the usual proceedings for its collection were instituted in the third district court for the parish of Orleans. The corporation filed an answer setting up the exemption from taxes contained in its charter, and claiming that it was a contract, and contended that the constitution of 1868 and the statute passed in pursuance thereof impaired the obligation of said contract, in violation of the tenth section of the first article of the constitution of the United States. The court below gave judgment in favor of the city, and an appeal was taken to the supreme court of Louisiana, and the judgment was affirmed. We are now called upon to review this decision.

§ 2305. *A cotton-press, devised to an asylum, and the income from which is employed in charitable purposes, is property actually used for charitable purposes.*

The language of the exemption is so explicit and so broad, and comes in after so many allusions to property which it is supposed the corporation might acquire, other than that which would be directly used for food and shelter to the destitute and helpless persons under its care, that no doubt can be entertained as to its literal application to all the property of the society which it would be lawful and proper for it to possess. The funds on which it relies for carrying on its work, however invested, whether in stocks, real estate or otherwise, no less than the asylum building itself, are clearly embraced in the terms of the exemption; and to exclude them from its operation would require the insertion or addition of words which the legislature did not see fit to express. Undoubtedly, if the corporation should acquire property not needed or used for carrying on the institution, it would be an act outside of the objects and purposes of the charter and *ultra vires*; and, as to such property, it could not, in its own wrong, justly claim the benefit of the exemption. But the property in question is not obnoxious to this objection; it directly contributes to the support of the institution, and is held for that purpose alone.

§ 2306. *Code of Louisiana of 1825 does not authorize a repeal or modification of a charter without providing for full indemnity to the parties interested in it.*

Indeed, it is not on any assumption that the language of the exemption does

not extend to the property taxed that the supreme court of Louisiana bases its judgment. The main ground upon which it relies is that the charter was granted and accepted under a standing law of the state, by which the legislature was authorized to abrogate the charter of any corporation; and it was argued that the power to abrogate included the lesser power to alter and amend. This law is contained in article 438 of the civil code adopted in 1825, being a modification of a similar article in the code of 1808, book i, tit. 10, c. 3. In the code of 1825 it reads as follows: "Chapter III. *Of the dissolution of corporations.* (Art. 438.) A corporation legally established may be dissolved: 1. By an act of the legislature, if they deem it necessary or convenient to the public interest; provided, that when an act of incorporation imports a contract, on the faith of which individuals have advanced money or engaged their property, it cannot be repealed without providing for the reimbursement of the advances made, or making full indemnity to such individuals; 2. By the forfeiture of their charter, when the corporations abuse their privileges or refuse to accomplish the conditions on which such privileges were granted," etc.

The counsel for the plaintiff in error contends that this article has reference only to the absolute dissolution of a corporation, and not to a mere alteration of its charter; and, from its correlation to other parts of the title, this seems to be a very probable view of its office. But if it be construed in the large sense contended for by the counsel of the city, the qualification with which it is accompanied in the proviso is very important and not to be ignored. This qualification requires reimbursement or indemnity to those who have made advances upon the faith of the charter of incorporation. Nothing of the kind has been attempted in this case. As the corporation has not been dissolved, but is continued in existence, and still represents those who contributed to its establishment, the corporation itself is the only proper party to receive indemnity; and no indemnity short of the amount of the tax imposed would be adequate. The indemnity and the tax would mutually balance or neutralize each other. In other words, proper indemnity would require a revocation or nullity of the tax.

§ 2307. *The imposition of a tax on the property of a charity, contrary to the express terms of its charter, and without any provision for compensation, is a violation of the tenth section of article 1 of the constitution of the United States.*

It is suggested, however, by the supreme court, in its opinion, that the reserved power contained in the code has no application to this case, because the property upon which the tax in question was imposed was acquired by gratuitous donation, after the adoption of the constitution of 1868, and, consequently (as the court infers), after the repeal of so much of the charter as exempted from taxation the property not employed within the limits of exemption allowed by that constitution. "When a case of prior acquired property," says the court, "presents itself, it will be time enough to express our opinion thereon." But this argument presupposes the existence of a right to repeal the provisions of the charter as to future acquisitions, without qualification or condition. This seems to us a begging of the question at issue. The contract did not apply only to property in existence when the charter was granted, nor only to that which was in existence when the constitution of 1868 was adopted, but to all that might afterwards be acquired in the due fulfillment of the purposes of the institution. If the present asylum should be destroyed, and a new one erected on a different piece of ground, the argument of the court would be equally applicable to such newly acquired property as to the property in ques-

tion. The constitution itself did not exempt any property. It only gave the legislature the power (to be exercised or not, in its discretion) to exempt property actually used for church, school and charitable purposes. The legislature has seen fit to make this exemption; but it was not obliged by the constitution to do so. The argument of the supreme court would go to the extent of declaring that the abrogation of the contract, effected by the constitution of 1868, was valid as to all after-acquired property, whether indemnity was provided or not; and this amounts to saying that the legislature or people of Louisiana had absolute power to pass a law impairing the obligation of the contract, without any condition or qualification whatsoever. We cannot concur in this view. We think that the power of abrogation, or alteration, was qualified by the duty of providing indemnity to the full extent of the damage or burden caused by such change. This conclusion seems to us so obvious as to require no extended argument in its support.

This opinion might be extended by an examination of authorities. We might refer to *Home of the Friendless v. Rouse*, 8 Wall., 430 (§§ 2289-94, *supra*), which is almost on all-fours with the present case. We might go back to the case of *Dartmouth College v. Woodward*, 4 Wheat., 518 (§§ 2099-2117, *supra*), and the cases since decided, and review all the reasons on which they were grounded; we might dilate on the legislative reasons for granting immunity from taxes to such charitable institutions as that of the plaintiff in error, prominent among which would doubtless be the fact that the support and maintenance extended to the objects of the charity relieves the state from a burden which would involve a much larger amount of taxation than that which it waives by granting the exemption. But such a review would be but a repetition of what has been said before, and much of it would be out of place.

It is proper, however, that we should notice one or two cases which the counsel for the city suppose to be favorable to their views, and on which they place considerable reliance. These are *Tucker v. Ferguson*, 22 Wall., 527, and *West Wisconsin R'y Co. v. Board of Supervisors*, 93 U. S., 505. We think that they do not apply to the case now under consideration. In the first place, the constitutions of Michigan and Wisconsin, in which states those cases arose, reserved to their legislatures, respectively, the power to alter, amend and repeal charters of incorporation. In the next place, in those cases, the exemption granted was held to be gratuitous on the part of the state, no consideration passing therefor from the companies. It was no part of their charters of incorporation, and, therefore, formed no consideration for their acceptance. Whereas, in the present case, the exemption was expressed in the charter itself, and was one of the inducements offered for its acceptance, and for making donations for the establishment of the institution.

It is also said that, in order to constitute a contract, the grant ought to be clear and free from all ambiguity and doubt, and not susceptible of a different construction. We think it is so in this case. The contract is not a matter of inference or presumption. It is distinctly expressed in the act of incorporation. Indeed, a clearer case could hardly be made. The addition of a declaration, that the exemption given should not be withdrawn, would not have added to its force. We are well aware of the forcible language which has been used in previous cases in reference to the importance to the state of the governmental function of taxation; the caution that ought to be exercised in maintaining a claimed exemption from taxes; the clearness and certainty which the grant should exhibit. We concur in all that has been said by this court and many

state courts on the subject. But where the language is clear, and the intention to grant the exemption apparent, the court has never hesitated to give it force and effect. And, as before said, we think it difficult to conceive a grant more clearly expressed than that in the present case; and unless we are disposed to reverse the previous decisions of this court, we cannot hesitate what judgment we ought to give.

We are of opinion that the imposition of the tax in question, contrary to the express terms of the charter, and without any provision for compensation or indemnity, was not a legitimate exercise of the power of dissolution reserved in the code; and that section 118 of the constitution of 1868, and the legislative act by virtue of which the said tax was imposed, as construed and applied to the circumstances of this case, are in violation of the tenth section of article 1 of the constitution of the United States. Our conclusion is that the judgment of the supreme court of Louisiana must be reversed, and that the cause be remanded with instructions to reverse the judgment of the third district court of the parish of Orleans, and to render judgment in conformity with this opinion.

JUSTICES MILLER and FIELD dissented, on the ground that the act did not exempt all property acquired after its passage.

UNIVERSITY v. PEOPLE.

(9 Otto, 309-325. 1878.)

ERROR to the Supreme Court of Illinois.

Opinion by MR. JUSTICE MILLER.

STATEMENT OF FACTS.—This is a writ of error to the supreme court of Illinois, bringing before us a judgment of that court, deciding that certain property of the plaintiff was liable to taxation, which was resisted on the ground that it was exempt by a legislative contract. The university was incorporated by an act of the legislature of the state of Illinois, approved January 28, 1851, which contained the powers necessary to its usefulness as an institution of learning, and, among other provisions, authorized it to purchase and hold real estate to the extent of two thousand acres of land, and receive gifts and devises of land above that amount, which must be sold within ten years. In 1855 the legislature, by an amendment to this charter, appointed three additional trustees, and enlarged its powers, in some respects not very important. But the fourth section of that act is the one supposed to contain the contract on which this case must be decided. It was this: "That all property, of whatever kind or description, belonging to or owned by said corporation, shall be forever free from taxation for any and all purposes."

The state constitution of 1848, in force when the charter and amended charter above cited were enacted, declares that "the property of the state and counties, both real and personal, and such other property as the general assembly may deem necessary for school, religious and charitable purposes, may be exempt from taxation." The record shows a very large list of lots and lands in Cook county which the plaintiff asserted to be free from taxation under this law, but which were listed for taxes of the year 1874, and about to be sold for their non-payment. By proper judicial proceedings the question arose before the supreme court of the state, which held that they were liable to be so taxed.

§ 2308. *The supreme court has jurisdiction to determine whether a state statute impairs the obligation of a contract.*

A motion was made some time before the case was reached for argument in this court to dismiss it for want of jurisdiction, and was overruled; but the attorney-general of Illinois renews the objection now in connection with the main argument. This question of jurisdiction to review the judgments of state courts is so frequent, and the principles which govern it so well settled, that we need not be very elaborate in our opinion on that point. The argument is that the judgment of the state court is limited to a construction of the fourth clause of the amendatory charter of 1855, as it is affected by the constitution under which it was enacted, and that whether that statute was a contract or not, or whether it was properly construed or not, it is still but the decision of a court construing a contract or a statute, and there is no law of the state impairing the obligation of that contract within the meaning of the constitution of the United States. If this were true in point of fact, the conclusion would be sound, as we have repeatedly held in this court. *Railroad Co. v. Rock*, 4 Wall., 177; *Railroad Co. v. McClure*, 10 id., 511; *Knox v. Exchange Bank*, 12 id., 379.

But the premises assumed are not justified by the facts. The general revenue law of Illinois, prior to the amendment of 1855 to plaintiff's charter, contained nothing which exempted its property from taxation. When that act was passed it became a part of the law of the state governing taxation as applicable to the property of the university. The law remained in this condition until the state adopted a new constitution, in 1870, the part of which relating to this subject is in these words: "The property of the state, counties and other municipal corporations, both real and personal, and such other property as may be used exclusively for agricultural and horticultural societies, for school, religious, cemetery and charitable purposes, may be exempted from taxation; but such exemption shall be only by general law."

In order to conform the law of the state on the subject of taxation to this provision of the new constitution, the legislature revised its revenue laws in 1872, and in this statute the exemption established was: "*First.* All lands donated by the United States for school purposes, not sold or leased. All public school-houses. All property of institutions of learning, including the real estate on which the institutions are located, not leased by such institutions or otherwise used with a view to profit. *Secondly.* All church property actually and exclusively used for public worship, when the land (to be of reasonable size for the location of the church building) is owned by the congregation."

It was under this law the local officers proceeded in assessing plaintiff's land for taxation, and it was their construction of the law which was sustained by the supreme court. If, therefore, the legislation of 1855 was a contract which exempted the property in question from taxation, and by the law of 1872, as construed by the supreme court, it is held liable to taxation, it is manifest that it is the law of 1872 and the constitution of 1870 which impairs the obligation of that contract, however the court, by an erroneous construction of that contract, may be led to hold otherwise. It is strenuously insisted that these provisions of the constitution of 1870 and the revenue law of 1872 do not repeal the exemption as established by the fourth section of the amended charter of 1855, because that section was in excess of the authority conferred by the constitution of 1848. But this depends on the construction of that contract as affected by the constitution under which it was enacted. If, by virtue of that

constitution, the legislature of that day could only exempt plaintiff's real estate so far as it was in immediate use for school purposes, as was held by the supreme court, then it may not repeal that statute or impair that contract, for the exemption will probably amount to the same thing under either statute. But if it is a contract, as is contended for by plaintiff's counsel, which, under a true construction of the constitution of 1848, exempts all the property of plaintiff which is held by it for appropriation to the purposes of the university as a school, as an institution for teaching, and which is held for no other purpose whatever, and which can as effectually promote the purpose by leases, of which the rent goes to support the school, as in any other way, then the law of 1872 and the constitution of 1870 do, to the extent of the difference arising from these two constructions, impair the obligation of the contract of 1855. Whether that contract is such as to be impaired by these later laws is one of the questions of which this court always has jurisdiction. *Jefferson Branch Bank v. Skelly*, 1 Black, 436; *Bridge Proprietors v. Hoboken Co.*, 1 Wall., 144 (§§ 2087-92, *supra*); *Delmas v. Insurance Co.*, 14 id., 668.

The supreme court of Illinois, in its opinion found in the record, appears to concede that the act of 1855, to the extent that it was authorized by the state constitution, was a contract.

"It is not claimed," says the court, "that appellant is in any sense a public corporation, but it is claimed that the purpose for which it is created is so far beneficial to the public that it affords a sufficient consideration for the grant of exemption from taxation in the amendment, and that when the amendment was accepted and acted on by the corporation it must be held a vested right which cannot be withdrawn by subsequent legislation, because of the provision of the constitution of the United States which prohibits a state from passing a law impairing the obligation of a contract. If it was competent for the general assembly to make the exemption, we are not disposed to contest the correctness of their position; but if it was not competent to make the exemption, the attempt was a nullity, and the case is not affected by the constitution of the United States." The court thus concedes that there was a contract so far as the legislative power extended.

§ 2309. *Where lands are bought or donated, and moneys expended in reliance upon an act, there is a sufficient consideration for such act.*

It is possible, if that question had been fully investigated, and all the facts necessary to decide it were before the court, it might not appear that all the lands subjected to taxation by the judgment of the supreme court were bought after the date of the amended charter, or donated on the faith of that exemption. But it does appear, by a stipulation made for that purpose, that since the granting of said amended charter the corporation "has expended, in the erection and purchase of buildings, apparatus, and other facilities and appliances for education, and for the promotion of the objects stated in and contemplated by the act of incorporation, over \$200,000, realized from donations and the sale of lots and lands, and has built up a university, with several departments of learning, in which more than five hundred students are taught the higher branches of learning." It is, perhaps, a fair inference from this statement, and in deference to the holding of the supreme court, that there was such acceptance of this act of 1855, and such investments made on the faith of it, that at least some portion of the property now in question is protected by contract, if the exemption clause lawfully covers it.

It will readily be conceded that the language of the fourth section of the act of 1855 is broad enough for that purpose: "All property, of whatever kind or description, belonging to or owned by said corporation, shall be forever free from taxation for any and all purposes." But the argument is, that since the constitution then in force only permitted the legislature to exempt from taxation the property, real and personal, used by the university, in immediate connection with its function of teaching, the statute must be limited to property so used. This was the view taken by the supreme court of the state. "By the language of the constitution," says the court, "while a discretion is conferred on the general assembly whether to exempt or not, and, if it shall determine to exempt, the amount of the exemption, it is clearly restricted in the exercise of this discretion to property for schools and religious and charitable purposes; property for such purposes, in the primary and ordinary acceptation of the term, is property which in itself is adapted to and intended to be used as an instrumentality in aid of such purposes. It is the direct and immediate use, and not the remote or consequential benefit to be derived through the means of the property, that is contemplated." Though the court is here construing the constitution of its own state, and is, therefore, entitled to our consideration on that ground, as well as for its character and standing for learning and ability, we find ourselves, in the performance of the duty of reviewing this case, compelled to differ with that court in the nature and extent of the constitutional limitation of this contract, as made by the legislature of the same state. For this constitution necessarily becomes a part of the contract which is said to be impaired by subsequent legislation.

§ 2810. *Distinction between "property used for schools" and "property for school purposes."*

The first observation we have to make is that the constitution does not say "property used for schools," as the opinion of the court implies. Neither the important word *use* or *schools* is found in the section of the instrument on that subject. If the language were that the legislature might "exempt property for the use of schools," we should readily agree with that court. Indeed, that would be the appropriate language to convey the idea on which the court rests its decision. The makers of the constitution, however, used other language because they had another meaning, and did not use that because they did not mean that. They said that the legislature might exempt from taxation "such property as they might deem necessary" (not for the use of schools, but) "for school purposes." The distinction is, we think, very broad between property contributing to the purposes of a school, made to aid in the education of persons in that school, and that which is directly or immediately subjected to use in the school. The purposes of the school and the school are not identical. The purpose of a college or university is to give youth an education. The money which comes from the sale or rent of land dedicated to that object aids this purpose. Land so held and leased is held for school purposes, in the fullest and clearest sense.

A devise of a hundred acres of land "to the president of the university, for the purposes of the school," would be not only a valid conveyance, but, if the president failed to do so, a court of chancery would compel him to execute the trust; but if he leased it all for fair rent and paid the proceeds into the treasury of the corporation to aid in the support of the school, he would be executing the trust. When the constitution, in 1870, came to be reconstructed, its

framers had learned something about exemption from taxation, as we shall see by placing the provision in that constitution alongside that of 1848 on the same subject:

1848.

"The property of the state and counties, both real and personal, and such other property as the general assembly may deem necessary for school, religious and charitable purposes, may be exempt from taxation."

1870.

"The property of the state, counties and other municipal corporations, both real and personal, and such other property as may be used exclusively for agricultural and horticultural societies, for school, religious, cemetery and charitable purposes, may be exempted from taxation; but such exemption shall be only by general law."

Here it is only such property as may be exclusively used for school purposes that may be exempted, and this only by a general law.

§ 2311. *The act of 1872 impairs the obligation of a contract in subjecting to taxation property of the university leased for the benefit of the institution and for purposes of schools.*

The general law passed in 1872 to give effect to the change in the constitution exempted only "the real estate on which the institutions of learning are located, not leased by such institutions or otherwise used with a view to profit." This is what the supreme court says was meant by the constitution of 1848, but if it was, it took a deal of change in the language when the framers of the new constitution and of the new tax law came to express the same idea. We cannot come to the conclusion that they were intended to mean the same, but that the later law was designed to limit the more enlarged power of the earlier one.

If our construction of the constitution of 1848 is sound, the judgment of the supreme court must be reversed, for the stipulation of facts on which the case was tried says that "it is admitted that all the lots and lands mentioned and described in the objections filed in said proceeding for judgment, whereon said taxes are levied, excepting improvements on the same, are leased by said university to different parties for a longer or shorter period, and that all said lots and lands are held for sale or lease, for the use and support of said institution and the object contemplated by said charter." We are of opinion that such use and such holding bring the lots within the class of property which, by the constitution of 1848, the legislature could, if it deemed proper, exempt from taxation, and that the legislature did so exempt it.

The judgment of the supreme court of the state will be reversed, and the case remanded to that court for further proceedings not inconsistent with this opinion; and it is so ordered.

JUSTICES STRONG and BRADLEY did not sit in this case.

CHICAGO v. SHELDON.

(9 Wallace, 50-56. 1869.)

ERROR to U. S. Circuit Court, Northern District of Illinois.

STATEMENT OF FACTS.—The question in this case is whether the railway company is liable only for the repair of streets, or whether it is liable to assessment for an entirely new pavement. The provision of the ordinance on which its liability depends is stated in the opinion.

§ 2312. *Where a street railway company is required to keep the street in repair, it is not liable to an assessment for a new pavement.*

Opinion by MR. JUSTICE NELSON.

It is asserted, on the part of the railway company, that, by the true construction of their contract, they are exempt from the assessment made upon their property, and the seventh section of the ordinance of the 23d May, 1859, is referred to and relied on in support of this construction. That section prescribes the obligations and duties of the company in respect to the condition and repairs of the streets during the whole period of the running of the contract, and imposes certain burdens upon it as to repairs, from which, to their extent, the city, or adjoining owners of lots, are relieved. It is insisted that this provision was intended, and so understood by both parties, as regulating the whole subject as it respects improvements of the streets occupied by the company, and to fix in the contract the extent of their liability. The language of it is somewhat peculiar, and it cannot well be denied but that a fair and reasonable interpretation favors this view. It is as follows: "The said company shall, as respects the *grading, paving, macadamizing, filling or planking of the streets, or parts of the streets*, upon which they shall construct their said railways, or any of them, keep eight feet in width along the line of said railway on all the streets where one track is constructed, and sixteen feet in width along the line of said railway where two tracks are constructed, in good repair and condition."

§ 2313. *Where the language in a contract is indefinite or ambiguous, and of doubtful construction, the practical interpretation of the parties themselves is entitled to great, if not controlling, influence in its construction.*

Now, it is quite clear that the above recitals embrace the whole subject of improvements of the streets, and that it was present to the minds of the parties when entering into the stipulation respecting repairs that followed. And this being so, it is difficult to deny but that these stipulations were made as fixing the proportion or share of these general improvements which should be imposed on the company, namely, they should keep in good condition and repair eight or sixteen feet, as they used a single or double track, along the entire length of the road. They were not to grade, pave, macadamize, fill or plank even the above width or distance, except so far as such work came within the category of repairs. What adds great weight to this view is, it accords with the practical construction given to the contract by both parties. It was entered into, as we have seen, on the 23d May, 1859. Several of these special assessments were authorized subsequently by the common council and collected, but no attempt was made to assess the railroad property of the company. Nor was any question raised as to its exemption till 1866, and not then by the city, but by some of the proprietors of lots fronting on the streets. In cases where the language used by the parties to the contract is indefinite or ambiguous, and hence of doubtful construction, the practical interpretation by the parties themselves is entitled to great, if not controlling, influence. The interest of each, generally, leads him to a construction most favorable to himself, and when the difference has become serious, and beyond amicable adjustment, it can be settled only by the arbitrament of the law. But, in an executory contract, and where its execution necessarily involves a practical construction, if the minds of both parties concur, there can be no great danger in the adoption of it by the court as the true one.

§ 2314. *The legislature of Illinois has full power to commute the burdens of general or special assessments or taxes for what they deem an equivalent.*

There is another consideration in the case entitled to weight in the interpretation of this contract; and that is the language of the contract made between the city and the company in 1864. This ordinance is *in pari materia* with the one of 1859, and helps to explain any ambiguity in it. We may add, also, that the learned judge who delivered the opinion of the court, maintaining the liability of this company to the payment of the assessment, does not place his opinion upon the ground that the contract did not exempt it, but that the legislature were disabled by the constitution of the state from conferring any such power on the city. The objection is founded on the clauses of the constitution which provide that taxes shall be levied so that each person shall pay in proportion to the value of his property; and that where corporate authorities of counties, cities, etc., are authorized to levy and collect taxes for corporate purposes, the taxes shall be uniform in respect to persons and property. We are not concerned to deal with these provisions, as it is perfectly settled by the decisions of the supreme court of the state that, according to the true construction of them, they do not forbid the legislature commuting with individuals or corporate bodies the burdens of general or specific taxes or assessments, of the character of those in question, for what they may deem an equivalent. This has been so frequently decided that we need only refer to the cases. *Illinois Central Railroad v. County of McLean*, 17 Ill., 291; *Hunsaker v. Wright*, 30 id., 146; *Neustadt v. Illinois Central Railroad*, 31 id., 434. It is supposed by the counsel for the city that this doctrine has been modified by the recent cases of *Chicago v. Larned*, decided in 1864, and *The Same v. Baer*, in 1866. But, on looking into these cases, we find no references to the cases above cited, or to the doctrine they maintain. If it were otherwise, however, we could not agree that such decisions could have the effect to invalidate the contract in question.

§ 2315. *Where a contract is valid by the laws when entered into by the parties, neither the legislature nor any decision of the state courts can impair its obligation.*

A contract having been entered into between the parties, valid at the time, by the laws of the state, it is not competent even for its legislature to pass an act impairing its obligation, much less could any decision of its courts have that effect.

A point is made that the legislature have not conferred, or intended to confer, authority upon the city to make this contract. We need only say that full power was not only conferred, but that the contract itself has been since ratified by this body.

Judgment affirmed.

TOMLINSON v. JESSUP.

(15 Wallace, 454-459. 1872.)

APPEAL from U. S. Circuit Court, District of South Carolina.

The facts are stated in the opinion.

§ 2316. *An exemption from taxation is taken subject to the reserved power of amendment or repeal.*

Opinion by MR. JUSTICE FIELD.

The constitution of South Carolina, adopted in 1868, declares that the property of corporations then existing or thereafter created shall be subject to taxation, except in certain cases, not material to the present inquiry. The subsequent

legislation of the state carried out this requirement and provided for the taxation of the property of railroad companies; and the question presented is, whether the act of December, 1855, to amend the charter of the Northeastern Railroad Company, exempted the property of that company from such taxation. The company was incorporated in 1851, and at that time a general law of the state was in existence, passed in 1841, which enacted that the charter of every corporation subsequently granted, and any renewal, amendment or modification thereof, should be subject to amendment, alteration or repeal by legislative authority, unless the act granting the charter, or the renewal, amendment or modification, in express terms excepted it from the operation of that law. The provisions of that law, therefore, constituted the condition upon which every charter of a corporation subsequently granted was held, and upon which every amendment or modification was made. They were as operative and as much a part of the charter and amendment as if incorporated into them. The act amending the charter of the Northeastern Railroad Company, passed in December, 1855, provided that the stock of the company, and the real estate it then owned, or might thereafter acquire, connected with or subservient to the works authorized by its charter, should be exempted from taxation during the continuance of the charter. This act contained no clause excepting the amendment from the provisions of the general law of 1841. It was, therefore, itself subject to repeal by force of that law.

It is true that the charter of the company, when accepted by the corporators, constituted a contract between them and the state, and that the amendment, when accepted, formed a part of the contract from that date and was of the same obligatory character. And it may be equally true, as stated by counsel, that the exemption from taxation added greatly to the value of the stock of the company, and induced the plaintiff to purchase the shares held by him. But these considerations cannot be allowed any weight in determining the validity of the subsequent taxation. The power reserved to the state by the law of 1841 authorized any change in the contract as it originally existed, or as subsequently modified, or its entire revocation. The original corporators, or subsequent stockholders, took their interests with knowledge of the existence of this power, and of the possibility of its exercise at any time in the discretion of the legislature. The object of the reservation, and of similar reservations in other charters, is to prevent a grant of corporate rights and privileges in a form which will preclude legislative interference with their exercise if the public interest should at any time require such interference. It is a provision intended to preserve to the state control over its contract with the corporators, which without that provision would be irrevocable and protected from any measures affecting its obligation.

There is no subject over which it is of greater moment for the state to preserve its power than that of taxation. It has nevertheless been held by this court, not, however, without occasional earnest dissent from a minority, that the power of taxation over particular parcels of property, or over property of particular persons or corporations, may be surrendered by one legislative body, so as to bind its successors and the state. It was so adjudged at an early day in *New Jersey v. Wilson*, 7 Cranch, 164 (§ 2295, *supra*); the adjudication was affirmed in *Jefferson Bank v. Skelly*, 1 Black, 436, and has been repeated in several cases within the past few years, and notably so in the cases of *The Home of the Friendless v. Rouse*, 8 Wall., 430 (§§ 2289-94, *supra*), and *Wilmington Railroad v. Reid*, 13 id., 264 (§§ 2303, 2304, *supra*). In these cases, and

in others of a similar character, the exemption is upheld as being made upon considerations moving to the state which give to the transaction the character of a contract. It is thus that it is brought within the protection of the federal constitution. In the case of a corporation, the exemption, if originally made in the act of incorporation, is supported upon the consideration of the duties and liabilities which the corporators assume by accepting the charter. When made, as in the present case, by an amendment of the charter, it is supported upon the consideration of the greater efficiency with which the corporation will thus be enabled to discharge the duties originally assumed by the corporators to the public, or of the greater facility with which it will support its liabilities and carry out the purposes of its creation. Immunity from taxation, constituting in these cases a part of the contract with the government, is, by the reservation of power such as is contained in the law of 1841, subject to be revoked equally with any other provision of the charter whenever the legislature may deem it expedient for the public interests that the revocation shall be made. The reservation affects the entire relation between the state and the corporation, and places under legislative control all rights, privileges and immunities derived by its charter directly from the state. Rights acquired by third parties, and which have become vested under the charter, in the legitimate exercise of its powers, stand upon a different footing; but of such rights it is unnecessary to speak here. The state only asserts in the present case the power under the reservation to modify its own contract with the corporators; it does not contend for a power to revoke the contracts of the corporation with other parties, or to impair any vested rights thereby acquired.

Decree reversed, and the cause remanded with directions to dismiss the suit.

RAILROAD COMPANY v. GEORGIA.

(8 Otto, 359-366. 1878.)

ERROR to the Supreme Court of Georgia.

Opinion by MR. JUSTICE STRONG.

STATEMENT OF FACTS.—The single question presented in this case is whether the act of the legislature of Georgia, approved February 28, 1874, whereby it was enacted that the property of all railroad companies in the state should be taxed as other property of the people of the state, impairs the obligations of the contract contained in the charter of the plaintiff in error. The question compels consideration of the inquiry, what was the contract into which the state entered with the company, and what are the rights which the company holds under it.

Prior to the 18th day of April, 1863, there were two railroad companies in the state, one incorporated on the 25th day of December, 1847, as the "Savannah, Albany & Gulf Railroad," and the other incorporated on the 27th day of February, 1856, with the name "The Atlantic & Gulf Railroad Company," the same name now borne by the plaintiffs. The charter of each of these companies contained a grant of all the rights, privileges and immunities which had been granted to, or were held and enjoyed by, any other incorporated railroad company or companies, or which had been granted to the Central Railroad & Banking Company, or to the Georgia Railroad Company, or to either of them. Both these latter companies had been incorporated prior to 1840, and each held by its charter the privilege or immunity of not being subject to be taxed higher than one-half of one per cent. upon its annual net income in the one case, and

in the other, on the net proceeds of its investments. Consequently, the Savannah, Albany & Gulf Railroad Company, and the Atlantic & Gulf Railroad Company, severally acquired by their charters an exemption from taxation at any higher rate, or in any different manner. And such an immunity they severally continued to hold down to 1863. This, we think, admits of no reasonable doubt. If their rights are now the same as they were when the original charters of the two companies were first granted, it is quite clear the provisions of the taxing act of 1874 could not be applied to them without impairment of the contracts they had with the state. Neither of the companies, however, is now existing under or by virtue of its original charter. On the 18th day of April, 1863, the legislature of the state passed an act whereby they were empowered to consolidate their stocks upon such terms as might be agreed upon by the directors and ratified by a majority of the stockholders; and the act enacted that, when so consolidated, they should be known as "The Atlantic & Gulf Railroad Company," with a proviso that nothing therein contained should relieve or discharge either of them from any contract theretofore entered into by either, but that this company should be liable on the same. By the second section it was enacted that the stockholders of said consolidated railroad companies, by such corporate name and in such corporate capacity, should be capable in law to have, purchase and enjoy such real and personal estate, goods and effects as might be necessary and proper to carry out the objects therein specified, and to secure the full enjoyment of all the rights therein and thereby granted, and by said name to sue and be sued, plead and be impleaded, in any court of competent jurisdiction; to have and use a common seal, and the same to alter at pleasure; to make and establish by-laws, and generally to exercise corporate powers.

The third section of the act declared that the several immunities, franchises and privileges granted to the said Savannah, Albany & Gulf Railroad Company, and the Atlantic & Gulf Railroad Company, by their original charters and the amendments thereof, and the liabilities therein imposed, should continue in force, except so far as they might be inconsistent with the act of consolidation. The fifth section repealed all laws and parts of laws militating against the act.

§ 2317. *The act of the Georgia legislature of April 18, 1863, consolidating two railroad companies, extinguished both and created a new corporation.*

It is conceded that, under this act, a consolidation took place. It is, therefore, a vital question: What was its effect? Did the consolidated companies become a new corporation, holding its powers and privileges as such under the act of 1863? Or was the consolidation a mere alliance between two pre-existing corporations, in which each preserved its identity and distinctive existence? Or, still further, was it an absorption of one by another, whereby the former was dissolved, while the latter continued to exist? The answer to these inquiries must be found in the intention of the legislature as expressed in the consolidating act. We think that intention was the creation of a new corporation out of the stockholders of the two previously existing companies. The consolidation provided for was clearly not a merger of one into the other, as was the case of *Central Railroad & Banking Co. v. Georgia*, 92 U. S., 665. Nor was it a mere alliance or confederation of the two. If it had been, each would have preserved its separate existence as well as its corporate name. But the act authorized the consolidation of the stocks of the two companies, thus making one capital in place of two. It contemplated, therefore, that the sep-

arate capital of each company should go out of existence as the capital of that company; and, if so, how could either have a continued separate being? True, the proviso to the first section declared that nothing therein contained should relieve or discharge either of the companies from any contract theretofore entered into by either, adding: "But this company [that is, the company created by the act] shall be liable on the same." It is thus distinguished between the two original companies and the one contemplated to be formed by their consolidation. And the proviso would have been quite unnecessary had it not been thought by the legislature that the consolidation would work a dissolution of the amalgamated companies. Hence it was considered necessary to preserve the rights of parties who might have contracted with them. Only their contracts were mentioned in the proviso, and that in order to authorize a novation. The third section continued in force the several immunities, franchises and privileges granted by the original charters and the amendments thereof, and the liabilities therein imposed, but plainly for the benefit of the consolidated companies. Why speak of original charters, if a later charter was not intended by the act? That such was the intention appears still more clearly in the third section. That conferred upon the consolidated stockholders complete corporate powers. It granted to them, when consolidated, not only a corporate name, but the right under that name to acquire and hold property, to sue and be sued, to have a common seal, to make by-laws, and generally to do everything that appertains to corporations of like character. This full grant of corporate power must have been intended for some purpose. What was it, if not to create a corporation? For that purpose it was amply sufficient. For any other it was unmeaning. If the two original companies were to continue in being, if it was not contemplated that they should be dissolved by consolidation, a new grant of corporate power and existence was unnecessary. They had it already.

§ 2318. — *and whatever franchises and immunities the new corporation possesses, it holds by virtue of that act. Effect of a consolidation of corporations.*

Looking thus at the legislative intent appearing in the consolidation act, we are constrained to the conclusion that a new corporation was created by the consolidation effected thereunder, in the place and in lieu of the two companies previously existing, and that whatever franchises, immunities or privileges it possesses, it holds them solely by virtue of the grant that act made. That generally the effect of consolidation, as distinguished from a union by merger of one company into another, is to work a dissolution of the companies consolidating, and to create a new corporation out of the elements of the former, is asserted in many cases, and it seems to be a necessary result. In *McMahan v. Morrison*, 16 Ind., 172, the effect of a consolidation was said to be "a dissolution of the corporations previously existing, and at the same instant the creation of a new corporation, with property, liabilities and stockholders derived from those then passing out of existence." So in *Lauman v. Lebanon Valley R. Co.*, 30 Penn. St., 42, the court said: "Consolidation is a surrender of the old charter by the companies, the acceptance thereof by the legislature, and the formation of a new company out of such portions of the old as enter into the new." This court, in *Clearwater v. Meredith*, 1 Wall., 40, expressed its approval of what was said in the former of these cases. It is true these expressions have not all the weight of authority, for they were not necessary to the decisions made, but they are worthy of consideration, and they are in accordance with what seems to be sound reason. When, as in this case, the

stock of two companies is consolidated, the stockholders become partners, or *quasi* partners, in a new concern. Each set of stockholders is shorn of the power which, as a body, it had before. Its action is controlled by a power outside of itself. To illustrate: The stockholders of the Savannah & Albany Railroad Company could not, after consolidation, have exercised any of the powers or franchises they had prior to their consolidation with the stockholders of the Atlantic & Gulf Railroad Company. They could not have built their road or controlled its management. They could not, therefore, have performed the duties which by their original charter were imposed upon them. Those duties could only have been performed by another organization, composed partly of themselves and partly of others. Their powers, their franchises and their privileges were therefore gone, no longer capable of exercise or enjoyment. Gone where? Into the new organization, the consolidated company, which exists alone by virtue of the legislative grant, and which has all its powers, facilities and privileges by virtue of the consolidation act. What, then, was left of the old companies? Apparently nothing. They must have passed out of existence, and the new company must have succeeded to their rights and duties. But the new company comes into existence under a fresh grant. Not only its being, but its powers, its franchises and immunities, are grants of the legislature which gave it its existence.

If, then, the old Atlantic & Gulf Railroad Company and the Savannah, Albany & Gulf Railroad Company went out of existence when their stocks were consolidated under the act of the legislature of 1863, their powers, their rights, their franchises, privileges and immunities ceased with them, and they have no existence except by virtue of the grant of corporate powers and privileges made by the consolidation act of 1863. That act created a new corporation, and endowed it with the several immunities, franchises and privileges which had previously been granted to the two companies, but which they could no longer enjoy. It necessarily follows that the new company held the rights granted to it under and subject to the law as it was when the new charter was granted.

§ 2319. *Where a state law reserves the right to withdraw a franchise, an exemption from taxation may be repealed.*

And the code of the state which came in force on the 1st of January, 1863, before the charter was granted, contained the following provision: "Section 1051. Persons are either natural or artificial. The latter are creatures of the law, and, except so far as the law forbids it, subject to be changed, modified or destroyed at the will of the creator; they are called corporations." "Section 1082. In all cases of private charters hereafter granted, the state reserves the right to withdraw the franchise, unless such right is expressly negatived in the charter."

No such right was negatived in the charter granted to the plaintiffs in error. Consequently the franchise was held subject to a power in the state to withdraw it, and subject to be changed, modified or destroyed at the will of its grantor or creator. These provisions of the code became, in substance, a part of the charter. *Railroad Co. v. Maine*, 96 U. S., 499. It is quite too narrow a definition of the word "franchise," used in this statute, to hold it as meaning only the right to be a corporation. The word is generic, covering all the rights granted by the legislature. As the greater power includes every less power which is a part of it, the right to withdraw a franchise must authorize a withdrawal of every or any right or privilege which is a part of the franchise. So

it was held in *Central Railroad & Banking Co. v. Georgia*, 54 Ga., 401, and so it must be held now, especially in view of the statutory provision of the code, that private corporations are subject to be changed, modified or destroyed at the will of their creator. Hence the exemption from taxation, except to the extent and in the mode designated in the charter, could be withdrawn without any violation of the state's contract with the company, and the act of 1874 was such a withdrawal.

§ 2320. *The decision of the supreme court of a state, that an act of its legislature is in accordance with the state constitution, is conclusive upon this court.*

In regard to the position taken by the plaintiff in error, that the sections of the code we have quoted were not laws of the state in 1863, because the code was not read three times in each house of the general assembly, as required by the state constitution, it is sufficient to say the supreme court of the state has decided they were, and its decision of such a question is not open for revision by us in a case brought here from a state court. *Pennsylvania College Cases*, 13 Wall., 190 (§§ 2118-26, *supra*).

Judgment affirmed.

PROVIDENCE BANK v. BILLINGS.

(4 Peters, 514-565. 1880.)

Opinion by MARSHALL, C. J.

STATEMENT OF FACTS.—This is a writ of error to a judgment rendered in the highest court for the state of Rhode Island, in an action of trespass brought by the plaintiff in error against the defendant.

In November, 1791, the legislature of Rhode Island granted a charter of incorporation to certain individuals who had associated themselves together for the purpose of forming a banking company. They are incorporated by the name of the "President, Directors and Company of the Providence Bank," and have the ordinary powers which are supposed to be necessary for the usual objects of such associations. In 1822 the legislature of Rhode Island passed "An act imposing a duty on licensed persons and others, and bodies corporate within the state," in which, among other things, it is enacted that there shall be paid, for the use of the state, by each and every bank within the state, except the Bank of the United States, the sum of fifty cents on each and every \$1,000 of the capital stock actually paid in." This tax was afterwards augmented to \$1.25. The Providence Bank, having determined to resist the payment of this tax, brought an action of trespass against the officers, by whom a warrant of distress was issued against and served upon the property of the bank, in pursuance of the law. The defendants justify the taking set out in the declaration under the act of assembly imposing the tax; to which plea the plaintiffs demur, and assign for cause of demurrer that the act is repugnant to the constitution of the United States, inasmuch as it impairs the obligation of the contract created by their charter of incorporation. Judgment was given by the court of common pleas in favor of the defendants, which judgment was, on appeal, confirmed by the supreme judicial court of the state. That judgment has been brought before this court by a writ of error.

§ 2321. *A charter of a bank is a contract, the obligations of which the states are prohibited from impairing.*

It has been settled that a contract entered into between a state and an individual is as fully protected by the tenth section of the first article of the con-

stitution as a contract between two individuals, and it is not denied that a charter incorporating a bank is a contract. Is this contract impaired by taxing the banks of the state?

§ 2322. — *but where such a charter contains no provision on the subject of taxation, a law taxing the corporation is not one impairing the obligation of a contract.*

This question is to be answered by the charter itself. It contains no stipulation promising exemption from taxation. The state, then, has made no express contract which has been impaired by the act of which the plaintiffs complain. No words have been found in the charter which in themselves would justify the opinion that the power of taxation was in the view of either of the parties, and that an exemption of it was intended, though not expressed. The plaintiffs find great difficulty in showing that the charter contains a promise, either express or implied, not to tax the bank. The elaborate and ingenious argument which has been urged amounts in substance to this: The charter authorizes the bank to employ its capital in banking transactions, for the benefit of the stockholders. It binds the state to permit these transactions for this object. Any law arresting directly the operations of the bank would violate this obligation, and would come within the prohibition of the constitution. But as that cannot be done circuitously which may not be done directly, the charter restrains the state from passing any act which may indirectly destroy the profits of the bank. A power to tax the bank may unquestionably be carried to such an excess as to take all its profits, and still more than its profits, for the use of the state, and consequently destroy the institution. Now, whatever may be the rule of expediency, the constitutionality of a measure depends not on the degree of its exercise, but on its principle. A power, therefore, which may in effect destroy the charter is inconsistent with it, and is impliedly renounced by granting it. Such a power cannot be exercised without impairing the obligation of the contract. When pushed to its extreme point or exercised in moderation, it is the same power, and is hostile to the rights granted by the charter. This is substantially the argument for the bank. The plaintiffs cite and rely on several sentiments expressed on various occasions by this court, in support of these positions.

The claim of the Providence Bank is certainly of the first impression. The power of taxing moneyed corporations has been frequently exercised, and has never before, so far as is known, been resisted. Its novelty, however, furnishes no conclusive argument against it. That the taxing power is of vital importance, that it is essential to the existence of government, are truths which it cannot be necessary to reaffirm. They are acknowledged and asserted by all. It would seem that the relinquishment of such a power is never to be assumed. We will not say that a state may not relinquish it, that a consideration sufficiently valuable to induce a partial release of it may not exist; but as a whole community is interested in retaining it undiminished, that community has a right to insist that its abandonment ought not to be presumed in a case in which the deliberate purpose of the state to abandon it does not appear.

The plaintiffs would give to this charter the same construction as if it contained a clause exempting the bank from taxation on its stock in trade. But can it be supposed that such a clause would not enlarge its privileges? They contend that it must be implied, because the power to tax may be so wielded as to defeat the purpose for which the charter was granted. And may not this be said with equal truth of other legislative powers? Does it not also

apply with equal force to every incorporated company? A company may be incorporated for the purpose of trading in goods as well as trading in money. If the policy of the state should lead to the imposition of a tax on unincorporated companies, could those which might be incorporated claim an exemption, in virtue of a charter which does not indicate such an intention? The time may come when a duty may be imposed on manufactures. Would an incorporated company be exempted from this duty as the mere consequence of its charter?

The great object of an incorporation is to bestow the character and properties of individuality on a collective and changing body of men. This capacity is always given to such a body. Any privileges which may exempt it from the burdens common to individuals do not flow necessarily from the charter, but must be expressed in it, or they do not exist. If the power of taxation is inconsistent with the charter, because it may be so exercised as to destroy the object for which the charter is given, it is equally inconsistent with every other charter, because it is equally capable of working the destruction of the objects for which every other charter is given. If the grant of a power to trade in money to a given amount implies an exemption of the stock in trade from taxation, because the tax may absorb all the profits, then the grant of any other thing implies the same exemption; for that thing may be taxed to an extent which will render it totally unprofitable to the grantee. Land, for example, has in many, perhaps in all, the states been granted by government since the adoption of the constitution. This grant is a contract, the object of which is that the profits issuing from it shall inure to the benefit of the grantee. Yet the power of taxation may be carried so far as to absorb these profits. Does this impair the obligation of the contract? The idea is rejected by all; and the proposition appears so extravagant, that it is difficult to admit any resemblance in the cases. And yet, if the proposition for which the plaintiffs contend be true, it carries us to this point. That proposition is, that a power which is in itself capable of being exerted to the total destruction of the grant, is inconsistent with the grant, and is therefore impliedly relinquished by the grantor, though the language of the instrument contains no allusion to the subject. If this be an abstract truth, it may be supposed universal. But it is not universal, and therefore its truth cannot be admitted, in these broad terms, in any case. We must look for the exemption in the language of the instrument, and if we do not find it there, it would be going very far to insert it by construction.

§ 2323. *An incorporated bank, unless its charter expressly exempts it from taxation, is liable to be taxed the same as individuals and unincorporated companies.*

The power of legislation, and consequently of taxation, operates on all the persons and property belonging to the body politic. This is an original principle, which has its foundation in society itself. It is granted by all for the benefit of all. It resides in government as a part of itself, and need not be reserved when property of any description, or the right to use it in any manner, is granted to individuals or corporate bodies. However absolute the right of an individual may be, it is still in the nature of that right that it must bear a portion of the public burdens, and that portion must be determined by the legislature. This vital power may be abused; but the constitution of the United States was not intended to furnish the corrective for every abuse of power which may be committed by the state governments. The interest, wisdom and

justice of the representative body, and its relations with its constituents, furnish the only security, where there is no express contract, against unjust and excessive taxation, as well as against unwise legislation generally. This principle was laid down in the case of *McCulloch v. State of Maryland*, 4 Wheat, 316 (§§ 380–398, *supra*), and in *Osborn v. Bank of United States*, 9 Wheat, 738 (§§ 2363–87, *infra*). Both those cases, we think, proceeded on the admission that an incorporated bank, unless its charter shall express the exemption, is no more exempted from taxation than an unincorporated company would be, carrying on the same business. The case of *Fletcher v. Peck*, 6 Cranch, 87 (§§ 1805–12, *supra*), has been cited; but in that case the legislature of Georgia passed an act to annul its grant. The case of *New Jersey v. Wilson*, 7 Cranch, 164 (§ 2295, *supra*), has been also mentioned, but in that case the stipulation, exempting the land from taxation, was made in express words.

The reasoning of the court in the case of *McCulloch v. State of Maryland* has been applied to this case; but the court itself appears to have provided against this application. Its opinion in that case, as well as in *Osborn v. Bank of United States*, was founded expressly on the supremacy of the laws of congress, and the necessary consequence of that supremacy to exempt its instruments, employed in the execution of its powers, from the operation of any interfering power whatever. In reasoning on the argument that the power of taxation was not confined to the people and property of a state, but might be exercised on every object brought within its jurisdiction, this court admitted the truth of the proposition, and added, that the power was an incident of sovereignty and was co-extensive with that to which it was an incident. All powers, the court said, over which the sovereign power of a state extends, are subjects of taxation. The sovereignty of a state extends to everything which exists by its own authority, or is introduced by its permission; but does it extend to those means which are employed by congress to carry into execution powers conferred on that body by the people of the United States? We think not. So in the case of *Osborn v. Bank of United States*, the court said, “the argument” in favor of the right of the state to tax the bank “supposes the corporation to have been originated for the management of an individual concern, to be founded upon contract between individuals having private trade and private profit for its great end and principal object.

“If these premises were true, the conclusion drawn from them would be inevitable. This mere private corporation, engaged in its own business, would certainly be subject to the taxing power of the state as any individual would be.” The court was certainly not discussing the question whether a tax, imposed by a state on a bank chartered by itself, impaired the obligation of its contract; and these opinions are not conclusive, as they would be had they been delivered in such a case; but they show that the question was not considered as doubtful, and that inferences, drawn from general expressions pointed to a different subject, cannot be correctly drawn.

§ 2324. *The act of Rhode Island of 1822, taxing licensed persons and others, and bodies corporate, does not impair the obligation of the contract created by the charter granted the Providence Bank.*

We have reflected seriously on this case, and are of opinion that the act of the legislature of Rhode Island, passed in 1822, imposing a duty on licensed persons and others, and bodies corporate within the state, does not impair the obligation of the contract created by the charter granted to the plaintiffs in error. It is therefore the opinion of this court that there is no error in the

judgment of the supreme judicial court for the state of Rhode Island affirming the judgment of the circuit court in this case, and the same is affirmed; and the cause is remanded to the said supreme judicial court, that its judgment may be finally entered.

HOME INSURANCE COMPANY v. CITY COUNCIL.

(8 Otto, 116-123. 1876.)

ERROR to the Supreme Court of Georgia.

Opinion by MR. JUSTICE SWAYNE.

STATEMENT OF FACTS.—Under an act of the legislature of Georgia, on the 19th of March, 1869, the insurance company procured the requisite authority to transact, by itself or agents, the business of insurance for one year from the 1st of January, 1874, and at the option of the company for sixty days longer. The company thereupon established an office and agency in the city of Augusta, and thereafter transacted business at that place. A general law of the state imposed a tax of one per cent. upon the gross amount of premiums received. An ordinance of the city imposed a tax of one and a quarter per cent. upon such receipts. These taxes were paid by the company without objection. On the 5th of January, 1874, the city council passed an ordinance which imposed, further, a license tax of \$250 "on each and every fire, marine or accidental insurance company located, having an office, or doing business within the city of Augusta." The bill was filed to enjoin the collection of this tax. The superior court of Richmond county sustained the validity of the tax, and dismissed the bill. The supreme court of the state affirmed the decree. The complainant thereupon sued out a writ of error, and removed the case to this court.

§ 2325. *Upon what depends the jurisdiction of this court over the judgments of state courts.*

In the argument here it was insisted by the defendant in error that this court has no jurisdiction of the case. We will first consider this objection. The bill alleges that the ordinance imposing the tax in question is void for many reasons, and, among them, that it is in conflict with the contract clause of the constitution of the United States.

Where a judgment or decree is brought to this court by a writ of error to a state court for review, the case, to warrant the exercise of jurisdiction on our part, must come within one of three categories: 1. There must have been drawn in question the validity of a treaty or statute of, or authority exercised under, the United States; and the decision must have been against the claim which either was relied upon to maintain. 2. Or there must have been drawn in question a statute of, or authority exercised under, a state, upon the ground of repugnance to the constitution, or a law or treaty, of the United States; and the decision must have been in favor of the validity of the state law or authority in question. 3. Or a right must have been claimed under the constitution, or a treaty or law of, or by virtue of a commission held, or authority exercised under, the United States; and the decision must have been against the right so claimed. R. S., 132, sec. 709; *Sevier v. Haskell*, 14 Wall., 15; *Weston v. City Council of Charleston*, 2 Pet., 449 (§§ 399-407, *supra*); *McGuire v. The Commonwealth*, 3 Wall., 885.

Here there was drawn in question the authority exercised by the city council, under the state, in passing the ordinance imposing the tax complained of.

The question raised was as to its repugnancy to the constitution of the United States; and the decision was in favor of the validity of the authority so exercised. A right was also claimed under the constitution of the United States. The decision was adverse to the claim. The case is, therefore, within two of the categories we have stated. The jurisdictional objection cannot be maintained.

This brings us to the consideration of the case upon its merits. Whether the claims which give us jurisdiction are well founded is the question to be considered. The national constitution (art. 1, sec. 10, clause 1) declares that "no state shall pass any law impairing the obligation of contracts."

§ 2326. *A license to a foreign corporation to transact business in a state, upon payment of fees, does not, without more, limit the state's power of taxation.*

The act of 1869, before mentioned, forbids any company to do the business of insurance in the state, without first obtaining a certificate from the comptroller-general of the state. Before obtaining such certificate, every company is required to furnish a sworn statement, setting forth certain specified particulars. Upon being satisfied of the truth of the statement, he is required to issue the certificate. He is entitled to a fee of \$7.50 for examining and filing each statement, and a fee of \$2.50 for each certificate. The fifth section declares that whatever deposits, taxes, penalties, certificates, or license fees, are exacted from Georgia companies in any other state, shall be exacted from the companies of such state in Georgia. It does not appear, by the record, that any Georgia insurance company was doing business in New York in the year 1874. This section, therefore, does not affect the case in hand. The act contains no other allusion to the subject of taxation. It does not, therefore, circumscribe, in any degree, the taxing power of the state, or of any municipality within the state clothed with such authority. It left both, in this respect, standing just where they would have stood if this act had not been passed. It contained no stipulation, express or implied, that either should be thereby in any wise limited or restrained. If it were competent for the state to impose the tax of one per cent. upon the gross amount of premiums received, would it not have been equally so for the state to impose a further tax, the same with that in question, and in the same way? And if it were competent for the city council to impose the tax of one and a quarter per cent. upon the same receipts, why might it not impose the further burden here in question? If the state could impose the further tax, why not the municipality? Is there any sensible ground of contract prohibition upon which the claim of exemption from either can be placed? This question must necessarily be answered in the negative. We find no semblance of a contract that additional taxes should not be imposed.

§ 2327. *A state may tax a corporation doing business within the state.*

In *The License Cases*, 5 Wall., 462, the nature of the tax exaction here in controversy was carefully considered by this court. There the revenue laws of the United States required payment in advance to be made for permission to carry on the business of selling liquor, and of selling lottery tickets. It was provided that no license so granted, or special tax so laid, should be construed to authorize any business within a state forbidden by the laws of such state, or so as to prevent the taxation by the state of the same business. This court held that the payment required was a special tax, levied in the manner prescribed; that the penalty provided was a mode of enforcing its payment; and that the license, when issued, was only a receipt for the tax. It was held further, that, as regards the reservation of power in favor of the states, the result would have

been the same if the acts of congress had been silent upon the subject. This was necessarily so, because the objects taxed belonged to the internal commerce of the states, and were within their police power, and the right of congress and the states to tax was concurrent. Congress could, therefore, no more restrict the power of a state than the state could restrict that of congress.

What is said there as to license taxes is applicable to the case before us. There is no difference in principle between such a tax and those which have been paid by the plaintiff in error to the defendant in error, and to the state, without objection. In the ordinance in question the tax is designated "a license tax," but its payment is not made a condition precedent to the right to do business. No special penalty is prescribed for its non-payment, and no second license is required to be taken out. Had the ordinance been otherwise in these particulars, we have seen, viewing the subject in the light of the License Tax Cases, that the result would have been the same. The case in all its aspects was ably and elaborately examined by the supreme court of the state. Their conclusion upon the "federal question" we have considered is the same with ours. There being no other such question raised in the record, our duty is thus terminated. We have no authority to look further into the case.

Judgment affirmed.

THE DELAWARE RAILROAD TAX.

(18 Wallace, 206-232. 1873.)

APPEAL from U. S. Circuit Court, District of Delaware.

STATEMENT OF FACTS.—On April 8, 1869, the state of Delaware passed an act taxing railroad companies. The tax was to be levied on the income, on the capital stock and on rolling stock used on the roads, different rates being prescribed for each. The tax having been paid under protest by the Philadelphia, Wilmington & Baltimore Railroad Company, Minot, a stockholder, brought this suit. The circuit court held the tax on the rolling stock invalid, but sustained the others. The railroad company was composed of a union of companies chartered by Delaware, Maryland and Pennsylvania, the act of Delaware, authorizing the consolidation, providing that the respective companies should constitute one company, and be entitled to "all the rights, privileges and immunities which each and all of them possess, have and enjoy under and by virtue of their respective charters."

Opinion by MR. JUSTICE FIELD.

It is contended by the appellant that the act of Delaware of April 8, 1869, so far as it imposes taxes upon the corporation defendant, violates the contract between the state and the corporation contained in the charter of the latter. His position is that the provision, in the act of Delaware of 1835, by which the Wilmington & Susquehanna Railroad Company was united with the Delaware & Maryland Railroad Company, that the new company should pay annually into the treasury of the state a tax of one-quarter of one per cent. upon its capital stock of \$400,000, being accepted by the stockholders of the two companies by their union into one company, constituted a contract between the new company and the state of Delaware, which precluded that state from imposing any greater or different tax upon the capital stock of the new company; and that the provision in the same act of Delaware, that the new company should possess all the rights and privileges vested in the original companies, or either of them, by that law, or any other law of that state or of Maryland,

extended to the new company the same exemption from taxation on its shares of capital stock which was possessed by the Maryland corporation under its charter; and that the same limitation upon the taxation of the capital stock, and the same immunity of the shares from any taxation, were extended to the corporation defendant by the provisions of the act of Delaware under which this latter company was formed.

§ 2328. *The charter of a private corporation a contract.*

That the charter of a private corporation is a contract between the state and the corporators, and within the provision of the constitution prohibiting legislation impairing the obligation of contracts, has been the settled law of this court since the decision in *Dartmouth College v. Woodward*, 4 Wheat., 518 (§§ 2099–2117, *supra*). Nor does it make any difference that the uses of the corporation are public, if the corporation itself be private. The contract is equally protected from legislative interference, whether the public be interested in the exercise of its franchise or the charter be granted for the sole benefit of its corporators. This doctrine is not controverted by any one; it is the established law; and the question in all cases, when it becomes necessary to apply it, is whether the particular legislative interference alleged does in fact impair the obligation of the contract; for it is not every kind of legislative interference with the powers, action and property of the corporation which will have that result.

§ 2329. *Construction of grants of immunity from taxation.*

It has also been repeatedly held by this court that the legislature of a state may exempt particular parcels of property or the property of particular persons or corporations from taxation, either for a specified period or perpetually, or may limit the amount or rate of taxation to which such property shall be subjected. And when such immunity is conferred, or such limitation is prescribed by the charter of a corporation, it becomes a part of the contract, and is equally inviolate with its other stipulations. But before any such exemption or limitation can be admitted, the intent of the legislature to confer the immunity or prescribe the limitation must be clear beyond a reasonable doubt. All public grants are strictly construed. Nothing can be taken against the state by presumption or inference. The established rule of construction in such cases is that rights, privileges and immunities not expressly granted are reserved. There is no safety to the public interests in any other rule. And with special force does the principle, upon which the rule rests, apply when the right, privilege or immunity claimed calls for any abridgment of the powers of the government or any restraint upon their exercise. The power of taxation is an attribute of sovereignty, and is essential to every independent government. As this court has said, the whole community is interested in retaining it undiminished, and has “a right to insist that its abandonment ought not to be presumed in a case in which the deliberate purpose of the state to abandon it does not appear.” *Providence Bank v. Billings*, 4 Pet., 561 (§§ 2321–24, *supra*). If the point were not already adjudged it would admit of grave consideration, whether the legislature of a state can surrender this power and make its action in this respect binding upon its successors, any more than it can surrender its police power or its right of eminent domain. But the point being adjudged, the surrender when claimed must be shown by clear, unambiguous language, which will admit of no reasonable construction consistent with the reservation of the power. If a doubt arise as to the intent of the legislature, that doubt must be solved in favor of the state.

§ 2330. *Where in a charter a fixed tax is stipulated, the state is not precluded from laying a further tax, there being no words to that effect.*

If, now, we apply this rule of construction to the provision of the act of Delaware under which the original Wilmington & Susquehanna Railroad Company was united with the Delaware & Maryland Railroad Company, requiring the new company to pay annually into the treasury of the state a tax of one-quarter of one per cent. upon its capital stock of \$400,000, the position of the appellant falls to the ground. That provision is not accompanied with any words indicating the intent of the legislature that no further or different tax should not be subsequently levied. Had the provision in question been embodied in an independent act, no one would pretend that the designation of the amount and character of the tax carried with it any implication that the tax should remain unchanged in these particulars for all future time during the existence of the corporation. And it is not perceived how a different conclusion is warranted because the tax is designated in an independent section of the act under which the new company was formed, instead of being designated in an independent act. As already observed, nothing can be taken from the power of the state in this respect by presumption or inference.

In the case of *Commonwealth v. Easton Bank*, 10 Penn. St., 451, we have an adjudication of the supreme court of Pennsylvania upon the precise question here presented. The Easton Bank had been chartered under a general law which prescribed the payment of taxes on its dividends at a fixed rate. A subsequent statute increased that rate, and it was argued, as here, that the designation in the original act created a contract on the part of the state that no additional tax should be laid, and that the latter act, therefore, impaired the obligation of the contract. But the court held that the designation in the original act was nothing more than a simple declaration of the tax *then* to be paid by the bank, and did not give the slightest intimation of an agreement or understanding that the tax should not be increased during the existence of the charter. "To deduce," said the court, "from premises so insufficient, a consequence of such magnitude, would, indeed, be a gross violation of the wholesome principle that an abandonment of the power of taxation is only to be established by clearly showing this to have been the deliberate purpose of the state."

§ 2331. *Construction of acts consolidating two or more corporations.*

The position of the appellant, as to the effect of the provision in the same act of Delaware, that the new company should possess all the rights and privileges vested in the original companies, or either of them, by that act, or any other law of that state or the state of Maryland, is more plausible, but equally unfounded. It proceeds, we think, as stated by the circuit court, upon a misapprehension of the purpose of the provision. A similar provision, as already stated, is contained in the Maryland act authorizing, on her part, the consolidation of the companies. The purpose of the two provisions was to vest in the new company the rights and privileges which the original companies had previously possessed under their separate charters; the rights and privileges in Maryland which the Maryland company had there enjoyed, and the rights and privileges in Delaware which the Delaware company had there enjoyed; not to transfer to either state and enforce therein the legislation of the other. The new company was clothed by the legislature of Delaware, so far as that legislature could clothe it, with all the rights and privileges of both the original companies; but as the Maryland company took under the legislation of Maryland only exemption from taxation of its shares in Maryland, the privilege of

the new company in this matter could only be a similar exemption in that state, not a similar exemption of the shares of its capital stock from taxation in Delaware. The new company stood in each state as the original company had previously stood in that state, invested with the same rights, and subject to the same liabilities. And the act of consolidation, so far as Delaware was concerned, had only this effect.

§ 2332. *The act of March 8, 1869, of the Delaware legislature, does not violate any contract between that state and the defendant corporation contained in the charter of the latter.*

The act of that state under which the three companies were consolidated into one, and the present defendant corporation was formed, contained a similar provision to the one we have been considering, that the new consolidated company should be entitled to all the rights, privileges and immunities which each and all of them possessed and enjoyed under their respective charters, a provision which, in no respect, changed the position with reference to taxation of the new company in one of the states from that of the old company in such state. Such is substantially the construction given by this court in the case of the Philadelphia, Wilmington & Baltimore R. Co. v. Maryland, reported in 10 How., 377. In that case the question arose whether the qualified exemption of the line of road which belonged to one of the companies was extended to the consolidated company under the provision in question; and the court said that, "as these companies held their corporate privileges under different charters, the evident meaning of this provision is, that whatever privileges and advantages either of them possessed should in like manner be held and possessed by the new company, to the extent of the road they had respectively occupied before the union; that it should stand in their place, and possess the power, rights and privileges they had severally enjoyed in the portions of the road which had previously belonged to them." We are, therefore, of opinion that the act of April 8, 1869, is not obnoxious to the objection that it violates any contract between the state of Delaware and the company contained in the charter of the latter.

§ 2333. *Shares may be taxed at the locality of the corporation, if the charter so provides.*

We proceed, therefore, to the second objection to the act, that it imposes taxes upon property beyond the jurisdiction of the state. If such be the fact, the tax to that extent is invalid, for the power of taxation of every state is necessarily confined to subjects within its jurisdiction. The objection of the appellant is directed principally to the tax imposed by the fourth section of the act, and assumes that the tax must be considered as laid upon the shares as representing the separate property of the individual stockholders, or as representing the property of the corporation. And the argument is that if the tax be laid upon the shares of the stockholders it falls upon property out of the state, because nearly all the stockholders, at least a much greater number than the ratio of the mileage of the road in Delaware to its entire length, are citizens and residents of other states; and if the tax be laid upon the shares as representing the property of the corporation, it falls upon property out of the state, because the ratio of the mileage of the road in Delaware to its entire length is not that which the capital invested by the company in that state bears to the entire capital of the company, or that which the value of the property of the company there situated bears to the value of its entire property.

If the assumption of the appellant were correct, there would be difficulty in

sustaining the validity of the tax. In the first place, the share of a stockholder is, in one aspect, something different from the capital stock of the company; the latter only is the property of the corporation; the former is the individual interest of the stockholder, constituting his right to a proportional part of the dividends when declared, and to a proportional part of the effects of the corporation when dissolved, after payment of its debts. Regarded in that aspect it is an interest or right which accompanies the person of the owner, having no locality independent of his domicile. *Van Allen v. Assessors*, 3 Wall., 583; *Union Bank v. State*, 9 Yerg., 501; *Richmond v. Daniel*, 14 Gratt., 385; *Savings Bank v. Nashua*, 46 N. H., 398; *Dwight v. Mayor*, 12 Allen, 322; *Redfield's Supplement to Law of R'ys*, 507-510. But whether, when thus regarded, it can be treated as so far severable from the property to which it relates as to be taxable independent of the locality of the latter, is a question not necessary now to decide. The argument of the appellant assumes that it is thus severable.

In any aspect, if provision for the taxation of the shares at the locality of the company be made in its charter, their taxability at such locality is annexed as an incident to the shares, and it does not matter where the domicile of the owner may be. The tax may then be enforced through the corporation by requiring it to withhold the amount from the dividends payable thereon. The shares in the national banks created under the act of congress of June 3, 1864, are made taxable at the place where the bank is located, and not elsewhere; and in the case of *National Bank v. Commonwealth*, reported in 9 Wall., 353, a law of Kentucky requiring the banks in that state to pay the tax laid on their shares was sustained by this court. But in the act of Delaware under which the corporation defendant was formed, there is no such provision for the taxation of the shares of the individual stockholders.

In the second place, assuming that the tax is upon the property of the corporation, if the ratio of the value of the property in Delaware to the value of the whole property of the company be less than that which the length of the road in Delaware bears to its entire length, and such is admitted to be the fact, a tax imposed upon the property in Delaware according to the ratio of the length of its road to the length of the whole road must necessarily fall upon property out of the state. The length of the whole road is in round numbers one hundred miles; the length in Delaware is twenty-four miles. The tax upon the property estimated according to this ratio would be in Delaware $\frac{24}{100}$, or $\frac{6}{25}$ of the amount of the tax upon the whole property. But the value of the property in Delaware is not $\frac{6}{25}$ of the value of the whole property, but much less than this proportion would require. We repeat, therefore, that upon the assumption made by the appellant there would be difficulty in sustaining the tax.

§ 2334. *The tax imposed by the Delaware act of April 8, 1869, was upon the corporation itself as an entity, and is valid.*

We do not think, however, the assumption is correct. As we construe the language of the fourth section, the tax is neither imposed upon the shares of the individual stockholders nor upon the property of the corporation, but is a tax upon the corporation itself, measured by a percentage upon the cash value of a certain proportional part of the shares of its capital stock; a rule which, though an arbitrary one, is approximately just; at any rate is one which the legislature of Delaware was at liberty to adopt. The state may impose taxes upon the corporation as an entity existing under its laws, as well as upon the capital

stock of the corporation or its separate corporate property. And the manner in which its value shall be assessed and the rate of taxation, however arbitrary or capricious, are mere matters of legislative discretion. It is not for us to suggest in any case that a more equitable mode of assessment or rate of taxation might be adopted than the one prescribed by the legislature of the state; our only concern is with the validity of the tax; all else lies beyond the domain of our jurisdiction.

Nothing was urged in the argument specially against the tax upon the corporation under the first section of the act, which is determined by the net earnings or income of the company. Whatever objections could be presented are answered by the observations already made upon the tax under the other section. A tax upon a corporation may be proportioned to the income received as well as to the value of the franchise granted or the property possessed.

§ 2335. *A tax on railroads by a state does not conflict with the power of congress to regulate commerce, etc.*

It remains to notice the objections that the act of 1869 conflicts with the power of congress to regulate commerce among the several states, and interferes with the right of transit of persons and property from one state into or through another. The tax imposed by the act in question affects commerce among the states and impedes the transit of persons and property from one state to another just in the same way, and in no other, that taxation of any kind necessarily increases the expenses attendant upon the use or possession of the thing taxed. That taxation produces this result of itself constitutes no objection to its constitutionality. As was very justly observed by this court in a recent case, "Every tax upon personal property, or upon occupations, business, or franchises, affects more or less the subjects, and the operations of commerce. Yet it is not everything that affects commerce that amounts to a regulation of it, within the meaning of the constitution." *State Tax on Railway Gross Receipts*, 15 Wall., 293 (§§ 1263-64, *supra*). The exercise of the authority which every state possesses to tax its corporations and all their property, real and personal, and their franchises, and to graduate the tax upon the corporations according to their business or income, or the value of their property, when this is not done by discriminating against rights held in other states, and the tax is not on imports, exports or tonnage, or transportation to other states, cannot be regarded as conflicting with any constitutional power of congress.

From the views expressed, it follows that the judgment of the circuit court must be affirmed; and it is so ordered.

NEW JERSEY v. YARD.

(5 Otto, 104-117. 1877.)

Opinion by MR. JUSTICE MILLER.

STATEMENT OF FACTS.—This is a writ of error to the court of errors and appeals of the state of New Jersey. The plaintiff invokes the jurisdiction of this court on the ground that an act of the legislature of that state, approved April 2, 1873, concerning taxation of railroad corporations, impairs the obligation of a contract between the state and the plaintiff, found in an act of March 23, 1865, and the written acceptance of that act by the company, dated April 24th of that year.

The third section of the act of 1865 reads as follows: "Be it enacted that

the tax of one-half of one per cent. provided by their said original act of incorporation, to be paid by the said company to the state whenever the net earnings of the said company amount to seven per cent. upon the cost of the road, shall be paid at the expiration of one year from the time when the road of the said company shall be open and in use to Phillipsburgh, and annually thereafter, which tax shall be in lieu and satisfaction of all other taxation or imposition whatsoever, by or under the authority of this state or any law thereof: *Provided*, that this section shall not go into effect or be binding upon the said company until the said company, by an instrument duly executed under its corporate seal, and filed in the office of the secretary of state, shall have signified its assent hereto, which assent shall be signified within sixty days after the passage of this act, or this act shall be void."

The act of 1873 imposed a more burdensome tax than this on all railroad companies not protected by irrevocable contracts; and the court of errors held that this statute was applicable to the plaintiff, because the contract of 1865, which had been formally accepted by the company, was repealable by the legislature of the state.

The single question, therefore, for our consideration is, whether the act of March 23, 1865, and its acceptance by the Morris & Essex Railroad Company, constituted a contract which could not be impaired by any subsequent legislation of the state. The court of errors decided that, while the act of 1865 was a contract, it must be taken in connection with other legislation of the state on that subject, by which the legislature reserved the right to alter and amend the contract, and that this right entered into and became a part of it; therefore, the exercise of this right did not impair its obligation.

§ 2336. *The legislature of a state cannot prohibit succeeding legislatures from binding the state by irrevocable legislative contracts.*

The solution of the question here presented must depend, first, upon an inquiry into this supposed reservation of power; and secondly, into the essential character of the contract of 1865. The case before us differs from those in which, by the constitution of some of the states, this right to alter, amend and repeal all laws creating corporate privileges becomes an inalienable legislative power. The power thus conferred cannot be limited or bargained away by any act of the legislature, because the power itself is beyond legislative control. The right asserted in this case to amend or repeal legislative grants to corporations, being itself but the expression of the will or purpose of the legislature for one particular session or term of the state of New Jersey, cannot bind any succeeding legislature which may choose to make a grant or a contract not subject to be altered or repealed; or, if any succeeding legislature to that of 1846, which enacted that "the charter of every corporation which shall hereafter be granted by the legislature shall be subject to alteration, suspension and repeal, in the discretion of the legislature," shall grant a charter or amend a charter, declaring in the act that it shall not be subject to alteration or repeal, the former act is of no force in that case. So it can by a general law repeal this general reservation of the right to repeal, and all special reservations in separate charters. It follows that, unlike the constitutional provision in other states, it is in New Jersey a question, in every case of a contract made by the legislature, whether that body intended that the right to change or repeal it should inhere in it, or whether, like other contracts, it was perfect, and not within the power of the legislature to impair its obligation.

§ 2337. *Construction of the charter of the Morris & Essex Railroad Company of New Jersey.*

The Morris & Essex Railroad Company was chartered by an act of the legislature January 29, 1835. Section 16 enacts that "as soon as the net proceeds of said railroad shall amount to seven per cent. (in any one year) upon its cost, the said corporation shall pay to the treasurer of the state a tax of one-half of one per cent. on the cost of said road, to be paid annually thereafter on the first Monday of January of each year; provided, that no other tax or impost shall be levied or assessed." By section 20, "the legislature reserve to themselves the right to alter, amend or repeal this act, whenever they think proper." The next succeeding legislature, in a supplement to the charter, repealed section 20, and substituted this language: "The legislature reserve to themselves the right to alter or amend this supplement, or the act to which this is a supplement, whenever the public good may require it." It is this last clause which counsel insist became, by operation of law, a part of the contract of the act of 1865, concerning taxation, already quoted.

The argument is that the original charter, and all subsequent amendments and supplements, are to be treated merely as parts of one act, and that this reserve of the right to alter or amend became a part of every new law which has reference to that railroad company. In support of this proposition, the cases of *Newark City Bank v. Assessor*, 30 N. J. L., 22, and *State v. Bergen*, 34 id., 439, are cited. They announce the general principle that a charter and its amendments are to be considered as acts *in pari materia* in construing them, and they do little more. The precise point held is, that a city charter, being declared to be a public act, supplements and amendments to it are also to be treated as public acts. But this falls short of establishing the principle that a reservation in a charter to a private corporation, of the right to repeal or amend it, shall extend to every subsequent amendment of the charter. It is not easy to see why such a provision should be extended beyond the terms in which it is expressed; and all the force which properly belongs to it is given when the exemption from the constitutional provision against impairing the obligation of contracts is extended as far as the language of the exemption justifies, and it should be extended no further by implication. The language in the statute we are construing covers the supplement of 1836 and the original act, and nothing more,—“the right to alter or amend this supplement, or the act to which this is a supplement,”—leaving future supplements to make the same reservation, if the legislature so intends.

§ 2338. *A statute which declares that charters granted thereafter shall be liable to repeal does not necessarily apply to supplements to existing charters.*

Section 6 of the general act of 1846 is by its terms limited to charters of corporations granted after its passage; and it requires a very strong implication to make it applicable to amendments to charters in existence before its passage, though the amendments were executed subsequently. But as we have already said, since the legislature which passed the act of 1865 had the power to make a contract which should not be subject to repeal or modification by one of the parties to it without the consent of the other, the main question here is, Did they intend to make such a contract? The principal function of a legislative body is not to make contracts, but to make laws. These laws are put into a form which, in all countries using the English language and inheriting the English common law, is called a statute. Unless forbidden by some exceptional

constitutional provision, the same authority which can make a law can repeal it. The constitution of the United States has imposed such a limitation upon the legislative power of all the states, by declaring that no state shall pass any law impairing the obligation of a contract. The frequency with which this court has been called on to declare state laws void, because they do impair the obligation of contracts, shows how very important and far-reaching that provision is. It may safely be said that in far the larger number of cases brought to this court under that clause of the constitution, the question has been as to the existence and nature of the contract, and not the construction of the law which is supposed to impair it; and the greatest trouble we have had on this point has been in regard to what may be called legislative contracts,—contracts found in statute laws of the state, if they existed at all. It has become the established law of this court that a legislative enactment, in the ordinary form of a statute, may contain provisions which, when accepted as the basis of action by individuals or corporations, become contracts between them and the state within the protection of the clause referred to of the federal constitution.

The difficulty in this class of cases has always been to distinguish what is intended by the legislature to be an exercise of its ordinary legislative function in making laws, which, like other laws, are subject to its full control by future amendments and repeals, from what is intended to become a contract between the state and other parties when the terms of the statute have been accepted and acted upon by those parties. This has always been a very nice point; and, when the supposed contract exists only in the form of a general statute, doubts still recur, after all our decisions on that class of questions. These doubts are increased when the terms of the statute relate to a matter which is in its essential nature one of exclusive legislative cognizance, and which at the same time requires money or labor to be expended by individuals or corporations. In such cases, the legislature may be supposed to be merely exercising its power of regulating the burdens which are to be borne for the public service, in which case it could be modified from time to time as legislative discretion might determine; or it might be a contract founded on a fair consideration moving from the party concerned to the state, and which in that case would be beyond the power of the state to impair. Statutes fixing the taxes to be levied on corporations partake, in a striking manner, of this dual character, and require for their construction a critical examination of their terms, and of the circumstances under which they are created. The writer of this opinion has always believed, and believes now, that one legislature of a state has no power to bargain away the right of any succeeding legislature to levy taxes in as full a manner as the constitution will permit. But, so long as the majority of this court adhere to the contrary doctrine, he must, when the question arises, join with the other judges in considering whether such a contract has been made.

§ 2339. *That a charter requires, as a condition precedent to its operation, a formal acceptance of its terms, implies that it is regarded as a binding contract when so accepted.*

In the case now under consideration, it is conceded on all hands that the act of 1865 was a contract for a tax of one-half of one per cent. per annum on the cost of the Morris & Essex Railroad, and no more. But counsel for defendant says the contract was repealable; that the legislature of its own volition could impose other and more burdensome taxes, at its discretion; that it was a contract so long as the legislature of New Jersey was satisfied with it, and no longer. It is conceded, also, that this construction of it cannot be sus-

tained, unless we are bound to import into it either the reservation clause of the act of 1836, or what is called the interpretation act of 1846. We have already shown how little reason there is for doing this on general principles of construction. We think it still clearer that it cannot be done, because it is inconsistent with the legislative intent in passing the act of 1865.

1. The legislature was not willing to rest this contract in the usual statutory form alone, depending for its validity as a contract upon some action of the corporation under it to bind it to its terms; but they required of the company a formal written acceptance within sixty days, or else it became wholly inoperative. The company duly executed this acceptance. There was, then, the complete formal, written instrument evidencing this contract, signed by the presiding officers of the two houses of the New Jersey legislature, and the governor, for one party, and the president and secretary and seal of the railroad company, of the other party. It does seem as if the legislative intention was to make a contract in the same manner, and on the same terms of equal obligation, as other contracts are made, and not to pass a statute which it could repeal or amend the day after it was signed by the parties.

§ 2340. *Where there is a settlement of disagreements, additional rights granted and a rate of taxation settled, a contract binding upon both parties will be inferred.*

2. There was a well-understood subject of contract. The corporation wished authority to build a branch road or roads, with favorable route, and power to acquire right of way; and the state wished the vexed question of the right to tax the corporation to be settled. For the company denied the right of the state to tax them under their charter, until the road paid them a net income of seven per cent. per annum on its cost. The legislature said, if you will consent to pay the one-half of one per cent. tax as originally agreed, and commence to do this within one year from the time the road shall be open and in use to Phillipsburgh, we will authorize an increase of ten millions of your capital stock and the franchises you seek as to the branch roads, and will agree that the tax shall be fixed at one-half of one per cent. Here was a subject of disagreement adjusted, additional rights granted, and the tax fixed, both as to its rate and the time of commencement. Can it be believed that it was intended by either party to this contract that, after it was signed by both parties, one was bound forever, and the other only for a day? That it was intended to be a part of the contract that the state of New Jersey was, at her option, to be bound or not? That there was implied in it, when it was offered to the acceptance of the company, the right on the part of the legislature to alter or amend it at pleasure? If the state intended to reserve this right, what necessity for asking the company to accept in such formal manner the terms of a contract which the state could at any time make to suit itself?

§ 2341. *A contract will be implied when the language used is inconsistent with any other hypothesis.*

3. The language used by the legislature is inconsistent with the right claimed. "Which tax (one-half of one per cent.) shall be in lieu and satisfaction of all other taxation or impositions whatsoever by or under authority of this state, or any law thereof." Is there here to be implied "except such laws as may hereafter be enacted?" Such a provision would be to nullify the whole contract. How could the tax be in lieu and satisfaction of all other taxation, if other taxes might be imposed next day? Or how can it be said to be in satisfaction of all taxes whatsoever under authority of the state, if the state

could immediately impose another and more burdensome tax? We admit the force of the doctrine, that, when it is asserted that a state has bargained away her right of taxation in a given case, the contract must be clear, and cannot be made out by dubious implications. But of the existence of the present contract there is no doubt. Its meaning and its terms are clear enough, and taken alone, no one denies but that it is a contract which would be protected by the constitution of the United States. The implication is of a right to revoke it, and comes from the other quarter, and is one which we do not think exists by fair construction, and which we do not feel at liberty to import into the contract to defeat its manifest purpose.

Judgment reversed, and cause remanded for further proceedings in conformity to this opinion.

§ 2342. **Power to exempt property.**—A state legislature has the power to grant to a corporation perpetual immunity from taxation, and such a grant is a contract which the state cannot subsequently impair. *Humphrey v. Pegues*,* 16 Wall., 244; *Jefferson Branch Bank v. Skelly*,* 1 Black, 436. See §§ 2219, 2227, 2230, 2238.

§ 2343. **Intention to exempt must clearly appear.**—Unless the intention to relinquish the right of taxation is expressed in a charter in clear and unambiguous terms, a court cannot presume that the legislature intended to relinquish that right. *Philadelphia & Wilmington R. Co. v. Maryland*, 10 How., 393; *Minot v. Philadelphia, etc., R'y Co.*, 2 Abb., 383; *North Missouri Railroad v. Maguire*, 20 Wall., 46; *New Jersey v. Yard.*, 5 Otto, 116, and 16 Alb. L. J., 466 (§§ 2336-41); *Wilmington Railroad v. Reid*, 18 Wall., 264 (§§ 2303, 2304); *Louisville, etc., R'y Co. v. Gaines*, 2 Flip., 682; *Railroad Co. v. Philadelphia*, 11 Otto, 528 (§§ 2366-72). See § 2343.

§ 2344. **Reserved power of amendment.**—An amendment to the charter of a railroad company provided that cities and towns along its route might contribute to its capital stock, and that its property should be exempt from taxation for a certain time. *Held*, that these provisions constituted a contract, and one and the same contract, and that before the limitation expired the state had no right to impose a tax on the property of the road, unless the right to do so was reserved to the state as a part of the same contract; that the provisions of law in force at the time of the passage of the act, authorizing the legislature to amend or alter the charter of any corporation thereafter to be created, was sufficient to enable the legislature to repeal the exemption from taxation. *Hewitt v. New York & Oswego Midland R'y Co.*, 12 Blatch., 476. See §§ 2030, 2032, 2037, 2049, 2051, 2057, 2198, 2220, 2222, 2224, 2239, 2240, 2245.

§ 2345. **Where a legislature has entered into a positive contract with a corporation that it shall be subjected to only certain specified forms of taxation, a reservation of the right to alter such contract cannot be left to dubious implication, but must be clearly made out.** *New Jersey v. Yard*, 5 Otto, 117 (§§ 2336-41).

§ 2346. **Land purchased from United States.**—The purchaser of land from the United States, in the state of Indiana, during the existence of the law of that state exempting from taxation "all lands sold by the United States until the term of five years from the day of the sale shall have expired," holds a contract of exemption which the state cannot impair. The fact that the exemption was induced by the act of congress of 1816, "to enable the people of Indiana territory to form a constitution," and that congress, by the act of 1847, assented to the imposition of taxes upon all lands sold by the United States from the day of sale, does not make the transaction any less a contract, the act of the state containing the exemption being in force in 1852, when the sale was made. *Thompson v. Holton*,* 6 McL., 386.

§ 2347. **Exemption does not pass to grantee, when.**—By act of the Ohio legislature in 1804, it was provided that certain college lands, reserved for the purposes of a university by the ordinance of 1787, should be vested in the trustees of the university and leased by them at a fixed annual rental, and that, in addition to such rental, the tenants should pay to the trustees a sum equal to the taxes levied on other property of the same kind in the state, and that such lands should be exempt from taxation. In 1826 the trustees were authorized to convey the college lands in fee simple. The act contained no proviso as to exemption from taxation, nor did the deeds under which the purchasers took title. In 1840 the legislature enacted that these lands should be taxed. *Held*, that the law of 1840 was valid, and not unconstitutional, as being in violation of the section prohibiting a state to pass any law impairing the obligation of contracts. The purchasers under the act of 1826 cannot go behind it, and are subject to be taxed like any other persons holding land in fee simple. *Armstrong v. Treasurer of Athens County*, 16 Pet., 287.

§§ 2348-2355. CONSTITUTION AND LAWS.—OBLIGATION OF CONTRACTS.

§ 2348. No contract of exemption.—A state statute granting to a corporation of another state the right to exercise its franchise within the state, and which provided that the company should, after the completion of the road in that state, pay into the treasury, as a tax, annually, the sum of \$10,000, and further providing that the stock of the company to an amount equal to the cost of the construction of that part of the road situate in that state should be subject to taxation in the same manner and at the same rate as other similar property, and containing no other provisions on the subject of taxation, does not constitute a contract that the state will not impose different taxes in the future. Other and further taxes imposed by the state upon the property of the road will impair no contract. *Erie Railway Co. v. Pennsylvania*, 21 Wall., 492. See §§ 2218, 2231, 2232, 2233, 2248.

§ 2349. The act of February 16, 1865, of the legislature of Missouri, to provide for the completion of the North Missouri Railroad, by which the lien upon the road, which had been secured to the state as security for the payment of certain sums of money advanced to the company by the state in the form of bonds, was released and a second lien accepted in its stead, in order that the company might issue and secure bonds of its own, and thereby complete its road; and by which the moneys belonging to the company were to be placed in the hands of a fund commissioner created by the act, and to be distributed by him as follows: (1) Amounts required for the expenditures in operating and repairing the road and carrying on the business of the corporation. (2) Amounts sufficient to pay the fund commissioner. (3) Amounts sufficient to pay the interest on said first mortgage bonds. (4) Amounts necessary for the construction and equipment of the road. (5) Amounts sufficient to pay accruing dividends on preferred stock. (6) Amounts sufficient to pay interest due on the outstanding bonds of the state previously loaned to the company. (7) The surplus to be disbursed to the payment of the principal of, first, the first mortgage bonds, and, next, the bonds of the state,—does not constitute a contract on the part of the state that it will not in the future tax the property of the road, and is not therefore impaired by a subsequent ordinance of the people of the state levying a tax on the road to pay and discharge the indebtedness of the state. *North Missouri Railroad v. Maguire*, 20 Wall., 46.

§ 2350. Act amounting to a contract.—Certain franchises were granted to banking corporations, on conditions which were complied with, and the act further provided that the state would not impose any further tax or burden on the banks during the continuance of their charters under the act. *Held*, that this amounted to a contract, the obligation of which was impaired by a tax imposed upon the stock or shares of the banks. *Gordon v. Appeal Tax Court*,* 3 How., 133. See §§ 2218, 2231.

§ 2351. But the exemption could not be claimed under an act extending the charters, no promise of exemption being made in the act of extension. *Ibid*.

§ 2352. A provision in the charter of an educational corporation which exempts its property from taxation as long as the corporation exists, and binds the state not to modify the charter in that regard, becomes, upon the acceptance and use of the charter, a franchise of the corporation of which it cannot be deprived by any species of state legislation, so long as the corporation uses its property for the educational purposes for which it was established, and does not forfeit its right of exemption from taxation under its contract. (*MILLER and FIELD, JJ.*, and *CHASE, C. J.*, dissent, on the ground that a state cannot give, sell or bargain away forever its taxing power.) *Washington University v. Rouse*,* 8 Wall., 439.

§ 2353. A legislature chartered railroad company A in 1851, and in 1855 amended its charter, granting it perpetual immunity from taxation. In 1849 it had chartered railroad company B, but no sufficient inducements having been found to procure the building of this latter road, in 1863 the legislature amended its charter by granting to it all the powers, rights and privileges granted by the charter of A. It was held that this grant included perpetual immunity from taxation, and that the state could not, under the constitution of the United States, afterwards impose taxes on the stock and property of the company. *Humphrey v. Pegues*,* 16 Wall., 244.

§ 2354. Section 60 of the charter of the State Bank of Ohio, requiring the officers of the bank to set off six per cent. of the dividends in the manner prescribed in it for the use of the state, which sum the state consented to accept in lieu of all taxes to which the bank or its stockholders might otherwise be subject, is a contract fixing the amount of taxation, and entitled to the protection of the constitution of the United States against any law of the state of Ohio impairing its obligation. The subsequent acts of Ohio, assuming to tax the bank and its branches differently from the tax stipulated in the sixtieth section of the charter, impair the contract of the charter, and are unconstitutional and void. *Jefferson Branch Bank v. Skelly*,* 1 Black, 436; *Wright v. Sill*,* 2 Black, 544; *Franklin Branch Bank v. State of Ohio*,* 1 Black, 474.

§ 2355. The charter of a railroad company exempting its property from taxation for a period of fifteen years, and after the expiration of this limitation allowing a tax on the in-

dividual shares of the stockholders whenever their annual profits exceed eight per cent., provided the tax does not exceed twenty-five cents a share per annum, is a contract protected by the constitution of the United States. *Raleigh & Gaston R. Co. v. Reid*, * 13 Wall., 269.

§ 2356. A bank formed under a law providing "that each banking company under the act, on accepting thereof and complying with its provisions, shall semi-annually, on the days designated for declaring dividends, set off to the state six per cent. on the profits, . . . which sum or amount so set off shall be in lieu of all taxes to which the company, or the stockholders therein, would otherwise be subject," holds this provision of the law as a contract, which the state cannot impair by imposing any higher rate of taxes, until the expiration of the charter. *Dodge v. Woolsey*, 18 How., 331 (CORPORATIONS, §§ 565-578).

XI. THE JUDICIARY.

[See COURTS. As to Appellate Jurisdiction, see APPEALS.]

1. In General.

SUMMARY — *Right of a bank to sue in the federal courts*, § 2357. — *Suit against a state; against state officers*, § 2358. — *Power of congress to charter a bank; state tax on such bank*, § 2359. — *Federal questions; other questions involved*, § 2360. — *Suits by Bank of United States*, § 2361. — *Enjoining state officers*, § 2362.

§ 2357. An act which provides that a bank shall be "made able and capable in law" "to sue and be sued, plead and be impleaded, answer and be answered, defend and be defended, in all state courts having competent jurisdiction, and in every circuit court of the United States," confers jurisdiction on the circuit court. *Osborn v. Bank of United States*, §§ 2363-87.

§ 2358. Though a state cannot be made a party, an injunction may issue against a state officer to enjoin proceedings under a void law. *Ibid.* See § 2405.

§ 2359. Congress has power to charter a bank as an instrument in carrying on the fiscal operations of the government; a state tax on such a bank is void. *Ibid.*

§ 2360. When a question to which the judicial power of the Union is extended by the constitution forms an ingredient of the original cause, it is in the power of congress to give the circuit court jurisdiction of that cause, although other questions of fact or of law may be involved. *Ibid.*

§ 2361. The Bank of the United States was created by congress, and enjoyed all its rights under a law of congress, and a suit by it was, therefore, a case arising under a law of the United States. *Ibid.*

§ 2362. A federal court will enjoin a state official from proceeding under an unconstitutional state law to destroy rights derived under an act of congress. *Ibid.*

[NOTES. — See §§ 2388-2468.]

OSBORN v. BANK OF UNITED STATES.

(9 Wheaton, 738-903. 1824.)

APPEAL from U. S. Circuit Court, District of Ohio.

STATEMENT OF FACTS. — The original bill in this case was for an injunction to restrain Osborn, the auditor of the state of Ohio, from proceeding against the Bank of the United States, under a state law of Ohio, passed in 1819, levying a tax upon said bank, and authorizing the auditor to enforce its collection by seizing upon the moneys and effects of the bank in a summary manner. An injunction was awarded and a subpoena issued thereon, which was served on Osborn on September 15, 1819. On September 18th, a writ of injunction was issued upon the same bill, and was served, according to the return, on Harper, while he was on his way to Columbus with \$100,000 of the bank's money, which he had seized under the authority of said Osborn; it also appeared that the writ was served on Osborn before Harper reached Columbus. In September, 1820, an amended bill was filed, making said Harper a defendant, and also making Currie, the state treasurer, to whom said money was delivered, and Sul-

livan, his successor in office, parties, and praying for discovery, an injunction, and for restoration of the money taken. The answer of Currie admitted the delivery by Harper to him of \$98,000, which he understood to be for said tax; that he passed the same to the credit of the state, but the same being in dispute, he kept it separate, and, having resigned his office, so passed it over to his successor, Sullivan. Sullivan denied all personal knowledge of the facts, but admitted notice of them from common report; admitted that he had \$98,000 in his custody, which he understood was the same here in controversy, and alleged that he held the same in his official capacity as treasurer of the state of Ohio. The court decreed that Osborn and Harper restore to the bank the sum of \$100,000, with interest on a certain amount of specie in the hands of Sullivan, and an appeal was taken to this court.

Opinion by MARSHALL, C. J.

At the close of the argument, a point was suggested of such vital importance as to induce the court to request that it might be particularly spoken to. That point is the right of the bank to sue in the courts of the United States. It has been argued, and ought to be disposed of before we proceed to the actual exercise of jurisdiction, by deciding on the rights of the parties. The appellants contest the jurisdiction of the court on two grounds: 1st. That the act of congress has not given it. 2d. That under the constitution congress cannot give it.

§ 2363. *The Bank of the United States was by its charter given the right to sue in any circuit court of the United States.*

1. The first part of the objection depends entirely on the language of the act. 3 Stats. at Large, 266. The words are that the bank shall be "made able and capable in law" "to sue and be sued, plead and be impleaded, answer and be answered, defend and be defended, in all state courts having competent jurisdiction, and in any circuit court of the United States." These words seem to the court to admit of but one interpretation. They cannot be made plainer by explanation. They give, expressly, the right "to sue and be sued" "in every circuit court of the United States," and it would be difficult to substitute other terms which would be more direct and appropriate for the purpose. The argument of the appellants is founded on the opinion of this court in *Bank of United States v. Deveaux*, 5 Cranch, 85. In that case it was decided that the former Bank of the United States was not enabled by the act which incorporated it to sue in the federal courts. The words of the third section of that act (1 id., 182) are that the bank may "sue and be sued," etc., "in courts of record or any other place whatsoever." The court was of opinion that these general words, which are usual in all acts of incorporation, gave only a general capacity to sue, not a particular privilege to sue in the courts of the United States; and this opinion was strengthened by the circumstance that the ninth rule of the seventh section of the same act subjects the directors, in case of excess in contracting debt, to be sued in their private capacity, "in any court of record of the United States, or either of them." The express grant of jurisdiction to the federal courts in this case was considered as having some influence on the construction of the general words of the third section, which does not mention those courts. Whether this decision be right or wrong, it amounts only to a declaration that a general capacity in the bank to sue, without mentioning the courts of the Union, may not give a right to sue in those courts. To infer from this that words expressly conferring a right to sue in those courts do not give the right, is surely a conclusion which the premises do not warrant. The

act of incorporation, then, confers jurisdiction on the circuit courts of the United States, if congress can confer it.

§ 2364. *Whenever a question to which the federal judicial power extends under the constitution is involved, congress has power to confer upon the circuit court jurisdiction of the whole cause, notwithstanding other questions of law and fact are also involved.*

2. We will now consider the constitutionality of the clause in the act of incorporation, which authorizes the bank to sue in the federal courts. In support of this clause, it is said that the legislative, executive and judicial powers of every well-constructed government are co-extensive with each other; that is, they are potentially co-extensive. The executive department may constitutionally execute every law which the legislature may constitutionally make, and the judicial department may receive from the legislature the power of construing every such law. All governments which are not extremely defective in their organization must possess within themselves the means of expounding as well as enforcing their own laws. If we examine the constitution of the United States, we find that its framers kept this great political principle in view. The second article vests the whole executive power in the president; and the third article declares "that the judicial power shall extend to all cases in law and equity arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority." This clause enables the judicial department to receive jurisdiction to the full extent of the constitution, laws and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case, and the constitution declares that the judicial power shall extend to all cases arising under the constitution, laws and treaties of the United States.

The suit of *The Bank of the United States v. Osborn and others* is a case, and the question is, whether it arises under a law of the United States. The appellants contend that it does not, because several questions may arise in it which depend on the general principles of the law, not on any act of congress. If this were sufficient to withdraw a case from the jurisdiction of the federal courts, almost every case, although involving the construction of a law, would be withdrawn; and a clause in the constitution relating to a subject of vital importance to the government, and expressed in the most comprehensive terms, would be construed to mean almost nothing. There is scarcely any case, every part of which depends on the constitution, laws or treaties of the United States. The questions whether the fact alleged as the foundation of the action be real or fictitious; whether the conduct of the plaintiff has been such as to entitle him to maintain his action; whether his right is barred; whether he has received satisfaction, or has in any manner released his claims, are questions, some or all of which may occur in almost every case; and if their existence be sufficient to arrest the jurisdiction of the court, words which seem intended to be as extensive as the constitution, laws and treaties of the Union, which seem designed to give the courts of the government the construction of all its acts, so far as they affect the rights of individuals, would be reduced to almost nothing.

In those cases in which original jurisdiction is given to the supreme court, the judicial power of the United States cannot be exercised in its appellate

form. In every other case the power is to be exercised in its original or appellate form, or both, as the wisdom of congress may direct. With the exception of these cases in which original jurisdiction is given to this court, there is none to which the judicial power extends, from which the original jurisdiction of the inferior courts is excluded by the constitution. Original jurisdiction, so far as the constitution gives a rule, is co-extensive with the judicial power. We find in the constitution no prohibition to its exercise, in every case in which the judicial power can be exercised. It would be a very bold construction to say that this power could be applied in its appellate form only, to the most important class of cases to which it is applicable. The constitution establishes the supreme court, and defines its jurisdiction. It enumerates cases in which its jurisdiction is original and exclusive, and then defines that which is appellate, but does not insinuate that, in any such case, the power cannot be exercised in its original form by courts of original jurisdiction. It is not insinuated that the judicial power, in cases depending on the character of the cause, cannot be exercised in the first instance in the courts of the Union, but must first be exercised in the tribunals of the state, tribunals over which the government of the Union has no adequate control, and which may be closed to any claim asserted under a law of the United States. We perceive, then, no ground on which the proposition can be maintained, that congress is incapable of giving the circuit courts original jurisdiction, in any case to which the appellate jurisdiction extends.

We ask, then, if it can be sufficient to exclude this jurisdiction, that the case involves questions depending on general principles? A cause may depend on several questions of fact and law. Some of these may depend on the construction of a law of the United States, others on principles unconnected with that law. If it be a sufficient foundation for jurisdiction, that the title or right set up by the party may be defeated by one construction of the constitution or law of the United States, and sustained by the opposite construction, provided the facts necessary to support the action be made out, then all the other questions must be decided as incidental to this, which gives that jurisdiction. Those other questions cannot arrest the proceedings. Under this construction, the judicial power of the Union extends effectively and beneficially to that most important class of cases which depend on the character of the cause. On the opposite construction, the judicial power never can be extended to a whole case, as expressed by the constitution, but to those parts of cases only which present the particular question involving the construction of the constitution or the law. We say, it never can be extended to the whole case, because, if the circumstance that other points are involved in it shall disable congress from authorizing the courts of the Union to take jurisdiction of the original cause, it equally disables congress from authorizing those courts to take jurisdiction of the whole cause, on an appeal, and thus will be restricted to a single question in that cause; and words obviously intended to secure to those who claim rights under the constitution, laws or treaties of the United States a trial in the federal courts will be restricted to the insecure remedy of an appeal upon an insulated point, after it has received that shape which may be given to it by another tribunal, into which he is forced against his will.

We think, then, that when a question to which the judicial power of the Union is extended by the constitution forms an ingredient of the original cause, it is in the power of congress to give the circuit courts jurisdiction of that cause, although other questions of fact or of law may be involved in it.

§ 2365. *The charter of the Bank of the United States is a law of the United States, and congress has power to give the circuit court jurisdiction of suits by and against the said bank.*

The case of the bank is, we think, a very strong case of this description. The charter of incorporation not only creates it, but gives it every faculty which it possesses. The power to acquire rights of any description, to transact business of any description, to make contracts of any description, to sue on those contracts, is given and measured by its charter, and that charter is a law of the United States. This being can acquire no right, make no contract, bring no suit, which is not authorized by a law of the United States. It is not only itself the mere creature of a law, but all its actions and all its rights are dependent on the same law. Can a being, thus constituted, have a case which does not arise literally, as well as substantially, under the law? Take the case of a contract, which is put as the strongest against the bank. When a bank sues, the first question which presents itself, and which lies at the foundation of the cause, is, has this legal entity a right to sue? Has it a right to come, not into this court particularly, but into any court? This depends on a law of the United States. The next question is, has this being a right to make this particular contract? If this question be decided in the negative, the cause is determined against the plaintiff; and this question, too, depends entirely on a law of the United States. These are important questions, and they exist in every possible case. The right to sue, if decided once, is decided forever, but the power of congress was exercised antecedently to the first decision on that right, and if it was constitutional then, it cannot cease to be so because the particular question is decided. It may be revived at the will of the party, and most probably would be renewed, were the tribunal to be changed. But the question respecting the right to make a particular contract, or to acquire a particular property, or to sue on account of a particular injury, belongs to every particular case, and may be renewed in every case. The question forms an original ingredient in every cause. Whether it be in fact relied on or not, in the defense, it is still a part of the cause and may be relied on. The right of the plaintiff to sue cannot depend on the defense which the defendant may choose to set up. His right to sue is anterior to that defense, and must depend on the state of things when the action is brought. The questions which the case involves, then, must determine its character, whether those questions be made in the cause or not.

The appellants say that the case arises on the contract; but the validity of the contract depends on a law of the United States, and the plaintiff is compelled, in every case, to show its validity. The case arises emphatically under the law. The act of congress is its foundation. The contract could never have been made but under the authority of that act. The act itself is the first ingredient in the case, is its origin, is that from which every other part arises. That other questions may also arise, as the execution of the contract, or its performance, cannot change the case, or give it any other origin than the charter of incorporation. The action still originates in and is sustained by that charter. The clause giving the bank a right to sue in the circuit courts of the United States stands on the same principle with the acts authorizing officers of the United States who sue in their own names to sue in the courts of the United States. The postmaster-general, for example, cannot sue under that part of the constitution which gives jurisdiction to the federal courts, in consequence of the character of the party, nor is he authorized to sue by the judi-

ciary act. 1 Stats. at Large, 73. He comes into the courts of the Union under the authority of an act of congress, the constitutionality of which can only be sustained by the admission that his suit is a case arising under a law of the United States. If it be said that it is such a case, because a law of the United States authorizes the contract and authorizes the suit, the same reasons exist with respect to a suit brought by the bank. That, too, is such a case; because that suit, too, is itself authorized and is brought on a contract authorized by a law of the United States. It depends absolutely on that law, and cannot exist a moment without its authority.

If it be said that a suit brought by the bank may depend in fact altogether on questions unconnected with any law of the United States, it is equally true with respect to suits brought by the postmaster-general. The plea in bar may be payment if the suit be brought on a bond, or *non-assumpsit* if it be brought on an open account, and no other question may arise than what respects the complete discharge of the demand. Yet the constitutionality of the act authorizing the postmaster-general to sue in the courts of the United States has never been drawn into question. It is sustained singly by an act of congress, standing on that construction of the constitution which asserts the right of the legislature to give original jurisdiction to the circuit court in cases arising under a law of the United States. The clause (id., 322) in the patent law, authorizing suits in the circuit courts stands, we think, on the same principle. Such a suit is a case arising under a law of the United States. Yet the defendant may not, at the trial, question the validity of the patent, or make any point which requires the construction of an act of congress. He may rest his defense exclusively on the fact that he has not violated the right of the plaintiff. That this fact becomes the sole question made in the cause cannot oust the jurisdiction of the court, or establish the position that the case does not arise under a law of the United States.

It is said that a clear distinction exists between the party and the cause; that the party may originate under a law with which the cause has no connection; and that congress may, with the same propriety, give a naturalized citizen, who is the mere creature of a law, a right to sue in the courts of the United States, as give that right to the bank. This distinction is not denied; and if the act of congress was a simple act of incorporation, and contained nothing more, it might be entitled to great consideration. But the act does not stop with incorporating the bank. It proceeds to bestow upon the being it has made all the faculties and capacities which that being possesses. Every act of the bank grows out of this law and is tested by it. To use the language of the constitution, every act of the bank arises out of this law.

A naturalized citizen is, indeed, made a citizen under an act of congress, but the act does not proceed to give, to regulate, or to prescribe his capacities. He becomes a member of the society, possessing all the rights of a native citizen, and standing, in the view of the constitution, on the footing of a native. The constitution does not authorize congress to enlarge or abridge those rights. The simple power of the national legislature is, to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it so far as respects the individual. The constitution then takes him up, and, among other rights, extends to him the capacity of suing in the courts of the United States, precisely under the same circumstances under which a native might sue. He is distinguishable in nothing from a native citizen, except so far as the constitution makes the distinction. The law makes none. There is, then, no resemblance

between the act incorporating the bank and the general naturalization law. 2 Stats. at Large, 153. Upon the best consideration we have been able to bestow on this subject, we are of opinion that the clause in the act of incorporation, enabling the bank to sue in the courts of the United States, is consistent with the constitution, and to be obeyed in all courts.

We will now proceed to consider the merits of the cause. The appellants contend that the decree of the circuit court is erroneous: 1. Because no authority is shown in the record from the bank authorizing the institution or prosecution of the suit. 2. Because, as against the defendant Sullivan, there are neither proofs nor admissions sufficient to sustain the decree. 3. Because, upon equitable principles, the case made in the bill does not warrant a decree against either Osborn or Harper for the amount of coin and notes in the bill specified to have passed through their hands. 4. Because the defendants are decreed to pay interest upon the coin when it was not in the power of Osborn or Harper, and was stayed in the hands of Sullivan by injunction. 5. Because the case made in the bill does not warrant the interference of a court of chancery by injunction. 6. Because, if any case is made in the bill proper for the interference of a court of chancery, it is against the state of Ohio, in which case the circuit court could not exercise jurisdiction. 7. Because the decree assumes that the Bank of the United States is not subject to the taxing power of the state of Ohio, and decides that the law of Ohio, the execution of which is enjoined, is unconstitutional. These points will be considered in the order in which they are made.

§ 2366. *The authority of a regularly licensed practitioner need not appear in the records of a chancery court by warrant of attorney, even if he acts for a corporation.*

1. It is admitted that a corporation can only appear by attorney, and it is also admitted that the attorney must receive the authority of the corporation to enable him to represent it. It is not admitted that this authority must be under seal. On the contrary, the principle decided in the cases of *Bank of Columbia v. Patterson*, 7 Cranch, 299, is supposed to apply to this case, and to show that the seal may be dispensed with. It is, however, unnecessary to pursue this inquiry, since the real question is whether the non-appearance of the power in the record be error, not whether the power was insufficient in itself. Natural persons may appear in court, either by themselves or by their attorney. But no man has a right to appear as the attorney of another without the authority of that other. In ordinary cases the authority must be produced, because there is, in the nature of things, no *prima facie* evidence that one man is in fact the attorney of another. The case of an attorney at law, an attorney for the purpose of representing another in court, and prosecuting or defending a suit in his name, is somewhat different. The power must indeed exist, but its production has not been considered as indispensable. Certain gentlemen, first licensed by government, are admitted by order of court to stand at the bar, with a general capacity to represent all the suitors in the court. The appearance of any one of these gentlemen in a cause has always been received as evidence of his authority; and no additional evidence, so far as we are informed, has ever been required. This practice, we believe, has existed from the first establishment of our courts, and no departure from it has been made in those of any state, or of the Union.

The argument supposes some distinction, in this particular, between a natural person and a corporation; but the court can perceive no reason for

this distinction. A corporation, it is true, can appear only by attorney, while a natural person may appear for himself. But when he waives this privilege, and elects to appear by attorney, no reason is perceived why the same evidence should not be required that the individual professing to represent him has authority to do so, which would be required if he were incapable of appearing in person. The universal and familiar practice, then, of permitting gentlemen of the profession to appear without producing a warrant of attorney, forms a rule which is as applicable in reason to their appearance for a corporation as for a natural person. Were it even otherwise, the practice is as uniform and as ancient with regard to corporations as to natural persons. No case has ever occurred, so far as we are informed, in which the production of a warrant of attorney has been supposed a necessary preliminary to the appearance of a corporation, either as plaintiff or defendant, by a gentleman admitted to the bar of the court. The usage, then, is as full authority for the case of a corporation as of an individual. If this usage ought to be altered, it should be a rule to operate prospectively, not by the reversal of a decree pronounced in conformity with the general course of the court, in a case in which no doubt of the legality of the appearance had ever been suggested.

In the statute of jeofails and amendment which respects this subject, the non-appearance of a warrant of attorney in the record has generally been treated as matter of form, and the thirty-second section of the judiciary act (1 Stats. at Large, 91) may very well be construed to comprehend this formal defect in its general terms in a case of law. No reason is perceived why the courts of chancery should be more rigid in exacting the exhibition of a warrant of attorney than a court of law; and, since the practice has, in fact, been the same in both courts, an appellate court ought, we think, to be governed in both by the same rule.

§ 2367. *In equity the answer of one defendant is evidence against another, who is his successor and upon whom his rights devolve.*

2. The second point is one on which the productiveness of any decree in favor of the plaintiffs most probably depends; for if the claim be not satisfied with the money found in the possession of Sullivan, it is at best uncertain whether a fund, out of which it can be satisfied, is to be found elsewhere. In inquiring whether the proofs or admissions in the cause be sufficient to charge Sullivan, the court will look into the answer of Currie as well as into that of Sullivan. In objection to this course, it is said that the answer of one defendant cannot be read against another. This is generally but not universally true. Where one defendant succeeds to another, so that the right of the one devolves on the other, and they become privies in estate, the rule is not admitted to apply. Thus, if an ancestor die, pending a suit, and the proceedings be revived against his heir, or if a suit be revived against an executor or administrator, the answer of the deceased person, or any other evidence, establishing any fact against him, might be read also against the person who succeeds to him. So, a *pendente lite* purchaser is bound by the decree, without being even made a party to the suit; *a fortiori*, he would, if made a party, be bound by the testimony taken against the vendor.

In this case, if Currie received the money taken out of the bank, and passed it over to Sullivan, the establishment of this fact, in a suit against Currie, would seem to bind his successor, Sullivan, both as a privy in estate, and as a person getting possession *pendente lite*, if the original suit had been instituted against Currie. We can perceive no difference so far as respects the answer

of Currie, between the case supposed and the case as it stands. If Currie, who was the predecessor of Sullivan, admits that he received the money of the bank, the fact seems to bind all those coming in under him as completely as it binds himself. This, therefore, appears to the court to be a case in which, upon principle, the answer of Currie may be read. His answer states that on or about the 19th or 20th of September, 1819, the defendant Harper delivered to him in coin and notes the sum of \$98,000, which he was informed and believed to be the money levied on the bank as a tax, in pursuance of the law of the state of Ohio. After consulting counsel on the question, whether he ought to retain this sum within his individual control, or pass it to the credit of the state on the books of the treasury, he adopted the latter course, but retained it carefully in a trunk, separate from the other funds of the treasury. The money afterwards came to the hands of Sullivan, the gentleman who succeeded him as treasurer, and gave him a receipt for all the money in the treasury, including this, which was still kept separate from the rest.

We think no reasonable doubt can be entertained but that the \$98,000, delivered by Harper to Currie, were taken out of the bank. Currie understood and believed it to be the fact. When did he so understand and believe it? At the time when he received the money. And from whom did he derive his understanding and belief? The inference is irresistible that he derived it from his own knowledge of circumstances, for they were of public notoriety, and from the information of Harper. In the necessary course of things, Harper, who was sent, as Currie must have known, on this business, brings with him to the treasurer of the state a sum of money, which, by the law, was to be taken out of the bank, pays him \$98,000 thereof, which the treasurer receives and keeps as being money taken from the bank, and so enters it on the books of the treasury. In a suit brought against Mr. Currie for this money by the state of Ohio, if he had failed to account for it, could any person doubt the competency of the testimony to charge him? We think no mind could hesitate in such a case. Currie, then, being clearly in possession of this money, and clearly liable for it, we are next to look into Sullivan's answer, for the purpose of inquiring whether he admits any facts which show him to be liable also. Sullivan denies all personal knowledge of the transaction; that is, he was not in office when it took place, and was not present when the money was taken out of the bank, or when it was delivered to Currie. But when he entered the treasury office, he received this sum of \$98,000, separate from the other money of the treasury, which, he understood from report, and was informed by his predecessor from whom he received it, was the money taken out of the bank. This sum has remained untouched ever since from respect to the injunction awarded by the court.

We ask if a rational doubt can remain on this subject? Mr. Currie, as treasurer of the state of Ohio, receives \$98,000 as being the amount of a tax imposed by the legislature of that state on the bank of the United States; enters the same on the books of the treasury; and the legality of the act by which the money was levied being questioned, puts it in a trunk and keeps it apart from the other money belonging to the public. He resigns his office, and is succeeded by Mr. Sullivan, to whom he delivers the money, informing him at the same time that it is the money raised from the bank; and Mr. Sullivan continues to keep it apart, and abstains from the use of it, out of respect to an injunction, forbidding him to pay it away, or in any manner to dispose of it. Is it possible to doubt the identity of this money?

Even admitting that the answer of Currie, though establishing his liability as to himself, could not prove even that fact as to Sullivan, the answer of Sullivan is itself sufficient, we think, to charge him. He admits that these \$98,000 were delivered to him, as being the money which was taken out of the bank, and that he so received it; for, he says, he understood this sum was the same as charged in the bill; that his information was from report, and from his predecessor; and that the money has remained untouched, from respect to the injunction. This declaration, then, is a part of the fact. The fact, as admitted in his answer, is not simply that he received \$98,000, but that he received \$98,000 as being the money taken out of the bank—the money to which the writ of injunction applied. In a common action between two private individuals, such an admission would, at least, be sufficient to throw on the defendant the burden of proving that the money, which he acknowledges himself to have received and kept as the money of the plaintiff, was not that which it was declared to be on its delivery. A declaration, accompanying the delivery, and constituting a part of it, gives a character to the transaction, and is not to be placed on the same footing with a declaration made by the same person at a different time. The answer of Sullivan, then, is, in the opinion of the court, sufficient to show that these \$98,000 were the specific dollars for which this suit was brought. This sum having come to his possession with full knowledge of the fact, in a separate trunk, unmixed with money, and with notice that an injunction had been awarded respecting it, he would seem to be responsible to the plaintiff for it, unless he can show sufficient matter to discharge himself.

§ 2368. *An official acting under an unconstitutional or void law is individually liable.*

3. The next objection is to the decree against Osborn and Harper, as to whom the bill was taken for confessed. The bill charges that Osborn employed John L. Harper to collect the tax, who proceeded by violence to enter the office of discount and deposit at Chillicothe, and forcibly took therefrom \$100,000 in specie and bank-notes; and that, at the time of the seizure, Harper well knew, and was duly notified, that an injunction had been allowed, which money was delivered either to Currie or Osborn. So far as respects Harper and Osborn, these allegations are to be considered as true. If the act of the legislature of Ohio, and the official character of Osborn, constitute a defense, neither of these defendants are liable, and the whole decree is erroneous; but if the act be unconstitutional and void, it can be no justification, and both these defendants are to be considered as individuals who are amenable to the laws. Considering them, for the present, in this character, the fact, as made out in the bill, is, that Osborn employed Harper to do an illegal act, and that Harper has done that act; and that they are jointly responsible for it is supposed to be as well settled as any principle of law whatever. We think it unnecessary, in this part of the case, to enter into the inquiry respecting the effect of the injunction. No injunction is necessary to attach responsibility on those who conspire to do an illegal act, which this is, if not justified by the authority under which it was done.

§ 2369. *No interest can be allowed on money while its use is restrained by an injunction.*

4. The next objection is to the allowance of interest on the coin, which constituted a part of the sum decreed to the complainants. Had the complainants, without the intervention of a court of equity, resorted to their legal remedy

for the injury sustained, their right to principal and interest would have stood on equal ground. The same rule would be adopted in a court of equity, had the subject been left under the control of the party in possession while the right was in litigation. But the subject was not left under the control of the party. The court itself interposed, and forbade the person in whose possession the property was to make any use of it. This order having been obeyed, places the defendant in the same situation, so far as respects interest, as if the court had taken the money into its own custody. The defendant, in obeying the mandate of the court, becomes its instrument, as entirely as the clerk of the court would have been had the money been placed in his hands. It does not appear reasonable that a decree which proceeds upon the idea that the injunction of the court was valid, ought to direct interest to be paid on the money which that injunction restrained the defendant from using.

§ 2370. *The federal courts have the power to restrain a state officer from acting under an unconstitutional state law.*

5. The fifth objection to the decree is, that the case made in the bill does not warrant the interference of a court of chancery. In examining this question it is proper that the court should consider the real case and its actual circumstances. The original bill prays for an injunction against Ralph Osborn, auditor of the state of Ohio, to restrain him from executing a law of that state, to the great oppression and injury of the complainants, and to the destruction of rights and privileges conferred on them by their charter, and by the constitution of the United States. The true inquiry is, whether an injunction can be issued to restrain a person, who is a state officer, from performing any official act enjoined by statute; and whether a court of equity can decree restitution, if the act be performed. In pursuing this inquiry, it must be assumed, for the present, that the act is unconstitutional, and furnishes no authority or protection to the officer who is about to proceed under it. This must be assumed, because, in the arrangement of his argument, the counsel who opened the cause has chosen to reserve that point for the last, and to contend that, though the law be void, no case is made out against the defendants. We suspend, also, the consideration of the question whether the interest of the state of Ohio, as disclosed in the bill, shows a want of jurisdiction in the circuit court which ought to have arrested its proceedings. That question, too, is reserved by the appellants, and will be subsequently considered. The sole inquiry, for the present, is whether, stripping the case of these objections, the plaintiffs below were entitled to relief, in a court of equity, against the defendants, and to the protection of an injunction. The appellants expressly waive the extravagant proposition that a void act can afford protection to the person who executes it, and admits the liability of the defendants to the plaintiffs, to the extent of the injury sustained, in an action at law. The question, then, is reduced to the single inquiry, whether the case is cognizable in a court of equity. If it is, the decree must be affirmed, so far as it is supported by the evidence in the cause.

The appellants allege that the original bill contains no allegation which can justify the application for an injunction, and treat the declarations of Ralph Osborn, the auditor, that he should execute the law, as the light and frivolous threats of an individual that he would commit an ordinary trespass. But surely this is not the point of view in which the application for an injunction is to be considered. The legislature of Ohio had passed a law for the avowed purpose of expelling the bank from the state, and had made it the duty of the

auditor to execute it as a ministerial officer. He had declared that he would perform this duty. The law, if executed, would unquestionably effect its object, and would deprive the bank of its chartered privileges, so far as they were to be exercised in that state. It must expel the bank from the state; and this is, we think, a conclusion which the court might rightfully draw from the law itself. That the declarations of the auditor would be fulfilled did not admit of reasonable doubt. It was to be expected that a person continuing to hold an office would perform a duty enjoined by his government, which was completely within his power. This duty was to be repeated until the bank should abandon the exercise of its chartered rights.

To treat this as a common casual trespass would be to disregard entirely its true character and substantial merits. The application to the court was to interpose its writ of injunction to protect the bank, not from the casual trespass of an individual, who might not perform the act he threatened, but from the total destruction of its franchise, of its chartered privileges, so far as respected the state of Ohio. It was morally certain that the auditor would proceed to execute the law, and it was morally certain that the effect must be the expulsion of the bank from the state. An annual charge of \$100,000 would more than absorb all the advantages of the privilege, and would, consequently, annul it.

The appellants admit that injunctions are often awarded for the protection of parties in the enjoyment of a franchise, but deny that one has ever been granted in such a case as this. But, although the precise case may never have occurred, if the same principle applies, the same remedy ought to be afforded. The interference of the court in this class of cases has most frequently been to restrain a person from violating an exclusive privilege, by participating in it. But if, instead of a continued participation in the privilege, the attempt be to disable the party from using it, is not the reason for the interference of the court rather strengthened than weakened? Had the privilege of the bank been exclusive, the argument admits that any other person, or company, might have been enjoined, according to the regular course of the court of chancery, from using or exercising the same business. Why would such person or company have been enjoined? To prevent a permanent injury from being done to the party entitled to the franchise or privilege; which injury, the appellants say, cannot be estimated in damages. It requires no argument to prove that the injury is greater, if the whole privilege be destroyed, than if it be divided; and, so far as respects the estimate of damages, although precise accuracy may not be attained, yet a reasonable calculation may be made of the amount of the injury, so as to satisfy the court and jury. It will not be pretended that, in such a case, an action at law could not be maintained, or that the materials do not exist on which a verdict might be found, and a judgment rendered. But in this, and many other cases of continuing injuries, as in the case of repeated ejectments, a court of chancery will interpose. The injury done by denying to the bank the exercise of its franchise in the state of Ohio is as difficult to calculate as the injury done by participating in an exclusive privilege. The single act of levying the tax, in the first instance, is the cause of an action at law; but that affords a remedy only for the single act, and is not equal to the remedy in chancery, which prevents its repetition, and protects the privilege. The same conservative principle which induces the court to interpose its authority for the protection of exclusive privileges, to prevent the commission of waste, even in some cases of trespass, and in many cases of destruction,

will, we think, apply to this. Indeed, trespass is destruction, where there is no privity of estate.

§ 2371. *Though the principal is beyond the reach of process, the law will afford a remedy against the agent.*

If the state of Ohio could have been made a party defendant, it can scarcely be denied that this would be a strong case for an injunction. The objection is, that, as the real party cannot be brought before the court, a suit cannot be sustained against the agents of that party; and cases have been cited to show that a court of chancery will not make a decree, unless all those who are substantially interested be made parties to the suit. This is certainly true where it is in the power of the plaintiff to make them parties; but if the person who is the real principal, the person who is the true source of the mischief, by whose power and for whose advantage it is done, be himself above the law, be exempt from all judicial process, it would be subversive of the best established principles to say that the laws could not afford the same remedies against the agent employed in doing the wrong which they would afford against him could his principal be joined in the suit. It is admitted that the privilege of the principal is not communicated to the agent; for the appellants acknowledge that an action at law would lie against the agent, in which full compensation ought to be made for the injury. It being admitted, then, that the agent is not privileged by his connection with his principal, that he is responsible for his own act, to the full extent of the injury, why should not the preventive power of the court also be applied to him? Why may it not restrain him from the commission of a wrong which it would punish him for committing? We put out of view the character of the principal as a sovereign state, because that is made a distinct point, and consider the question singly as respects the want of parties. Now, if the party before the court would be responsible for the whole injury, why may he not be restrained from its commission, if no other party can be brought before the court? The appellants found their distinction on the legal principle that all trespasses are several as well as joint, without inquiry into the validity of this reason, if true. We ask, if it be true? Will it be said that the action of trespass is the only remedy given for this injury? Can it be denied that an action on the case for money had and received to the plaintiff's use might be maintained? We think it cannot; and if such an action might be maintained, no plausible reason suggests itself to us for the opinion that an injunction may not be awarded to restrain the agent with as much propriety as it might be awarded to restrain the principal, could the principal be made a party.

§ 2372. *An agent will be restrained from paying over money to a principal who is exempt from judicial process.*

We think the reason for an injunction is much stronger in the actual than it would be in the supposed case. In the regular course of things, the agent would pay over the money immediately to his principal, and would thus place it beyond the reach of the injured party, since his principal is not amenable to the law. The remedy for the injury would be against the agent only; and what agent could make compensation for such an injury? The remedy would have nothing real in it. It would be a remedy in name only, not in substance. This alone would, in our opinion, be a sufficient reason for a court of equity. The injury would, in fact, be irreparable; and the cases are innumerable in which injunctions are awarded on this ground. But, were it even to be admitted that the injunction, in the first instance, was improperly awarded, and that the original bill could not be maintained, that would not, we think, materially

affect the case. An amended and supplemental bill, making new parties, has been filed in the cause, and on that bill, with the proceedings under it, the decree was pronounced. The question is whether that bill and those proceedings support the decree. The case they make is, that the money and notes of the plaintiffs in the circuit court have been taken from them without authority, and are in possession of one of the defendants, who keeps them separate and apart from all other money and notes. It is admitted that this defendant would be liable for the whole amount in an action at law; but it is denied that he is liable in a court of equity.

§ 2373. *A court of equity will always interpose to prevent the transfer of a specific article, which, if transferred, will be lost to the owner.*

We think it a case in which a court of equity ought to interpose, and that there are several grounds on which its jurisdiction may be placed. One, which appears to be ample for the purpose, is, that a court will always interpose to prevent the transfer of a specific article, which, if transferred, will be lost to the owner. Thus, the holder of negotiable securities, indorsed in the usual manner, if he has acquired them fraudulently, will be enjoined from negotiating them; because, if negotiated, the maker or indorser must pay them. 1 Mad., 154, 155. Thus, too, a transfer of stock will be restrained in favor of a person having the real property in the article. In these cases, the injured party would have his remedy at law; and the probability that this remedy would be adequate is stronger in the cases put in the books than in this, where the sum is so greatly beyond the capacity of an ordinary agent to pay. But it is the province of a court of equity, in such cases, to arrest the injury and prevent the wrong. The remedy is more beneficial and complete than the law can give. The money of the bank, if mingled with the other money in the treasury and put into circulation, would be totally lost to the owners; and the reason for an injunction is at least as strong in such a case as in the case of a negotiable note.

§ 2374. *Although a state cannot be sued, its officers may be. The fact that the state is interested in the proceedings does not oust the jurisdiction of the federal court, if the state is not actually made a party defendant on the record.*

6. We proceed now to the sixth point made by the appellants, which is, that if any case is made in the bill, proper for the interference of a court of chancery, it is against the state of Ohio, in which case the circuit court could not exercise jurisdiction. The bill is brought, it is said, for the purpose of protecting the bank in the exercise of a franchise granted by a law of the United States, which franchise the state of Ohio asserts a right to invade and is about to invade. It prays the aid of the court to restrain the officers of the state from executing the law. It is, then, a controversy between the bank and the state of Ohio. The interest of the state is direct and immediate, not consequential. The process of the court, though not directed against the state by name, acts directly upon it by restraining its officers. The process, therefore, is substantially, though not in form, against the state, and the court ought not to proceed without making the state a party. If this cannot be done the court cannot take jurisdiction of the cause. The full pressure of this argument is felt and the difficulties it presents are acknowledged. The direct interest of the state in the suit, as brought, is admitted; and had it been in the power of the bank to make it a party, perhaps no decree ought to have been pronounced in the cause until the state was before the court. But this was not in the power of the bank. The eleventh amendment of the constitution has exempted a state from the suits of citizens of other states or aliens, and the very difficult

question is to be decided, whether, in such a case, the court may act upon the agents employed by the state and on the property in their hands.

Before we try this question by the constitution it may not be time misapplied if we pause for a moment and reflect on the relative situation of the Union with its members should the objection prevail. A denial of jurisdiction forbids all inquiry into the nature of the case. It applies to cases perfectly clear in themselves; to cases where the government is in the exercise of its best established and most essential powers, as well as to those which may be deemed questionable. It asserts that the agents of a state, alleging the authority of a law void in itself because repugnant to the constitution, may arrest the execution of any law in the United States. It maintains that, if a state shall impose a fine or penalty on any person employed in the execution of any law of the United States, it may levy that fine or penalty by a ministerial officer, without the sanction even of its own courts; and that the individual, though he perceives the approaching danger, can obtain no protection from the judicial department of the government. The carrier of the mail, the collector of the revenue, the marshal of a district, the recruiting officer, may all be inhibited, under ruinous penalties, from the performance of their respective duties; the warrant of a ministerial officer may authorize the collection of these penalties, and the person thus obstructed in the performance of his duty may indeed resort to his action for damages after the infliction of the injury, but cannot avail himself of the preventive justice of the nation to protect him in the performance of his duties. Each member of the Union is capable, at its will, of attacking the nation, of arresting its progress at every step, of acting vigorously and effectually in the execution of its designs, while the nation stands naked, stripped of its defensive armor, and incapable of shielding its agent or executing its laws otherwise than by proceedings which are to take place after the mischief is perpetrated, and which must often be ineffectual, from the inability of the agents to make compensation.

These are said to be extreme cases; but the case at bar, had it been put by way of illustration in argument, might have been termed an extreme case; and, if a penalty on a revenue officer, for performing his duty, be more obviously wrong than a penalty on the bank, it is a difference in degree, not in principle. Public sentiment would be more shocked by the infliction of a penalty on a public officer for the performance of his duty than by the infliction of this penalty on a bank, which, while carrying on the fiscal operations of the government, is also transacting its own business; but in both cases the officer levying the penalty acts under a void authority, and the power to restrain him is denied as positively in the one as in the other. The distinction between any extreme case and that which has actually occurred, if, indeed, any difference of principle can be supposed to exist between them, disappears when considering the question of jurisdiction; for if the courts of the United States cannot rightfully protect the agents who execute every law authorized by the constitution from the direct action of state agents in the collection of penalties, they cannot rightfully protect those who execute any law.

The question, then, is, whether the constitution of the United States has provided a tribunal which can peacefully and rightfully protect those who are employed in carrying into execution the laws of the Union, from the attempts of a particular state to resist the execution of those laws. The state of Ohio denies the existence of this power, and contends that no preventive proceedings whatever, or proceedings against the very property which may have been seized

by the agent of a state, can be sustained against such agent, because they would be substantially against the state itself, in violation of the eleventh amendment of the constitution. That the courts of the Union cannot entertain a suit brought against a state by an alien or the citizen of another state is not to be controverted. Is a suit brought against an individual, for any cause whatever, a suit against a state in the sense of the constitution?

The eleventh amendment is the limitation of a power supposed to be granted in the original instrument; and to understand accurately the extent of the limitation, it seems proper to define the power that is limited. The words of the constitution, so far as they respect this question, are: "The judicial power shall extend to controversies between two or more states, between a state and citizens of another state, and between a state and foreign states, citizens or subjects." A subsequent clause distributes the power previously granted, and assigns to the supreme court original jurisdiction in those cases in which "a state shall be a party." The words of the eleventh amendment are: "The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of a foreign state."

The Bank of the United States contends that, in all cases in which jurisdiction depends on the character of the party, reference is made to the party on the record, not to one who may be interested, but is not shown by the record to be a party. The appellants admit that the jurisdiction of the court is not ousted by any incidental or consequential interest which a state may have in the decision to be made, but is to be considered as a party where the decision acts directly and immediately upon the state, through its officers. If this question were to be determined on the authority of English decisions, it is believed that no case can be adduced where any person has been considered as a party who is not made so in the record. But the court will not review those decisions, because it is thought a question growing out of the constitution of the United States requires rather an attentive consideration of the words of that instrument than of the decisions of analogous questions by the courts of any other country.

§ 2375. *Controversies between two or more states.*

Do the provisions, then, of the American constitution respecting controversies to which a state may be a party extend, on a fair construction of that instrument, to cases in which the state is not a party on the record? The first in the enumeration is a controversy between two or more states. There are not many questions in which a state would be supposed to take a deeper or more immediate interest than in those which decide on the extent of her territory. Yet the constitution, not considering the state as a party to such controversies, if not plaintiff or defendant on the record, has expressly given jurisdiction in those between citizens claiming lands under grants of different states. If each state, in consequence of the influence of a decision on her boundary, had been considered by the framers of the constitution as a party to that controversy, the express grant of jurisdiction would have been useless. The grant of it certainly proves that the constitution does not consider the state as a party in such a case.

Jurisdiction is expressly granted in those cases only where citizens of the same state claim lands under grants of different states. If the claimants be citizens of different states, the court takes jurisdiction for that reason. Still, the right of the state to grant is the essential point in dispute; and in that

point the state is deeply interested. If that interest converts the state into a party, there is an end of the cause; and the constitution will be construed to forbid the circuit courts to take cognizance of questions to which it was thought necessary expressly to extend their jurisdiction, even when the controversy arose between citizens of the same state. We are aware that the application of these cases may be denied, because the title of the state comes on incidentally, and the appellants admit the jurisdiction of the court where its judgment does not act directly upon the property or interests of the state; but we deemed it of some importance to show that the framers of the constitution contemplated the distinction between cases in which a state was interested and those in which it was a party, and made no provision for a case of interest, without being a party on the record. In cases where a state is a party on the record, the question of jurisdiction is decided by inspection. If jurisdiction depend, not on this plain fact, but on the interest of the state, what rule has the constitution given by which this interest is to be measured? If no rule be given, is it to be settled by the court? If so, the curious anomaly is presented, of a court examining the whole testimony of a cause, inquiring into, and deciding on, the extent of a state's interest, without having a right to exercise any jurisdiction in the case. Can this inquiry be made without the exercise of jurisdiction?

§ 2376. *Controversies between a state and citizens of other states.*

The next in the enumeration is a controversy between a state and the citizens of another state. Can this case arise if the state be not a party on the record? If it can, the question recurs, what degree of interest shall be sufficient to change the parties, and arrest the proceedings against the individual? Controversies respecting boundary have lately existed between Virginia and Tennessee, between Kentucky and Tennessee, and now exist between New York and New Jersey. Suppose, while such a controversy is pending, the collecting officer of one state should seize property for taxes belonging to a man who supposes himself to reside in the other state, and who seeks redress in the federal court of that state in which the officer resides. The interest of the state is obvious. Yet it is admitted that in such a case the action would lie, because the officer might be treated as a trespasser, and the verdict and judgment against him would not act directly on the property of the state. That it would not so act may, perhaps, depend on circumstances. The officer may retain the amount of the taxes in his hands, and, on the proceedings of the state against him, may plead in bar the judgment of a court of competent jurisdiction. If this plea ought to be sustained, and it is far from being certain that it ought not, the judgment so pleaded would have acted directly on the revenue of the state in the hands of its officer. And yet the argument admits that the action in such a case would be sustained. But suppose, in such a case, the party conceiving himself to be injured, instead of bringing an action sounding in damages, should sue for the specific thing, while yet in possession of the seizing officer. It being admitted, in argument, that the action sounding in damages would lie, we are unable to perceive the line of distinction between that and the action of detinue. Yet the latter action would claim the specific article seized for the tax, and would obtain it, should the seizure be deemed unlawful.

It would be tedious to pursue this part of the inquiry further, and it would be useless, because every person will perceive that the same reasoning is applicable to all the other enumerated controversies to which a state may be a party.

The principle may be illustrated by a reference to those other controversies where jurisdiction depends on the party. But before we review them, we will notice one where the nature of the controversy is, in some degree, blended with the character of the party.

§ 2377. *Suits against foreign ministers.*

If a suit be brought against a foreign minister, the supreme court alone has original jurisdiction, and this is shown on the record. But, suppose a suit to be brought which affects the interest of a foreign minister, or by which the person of his secretary, or of his servant, is arrested. The minister does not, by the mere arrest of his secretary, or his servant, become a party to this suit, but the actual defendant pleads to the jurisdiction of the court, and asserts his privilege. If the suit affects a foreign minister, it must be dismissed, not because he is a party to it, but because it affects him. The language of the constitution in the two cases is different. This court can take cognizance of all cases "affecting" foreign ministers; and, therefore, jurisdiction does not depend on the party named in the record. But this language changes when the enumeration proceeds to states. Why this change? The answer is obvious. In the case of foreign ministers, it was intended, for reasons which all comprehend, to give the national courts jurisdiction over all cases by which they were in any manner affected. In the case of states, whose immediate or remote interests were mixed up with a multitude of cases, and who might be affected in an almost infinite variety of ways, it was intended to give jurisdiction in those cases only to which they were actual parties.

§ 2378. *Controversies to which the United States is party.*

In proceeding with the cases in which jurisdiction depends on the character of the party, the first in the enumeration is, "controversies to which the United States shall be a party." Does this provision extend to the cases where the United States are not named in the record, but claim, and are actually entitled to, the whole subject in controversy? Let us examine this question. Suits brought by the postmaster-general are for money due to the United States. The nominal plaintiff has no interest in the controversy, and the United States are the only real party. Yet these suits could not be instituted in the courts of the Union under that clause which gives jurisdiction in all cases to which the United States are a party; and it was found necessary to give the court jurisdiction over them, as being cases arising under a law of the United States.

§ 2379. *Controversies between citizens of different states.*

The judicial power of the Union is also extended to controversies between citizens of different states; and it has been decided that the character of the parties must be shown on the record. Does this provision depend on the character of those whose interest is litigated, or of those who are parties on the record? In a suit, for example, brought by or against an executor, the creditors or legatees of his testator are the persons really concerned in interest; but it has never been suspected that if the executor be a resident of another state, the jurisdiction of the federal courts could be ousted by the fact that the creditors or legatees were citizens of the same state with the opposite party. The universally received construction in this case is, that jurisdiction is neither given nor ousted by the relative situation of the parties concerned in interest, but by the relative situation of the parties named on the record. Why is this construction universal? No case can be imagined in which the existence of an interest out of the party on the record is more unequivocal than in that which has been just stated. Why, then, is it universally admitted that this interest

in no manner affects the jurisdiction of the court? The plain and obvious answer is, because the jurisdiction of the court depends, not upon this interest, but upon the actual party on the record. Were a state to be the sole legatee, it will not, we presume, be alleged that the jurisdiction of the court, in a suit against the executor, would be more affected by this fact than by the fact that any other person, not suable in the courts of the Union, was the sole legatee. Yet, in such a case, the court would decide directly and immediately on the interest of the state. This principle might be further illustrated by showing that jurisdiction, where it depends on the character of the party, is never conferred in consequence of the existence of an interest in a party not named; and by showing that, under the distributive clause of the second section of the third article, the supreme court could never take original jurisdiction, in consequence of an interest in a party not named in the record.

§ 2380. *In all cases where jurisdiction depends on the party, it is the party named in the record.*

But the principle seems too well established to require that more time should be devoted to it. It may, we think, be laid down as a rule which admits of no exception, that, in all cases where jurisdiction depends on the party, it is the party named in the record. Consequently, the eleventh amendment, which restrains the jurisdiction granted by the constitution over suits against states, is, of necessity, limited to those suits in which a state is a party on the record. The amendment has its full effect, if the constitution be construed as it would have been construed had the jurisdiction of the court never been extended to suits brought against a state, by the citizens of another state, or by aliens. The state not being a party on the record, and the court having jurisdiction over those who are parties on the record, the true question is not one of jurisdiction, but whether, in the exercise of its jurisdiction, the court ought to make a decree against the defendants; whether they are to be considered as having a real interest, or as being only nominal parties.

§ 2381. *In proceedings against state officers, founded upon their action in executing an unconstitutional state law, such officers are regarded as the real parties in interest, and the court may enter decree against them.*

In pursuing the arrangement which the appellants have made for the argument of the cause, this question has already been considered. The responsibility of the officers of the state for the money taken out of the bank was admitted, and it was acknowledged that this responsibility might be enforced by the proper action. The objection is to its being enforced against the specific article taken, and by the decree of this court. But it has been shown, we think, that an action of detinue might be maintained for that article, if the bank had possessed the means of describing it, and that the interest of the state would not have been an obstacle to the suit of the bank against the individual in possession of it. The judgment in such a suit might have been enforced had the article been found in possession of the individual defendant. It has been shown that the danger of its being parted with, of its being lost to the plaintiff, and the necessity of a discovery, justified the application to a court of equity. It was in a court of equity alone that the relief would be real, substantial and effective. The parties must certainly have a real interest in the case, since their personal responsibility is acknowledged, and, if denied, could be demonstrated. It was proper, then, to make a decree against the defendants in the circuit court, if the law of the state of Ohio be repugnant to the constitution, or to a law of

the United States made in pursuance thereof, so as to furnish no authority to those who took, or to those who received, the money for which this suit was instituted.

§ 2382. *A state law which imposes a tax on any branch of the Bank of the United States is unconstitutional. M'Culloch v. Maryland, 4 Wheaton, 316, reviewed and affirmed.*

7. Is that law unconstitutional? This point was argued with great ability, and decided by this court, after mature and deliberate consideration, in the case of *M'Culloch v. State of Maryland, 4 Wheat., 316* (§§ 380–398, *supra*). A revision of that opinion has been requested; and many considerations combine to induce a review of it. The foundation of the argument in favor of the right of a state to tax the bank is laid in the supposed character of that institution. The argument supposes the corporation to have been originated for the management of an individual concern, to be founded upon contract between individuals, having private trade and private profit for its great end and principal object. If these premises were true, the conclusion drawn from them would be inevitable. This mere private corporation, engaged in its own business, with its own views, would certainly be subject to the taxing power of the state, as any individual would be; and the casual circumstance of its being employed by the government in the transaction of its fiscal affairs would no more exempt its private business from the operation of that power than it would exempt the private business of any individual employed in the same manner. But the premises are not true. The bank is not considered as a private corporation, whose principal object is individual trade and individual profit, but as a public corporation, created for public and national purposes. That the mere business of banking is, in its own nature, a private business, and may be carried on by individuals or companies having no political connection with the government, is admitted; but the bank is not such an individual or company. It was not created for its own sake, or for private purposes. It has never been supposed that congress could create such a corporation. The whole opinion of the court, in the case of *M'Culloch v. State of Maryland, 4 Wheat., 316*, is founded on, and sustained by, the idea that the bank is an instrument which is “necessary and proper for carrying into effect the powers vested in the government of the United States.” It is not an instrument which the government found ready made, and has supposed to be adapted to its purposes; but one which was created in the form in which it now appears, for national purposes only. It is, undoubtedly, capable of transacting private as well as public business. While it is the great instrument by which the fiscal operations of the government are effected, it is also trading with individuals for its own advantage. The appellants endeavor to distinguish between this trade and its agency for the public, between its banking operations and those qualities which it possesses in common with every corporation, such as individuality, immortality, etc. While they seem to admit the right to preserve this corporate existence, they deny the right to protect it in its trade and business. If there be anything in this distinction, it would tend to show that so much of the act as incorporates the bank is constitutional, but so much of it as authorizes its banking operation is unconstitutional. Congress can make the inanimate body, and employ the machine as a depository of, and vehicle for, the conveyance of the treasure of the nation, if it be capable of being so employed, but cannot breathe into it the vital spirit which alone can bring it into useful existence.

§ 2383. *The power to charter a bank is incidental to the power to carry on the fiscal operations of the government.*

Let this distinction be considered. Why is it that congress can incorporate or create a bank? This question was answered in the case of *M'Culloch v. State of Maryland*. It is an instrument which is "necessary and proper" for carrying on the fiscal operations of government. Can this instrument, on any rational calculation, effect its object, unless it be endowed with that faculty of lending and dealing in money which is conferred by its charter? If it can, if it be as competent to the purposes of government without as with this faculty, there will be much difficulty in sustaining that essential part of the charter. If it cannot, then this faculty is necessary to the legitimate operations of government, and was constitutionally and rightfully engrafted on the institution. It is, in that view of the subject, the vital part of the corporation; it is its soul; and the right to preserve it originates in the same principle with the right to preserve the skeleton or body which it animates. The distinction between destroying what is denominated the corporate franchise, and destroying its vivifying principle, is precisely as incapable of being maintained as a distinction between the right to sentence a human being to death and a right to sentence him to a total privation of sustenance during life. Deprive a bank of its trade and business, which is its sustenance, and its immortality, if it have that property, will be a very useless attribute.

§ 2384. *A tax upon the faculties, trade and occupation of a bank is a tax upon the bank itself.*

This distinction, then, has no real existence. To tax its faculties, its trade and occupation, is to tax the bank itself? To destroy or preserve the one, is to destroy or preserve the other. It is urged that congress has not, by this act of incorporation, created the faculty of trading in money; that it had anterior existence, and may be carried on by a private individual or company as well as by a corporation. As this profession or business may be taxed, regulated or restrained, when conducted by an individual, it may likewise be taxed, regulated or restrained when conducted by a corporation.

§ 2385. *The power of congress to charter a bank includes the power to authorize such bank to trade in money.*

The general correctness of these propositions need not be controverted. Their particular application to the question before the court is alone to be considered. We do not maintain that the corporate character of the bank exempts its operations from the action of state authority. If an individual were to be endowed with the same faculties, for the same purposes, he would be equally protected in the exercise of those faculties. The operations of the bank are believed not only to yield the compensation for its services to the government, but to be essential to the performance of those services. Those operations give its value to the currency in which all the transactions of the government are conducted. They are, therefore, inseparably connected with those transactions. They enable the bank to render those services to the nation for which it was created, and are, therefore, of the very essence of its character as national instruments. The business of the bank constitutes its capacity to perform its functions, as a machine for the money transactions of the government. Its corporate character is merely an incident, which enables it to transact that business more beneficially.

Were the secretary of the treasury to be authorized by law to appoint agencies throughout the Union to perform the public functions of the bank, and to

be endowed with its faculties as a necessary auxiliary to those functions, the operations of those agents would be as exempt from the control of the states as the bank, and not more so. If, instead of the secretary of the treasury, a distinct office were to be created for the purpose, filled by a person who should receive, as a compensation for his time, labor and expense, the profits of the banking business, instead of other emoluments to be drawn from the treasury, which banking business was essential to the operations of the government, would each state in the Union possess a right to control these operations? The question on which this right would depend must always be, are these faculties so essential to the fiscal operations of the government as to authorize congress to confer them? Let this be admitted, and the question, does the right to preserve them exist? must always be answered in the affirmative.

Congress was of opinion that these faculties were necessary to enable the bank to perform the services which are exacted from it, and for which it was created. This was certainly a question proper for the consideration of the national legislature. But, were it now to undergo revision, who would have the hardihood to say that without the employment of a banking capital those services could be performed? That the exercise of these faculties greatly facilitates the fiscal operations of the government is too obvious for controversy; and who will venture to affirm that the suppression of them would not materially affect those operations, and essentially impair, if not totally destroy, the utility of the machine to the government? The currency which it circulates by means of its trade with individuals is believed to make it a more fit instrument for the purposes of government than it could otherwise be; and, if this be true, the capacity to carry on this trade is a faculty indispensable to the character and objects of the institution.

The appellants admit that if this faculty be necessary to make the bank a fit instrument for the purposes of the government, congress possesses the same power to protect the machine in this as in its direct fiscal operations; but they deny that it is necessary to those purposes, and insist that it is granted solely for the benefit of the members of the corporation. Were this proposition to be admitted, all the consequences which are drawn from it might follow. But it is not admitted. The court has already stated its conviction, that, without this capacity to trade with individuals, the bank would be a very defective instrument, when considered with a single view to its fitness for the purposes of government. On this point the whole argument rests.

§ 2386. *It is not necessary that an exemption should be asserted in an act of incorporation which is implied from the nature of the incorporation.*

It is contended that, admitting congress to possess the power, this exemption ought to have been expressly asserted in the act of incorporation; and not being expressed, ought not to be implied by the court. It is not unusual for a legislative act to involve consequences which are not expressed. An officer, for example, is ordered to arrest an individual. It is not necessary, nor is it usual, to say that he shall not be punished for obeying this order. His security is implied in the order itself. It is no unusual thing for an act of congress to imply, without expressing, this very exemption from state control which is said to be so objectionable in this instance. The collectors of the revenue, the carriers of the mail, the mint establishment, and all those institutions which are public in their nature, are examples in point. It has never been doubted that all who are employed in them are protected while in the line of duty; and yet this protection is not expressed in any act of congress. It is incidental to, and

is implied in, the several acts by which these institutions are created, and is secured to the individuals employed in them, by the judicial power alone; that is, the judicial power is the instrument employed by the government in administering this security.

That department has no will in any case. If the sound construction of the act be, that it exempts the trade of the bank as being essential to the character of a machine necessary to the fiscal operations of the government, from the control of the states, courts are as much bound to give it that construction as if the exemption had been established in express terms. Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law.

The appellants rely greatly on the distinction between the bank and the public institutions, such as the mint or the postoffice. The agents in those offices are, it is said, officers of government, and are excluded from a seat in congress. Not so the directors of the bank. The connection of the government with the bank is likened to that with contractors. It will not be contended that the directors, or other officers of the bank, are officers of government. But it is contended that, were their resemblance to contractors more perfect than it is, the right of the state to control its operations, if those operations be necessary to its character as a machine employed by the government, cannot be maintained. Can a contractor for supplying a military post with provisions be restrained from making purchases within any state, or from transporting the provisions to the place at which the troops were stationed? Or could he be fined or taxed for doing so? We have not yet heard these questions answered in the affirmative. It is true that the property of the contractor may be taxed as the property of other citizens; and so may the local property of the bank. But we do not admit that the act of purchasing, or of conveying the articles purchased, can be under state control. If the trade of the bank be essential to its character as a machine for the fiscal operations of the government, that trade must be as exempt from state control as the actual conveyance of the public money. Indeed, a tax bears upon the whole machine; as well upon the faculty of collecting and transmitting the money of the nation as on that of discounting the notes of individuals. No distinction is taken between them.

§ 2387. *The act of the state of Ohio declared void.*

Considering the capacity of carrying on the trade of banking as an important feature in the character of this corporation, which was necessary to make it a fit instrument for the objects for which it was created, the court adheres to its decision in the case of *M'Culloch v. State of Maryland*, 4 Wheat., 316 (§§ 380-398, *supra*), and is of opinion that the act of the state of Ohio, which is certainly much more objectionable than that of the state of Maryland, is repugnant to a law of the United States made in pursuance of the constitution, and, therefore, void. The counsel for the appellants are too intelligent, and have too much self-respect, to pretend that a void act can afford any protection to the officers who execute it. They expressly admit that it cannot. It being then shown, we think conclusively, that the defendants could

derive neither authority nor protection from the act which they executed, and that this suit is not against the state of Ohio within the view of the constitution, the state being no party on the record, the only real question in the cause is whether the record contains sufficient matter to justify the court in pronouncing a decree against the defendants. That this question is attended with great difficulty has not been concealed or denied. But when we reflect that the defendants Osborn and Harper are incontestably liable for the full amount of the money taken out of the bank; that the defendant Currie is also responsible for the sum received by him, it having come to his hands with full knowledge of the unlawful means by which it was acquired; that the defendant Sullivan is also responsible for the sum specifically delivered to him, with notice that it was the property of the bank, unless the form of having made an entry on the books of the treasury can countervail the fact; that it was, in truth, kept untouched in a trunk by itself as a deposit, to await the event of the pending suit respecting it,—we may lay it down as a proposition, safely to be affirmed, that all the defendants in the cause were liable in an action at law for the amount of this decree. If the original injunction was properly awarded, for the reasons stated in the preceding part of this opinion, the money, having reached the hands of all those to whom it afterwards came with notice of that injunction, might be pursued, so long as it remained a distinct deposit, neither mixed with the money of the treasury nor put into circulation. Were it to be admitted that the original injunction was not properly awarded, still, the amended and supplemental bill, which brings before the court all the parties who had been concerned in the transaction, was filed after the cause of action had completely accrued. The money of the bank had been taken, without authority, by some of the defendants, and was detained by the only person who was not an original wrong-doer in a specific form; so that detinue might have been maintained for it, had it been in the power of the bank to prove the facts which are necessary to establish the identity of the property sued for. Under such circumstances, we think a court of equity may afford its aid, on the ground that a discovery is necessary, and also on the same principle that an injunction issues to restrain a person who has fraudulently obtained possession of negotiable notes, from putting them into circulation; or a person having the apparent ownership of stock really belonging to another, from transferring it. The suit, then, might be as well sustained in a court of equity as in a court of law, and the objection that the interests of the state are committed to subordinate agents, if true, is the unavoidable consequence of exemption from being sued — of sovereignty. The interests of the United States are sometimes committed to subordinate agents. It was the case in *Hoyt v. Gelston*, 3 Wheat., 246, in the case of *The Appollon*, 9 Wheat., 362, and in the case of *Doddridge v. Thompson*, 9 Wheat., 469, and in many others. An independent foreign sovereign cannot be sued, and does not appear in court. But a friend of the court comes in, and, by suggestion, gives it to understand that his interests are involved in the controversy. The interests of the sovereign, in such a case, and in every other where he chooses to assert them under the name of the real party to the cause, are as well defended as if he were a party to the record. But his pretensions, where they are not well founded, cannot arrest the right of a party having a right to the thing for which he sues. Where the right is in the plaintiff, and the possession in the defendant, the inquiry cannot be stopped by the mere assertion of title in a sovereign. The court must proceed to investigate the assertion, and examine the title. In

the case at bar, the tribunal established by the constitution for the purpose of deciding, ultimately, in all cases of this description, had solemnly determined that a state law imposing a tax on the Bank of the United States was unconstitutional and void, before the wrong was committed for which this suit was brought.

We think, then, that there is no error in the decree of the circuit court for the district of Ohio, so far as it directs restitution of the specific sum of \$98,000, which was taken out of the bank unlawfully, and was in the possession of the defendant Samuel Sullivan when the injunction was awarded in September, 1820, to restrain him from paying it away, or in any manner using it; and so far as it directs the payment of the remaining sum of \$2,000 by the defendants Ralph Osborn and John L. Harper; but that the same is erroneous so far as respects the interest on the coin, part of the said \$98,000, it being the opinion of this court, that, while the parties were restrained by the authority of the circuit court from using it, they ought not to be charged with interest. The decree of the circuit court for the district of Ohio is affirmed as to the said sums of \$98,000 and \$2,000, and reversed as to the residue.

MR. JUSTICE JOHNSON dissented on the point of jurisdiction.

§ 2388. Jurisdiction generally.—The jurisdiction of the courts of the United States is properly commensurate with every right and duty created, declared or necessarily implied by and under the constitution and laws of the United States. These courts are created courts of common law and equity, and under whichever of these classes of jurisprudence such rights or duties may fall, or be appropriately arranged, they are to be taken cognizance of and adjudicated according to the settled and known principles of that division to which they belong. *Irvine v. Marshall*, 20 How., 564.

§ 2389. The cession to the United States, in the treaty with Spain, of "all public lots and squares, vacant lands, . . . which are not private property," does not give the United States jurisdiction of a common claimed by the public by dedication. The government of the United States being one of delegated powers, it can exercise no authority except over subjects which have been delegated to it. Such jurisdiction cannot be enlarged by congress either by legislation or by an exercise of the treaty-making power, and as power to exercise jurisdiction over such common is not delegated by the constitution, it is not conferred by the treaty. *New Orleans v. United States*, 10 Pet., 736.

§ 2390. The ultimate right to determine the jurisdiction of the federal courts is placed by the constitution of the United States in the supreme court of the United States, and cannot in any manner be exercised by the legislatures of the states, and every court must abide by its decision. *United States v. Peters*, 5 Cr., 136; *United States v. Treasurer*, 2 Abb., 57.

§ 2391. Although the constitution declares that "the judicial power shall extend to all cases in law and equity arising under this constitution and the laws of the United States," the circuit courts of the United States can exercise jurisdiction in no case solely upon the ground that it falls within the constitutional grant of judicial power to the United States. There must be an act of congress expressly conferring jurisdiction. *Harrison v. Hadley*, 2 Dill., 229.

§ 2392. Congress cannot withdraw from judicial cognizance any matter which in its nature is the subject of a suit at common law, or in equity or admiralty; nor can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination. *Murray v. Hoboken Land & Improvement Co.*, 18 How., 273 (§§ 676-639).

§ 2393. Where any constitutional right is sought to be affected by the legislation of a state, it is competent for congress in such case to clothe the federal courts with original jurisdiction or with jurisdiction by transfer from the state courts. *Northwestern Fertilizing Co. v. Town of Hyde Park*, 3 Biss., 480.

§ 2394. As the supreme court of the United States is one of limited and special original jurisdiction, its action must be confined to the particular cases, controversies and parties over which the constitution and laws have authorized it to act. Any proceeding without the limits prescribed is *coram non judge*, and its action a nullity. *State of Rhode Island v. State of Massachusetts*, 12 Pet., 720.

§ 2395. It seems that the only original jurisdiction possessed by the courts of the United

States is in those cases enumerated in the constitution, and that in all other cases the only jurisdiction is appellate. *Todd's Case*, 13 How., 52, n.

§ 2396. It seems that the supreme court of the United States has appellate jurisdiction over the supreme courts of the states in cases where the construction of the constitution and laws of the United States is drawn in question, as to the effect to be given, in a state, of properly authenticated judgments rendered in courts of other states. *Westerwelt v. Lewis*, 2 McL., 512.

§ 2397. In case of a suit in the supreme court of the United States, between two states, to determine the boundary line between them, the United States, under the constitution, may intervene upon the application of the attorney-general for the protection of its rights. *State of Florida v. State of Georgia*, 17 How., 491; *State of Rhode Island v. State of Massachusetts*, 12 Pet., 720.

§ 2398. The Cherokee nation were not a "foreign state" within that clause of the constitution conferring jurisdiction on the supreme court in controversies "between a state or the citizens thereof and foreign states, citizens or subjects." *Cherokee Nation v. State of Georgia*, 5 Pet., 15.

§ 2399. The supreme court of the United States has no right to pronounce an abstract opinion upon the constitutionality of a state law. Such law must be brought into actual or threatened operation, upon rights properly falling under judicial cognizance, or a remedy is not to be had in that court. (Per THOMPSON, J., dissenting.) *Ibid.*

§ 2400. The thirteenth section of the judiciary act of 1789 (1 Statutes at Large, 81), so far as it attempts to grant to the supreme court the power to issue writs of *mandamus* in classes of cases not within its original jurisdiction, is unconstitutional and void. *Marbury v. Madison*, 1 Cr., 178.

§ 2401. **Chancery jurisdiction.**—The equitable power of the federal courts is derived from the constitution of the United States, and it cannot be in any manner enlarged, restricted or modified by the legislatures of the states. The fact that in a given state there is no court of chancery does not affect the powers of federal courts to exercise chancery jurisdiction. *Lorman v. Clarke*, 2 McL., 570; *Hubbard v. Northern R. Co.*, 3 Blatch., 86; *In re Meador*, 1 Abb., 325; *Baker v. Biddle*, Bald., 394.

§ 2402. The courts of the United States cannot exercise any equity powers except those conferred by acts of congress, and those judicial powers which the high court of chancery in England, acting under its judicial capacity as a court of equity, possessed and exercised at the time of the formation of the constitution of the United States. Powers not judicial, exercised by the chancellor merely as the representative of the sovereign, and by virtue of the king's prerogative as *parens patriæ*, are not, under the constitution of the United States, conferred upon the federal courts. *Fountain v. Ravenel*, 17 How., 384.

§ 2403. **Exclusive jurisdiction.**—The laws of the United States are laws in the several states, and are as binding upon the citizens and courts thereof as are the laws of the state. The United States is not a foreign sovereignty as regards the several states, but it is a concurrent, and, within its jurisdiction, a paramount sovereignty. When by act of congress jurisdiction is conferred upon the federal courts, it may be made exclusive by congress if not made so by the constitution; but if not made exclusive, either expressly or by necessary implication, the state courts have concurrent jurisdiction whenever, by their own constitution, they are able to take it. *Claffin v. Houseman*, 3 Otto, 136.

§ 2404. **Suit by state in supreme court.**—The right of a state to bring suit in the supreme court of the United States exists where it sues as an individual in a case where its sovereignty is involved, and where it claims a direct and not a remote or contingent interest. *State of Pennsylvania v. Wheeling, etc., Bridge Co.*, 13 How., 559.

§ 2405. **Suits against a state.**—A mere personal suit against a state, to recover the proceeds of slaves seized by the state after their illegal capture, is not a case in which a suit can be commenced by a private person against the state in the supreme court of the United States. *Ex parte Madrazzo*, 7 Pet., 632.

§ 2406. The eleventh amendment of the constitution, which deprived the supreme court of jurisdiction over suits brought against a state, applied to cases pending at the time of its adoption as well as to future cases. *Hollingsworth v. Virginia*, 3 Dal., 362. See §§ 2353, 2362.

§ 2407. The eleventh amendment to the federal constitution forbids a suit by injunction in a United States court against the officers of a state in their official character, to compel them to fulfil the state's contract by executing laws of the state, since such a proceeding is in effect a suit against the state. *McCauley v. Kellogg*, 2 Woods, 23.

§ 2408. The eleventh amendment to the constitution of the United States, which provides that the judicial power of the United States shall not extend to any suit against a state, does not affect the right of a state to assert, as plaintiff, any interest it may have in a subject-matter of controversy between individuals in a federal court. Nor will the mere suggestion of

title by a state to property of an individual, who is defendant, arrest the proceedings of the court and prevent its looking into the suggestion and examining the validity of the title. *United States v. Peters*, 5 Cr., 189.

§ 2409. Power of congress over courts.—The constitution, in distributing the various powers of the government, necessarily left it to the legislative power to organize the supreme court, to define its powers consistently with the constitution as to its original jurisdiction, and to distribute the residue of the judicial power between it and the inferior courts which it was bound to ordain and establish, defining their respective powers, whether original or appellate, by which, and how it should be exercised. *State of Rhode Island v. State of Massachusetts*, 12 Pet., 721.

§ 2410. Congress has constitutional authority to establish, from time to time, such inferior courts as it deems proper, and it may transfer a cause from one such tribunal to another, the constitution containing no provision prohibiting or restricting the right. *Stuart v. Laird*, 1 Cr., 309.

§ 2411. That part of the eleventh section of the judiciary act which prohibits actions in the federal circuit courts by the assignee of a *chose in action*, except in cases in which the action could have been maintained there originally, is constitutional. The constitution has defined the limits of the judicial power of the United States, but has not prescribed how much of it shall be exercised by the circuit courts; consequently, the statute which does prescribe the limits of their jurisdiction cannot be in conflict with the constitution unless it confers powers not enumerated therein. *Sheldon v. Sill*, 8 How., 448.

§ 2412. Congress has the constitutional authority to provide that, on appeals in admiralty cases, the jurisdiction of the supreme court shall be limited to questions of law arising upon the record. *The Francis Wright*, 15 Otto, 384.

§ 2413. Congress cannot bind the federal courts by a mere expression of opinion; it can only do so by legislative act. The function of ascertaining the scope of the law is purely judicial and cannot be exercised by the legislature. *United States v. Jordan*, 2 Low., 548.

§ 2414. The act of 1792, conferring upon the judges of the circuit courts of the United States the power to hear and decide claims against the United States for pensions, etc., as it intended to confer judicial power on such judges, and could not under the constitution, be inoperative to confer power on such judges to act as commissioners for the purposes of the act. *Todd's Case*, 18 How., 52, n.

§ 2415. It seems that an act of congress which imposes upon the circuit courts duties which are not judicial, and subjects their decision to the approval of the secretary of war, is unconstitutional. *Note to Hayburn's Case*, 2 Dal., 410.

§ 2416. Though under the constitution congress has no judicial powers, and can no more direct that a court find a judgment limited in a certain way than they can render or direct a judgment; yet where a claim against the government has been tried in the court of claims and the court has found against the claim, congress may submit the case to the court of claims and limit the amount for which a recovery may be had. *Nock v. United States*,* 2 Ct. Cl., 455.

§ 2417. A devised one undivided fifth part of his real estate to C, in trust for the entire use and benefit of B, for and during his natural life, and subject to be disposed of by B by his last will and testament. B subsequently procured a resolve of the legislature authorizing the trustee to sell a part of the real estate so held in trust, and, upon a division of the estate by the probate judge, to invest the net proceeds in other estate to be held upon the like trusts. This resolve having been passed at the solicitation of the person who possessed a complete dominion over the disposal of the property, was held to have been a constitutional exercise of power by the legislature, and not a usurpation of the functions of the judiciary. *Blagge v. Miles*, 1 Story, 426.

§ 2418. Congress has power to prescribe the time within which suits must be brought in the federal courts, and it makes no difference that the action would be subject to a different limitation if tried in the state courts, or that it has been removed from a state court into the federal court. The limitation clause of the act of 1803, when so construed, is not unconstitutional. *Clark v. Dick*,* 1 Dill., 8.

§ 2419. Jurisdiction not affected by state laws.—The jurisdiction of the federal courts cannot be affected by state laws. *National Bank v. Sebastian County*, 5 Dill., 414 (§§ 1903, 1904).

§ 2420. State laws cannot enlarge the powers of the courts of the United States beyond the limits marked out by the constitution. (Per TANEY, C. J.) *Fontain v. Ravenel*, 17 How., 393.

§ 2421. State laws can never confer jurisdiction on the courts of the United States. They can only furnish rules to ascertain the rights of parties, and thus assist in the administration of the proper remedies in cases in which jurisdiction is already vested by the laws of the United States. *Steamboat Orleans v. Phœbus*, 11 Pet., 184.

§ 2422. A state law cannot give jurisdiction to the federal courts. But it may give a substantial right of such a character that, where there is no impediment arising from the residence of the parties, the right may be enforced in the proper federal tribunal, whether it be a court of equity, of admiralty, or of common law. *Ex parte McNeil*, 13 Wall., 236.

§ 2423. Encroachments upon other departments.—Where a special act of congress, for the relief of certain claimants against the United States for extra services as contractors in carrying the mails, provided, with the consent of the claimants, for the submission of their claims to the solicitor of the treasury, to make such allowance therefor as should seem right, and directed the postmaster-general to credit them with whatever sums the solicitor should decide to be due them, it was held that a *mandamus* to compel the postmaster-general to make such credits was not an infringement upon the executive department of the government. *Kendall v. United States*, 12 Pet., 524.

§ 2424. In carrying a law into effect, the executive must necessarily construe it, and it is not for a court to say that there is error in the construction, and that a different course must be pursued. It is true that if an officer act without authority of law, and under color of an unconstitutional law, he is responsible, and where the mischief would be irremediable, an injunction may be interposed. *Astrom v. Hammond*, 3 McL., 110.

§ 2425. It seems that where, by an executive construction of the law, a wrong is done an individual, the court will give him redress. But where no such wrong is done, acts of the executive within the general scope of his powers, and by virtue of law, cannot be reviewed, though to some extent the letter of the law may not have been followed. There is no court of errors in which executive decisions, which do not affect individual rights, can be reviewed. *United States v. Lytle*, 5 McL., 17.

§ 2426. In all matters of discretion, and in regard to the forms of proceedings, it is clear that executive acts cannot in any form be drawn in question by the judicial power. This power is limited to cases where, by the exercise of executive functions, an injury is done to an individual; and in such cases there is a remedy at law. *Astrom v. Hammond*, 3 McL., 110.

§ 2427. No right can be incident to one department of the government which necessarily goes to the suspension of a right incident to another, or to control, suspend or defeat its operation. Where the department authorized to annul a voidable treaty shall deem it most conducive to the national interest that it should longer continue to be obeyed and observed, no right can be incident to the judiciary to declare it void in a single instance. *Jones v. Walker*,* 2 Paine, 688.

§ 2428. Assumption of judicial power.—A statute may declare the construction of previous statutes, so as to bind the courts in reference to all transactions occurring after the passage of the law, and may, in many cases, furnish the rule to govern the courts in transactions which are past, provided no constitutional right of the party is violated. Where congress can exercise a power by passing a new statute, which may be retroactive in its effect, the form of words which it uses to put this power in operation cannot be material, if the purpose is clear, and that purpose is within the power. And, therefore, the act of July 14, 1870, declaring that certain statutes previously passed "*shall be construed* to impose the taxes therein mentioned to the 1st day of August, 1870, but after that date no further taxes shall be levied or assessed under said sections," is not an invasion of the judicial power, as the same purpose might have been accomplished without using the word "*construe*." *Stockdale v. Insurance Companies*, 20 Wall., 823.

§ 2429. An act of congress construing previous revenue statutes, not being an attempt to construe them differently from what the courts had construed them, no construction on the subject having been given by the courts, and which is not an attempt to invade private rights, but which merely revives and continues in force a tax which might be supposed to have expired, is valid. *Ibid*.

§ 2430. Congress cannot, under cover of giving a construction to an existing or an expired statute, invade private rights with which it could not interfere, by a new or affirmative statute. *Ibid*.

§ 2431. The clause in the constitution authorizing congress to make all laws which shall be necessary and proper for carrying into execution the powers vested by the constitution in the government of the United States, or any department or officer thereof, authorizes congress to make all laws necessary to carry into execution the judgments which the judicial department has power to pronounce. *Wayman v. Southard*, 10 Wheat., 1.

§ 2432. Congress has constitutional power to regulate proceedings on executions in the federal courts, and direct the mode and manner, and out of what property of the debtor, satisfaction may be obtained. *Bank of United States v. Halstead*, 10 Wheat., 51.

§ 2433. Delegation of judicial power.—The act of 1852, relating to the board of land commissioners of California, which provides for what, in that statute, is called an appeal to

the district court, is not unconstitutional as vesting in the board a portion of the judicial power of the United States; and the removal of the papers and the case to the district court, instead of being an appeal, is merely the institution of a suit in the district court. *United States v. Ritchie*, 17 How., 533.

§ 2434. By laws passed in pursuance of the treaty with Spain at the time of the cession of Florida to the United States, the claims of Spaniards against the United States for injuries caused by the armies of the United States before the cession were referred to certain of the judges of Florida, who were to examine them, and if there appeared to be anything equitably due the claimant, were to report the same to the secretary of the treasury. *Held*, that no part of the judicial power under the constitution was conferred upon the respective judges while so acting, and that consequently no appeal lay. *United States v. Ferreira*, 13 How., 45.

§ 2435. A direction by congress to an accounting officer, commanding him to state or restate an account, and to come to such a conclusion in regard to it as in his opinion justice to the claimant shall require, confers upon such officer a ministerial and not a judicial office. The direction is designed as an instruction to the officer by which to adjust the accounts, congress reserving to itself the power to approve, reject or rescind, or otherwise to act in the premises as the exigencies of the case might require. *Gordon v. United States*,* 1 Ct. Cl., 4.

§ 2436. Altering forms of process.—The act of 1792, giving the courts of the United States authority to alter the forms of process and modes of proceeding in suits at law, and also those of equity, and of admiralty and maritime jurisdiction, is not unconstitutional as granting to the courts legislative power. *Bank of United States v. Halstead*, 10 Wheat., 51.

§ 2437. Laws conferring authority on the federal courts to adopt such state laws relating to process and procedure as they shall see fit are constitutional. *Beers v. Haughton*, 9 Pet., 359; *Dobbins v. Allegheny*,* 2 Pittsb. R., 120.

§ 2438. Territorial courts.—The distinction between the federal and state jurisdictions under the constitution of the United States has no foundation in the territorial governments, and consequently no such distinction exists, either in respect to the jurisdiction of their courts, or the subjects submitted to their cognizance. Territories are not organized under the federal constitution, nor subject to its complex division of the powers of government. They are exclusively the creations of the legislative department, and subject to its supervision and control. *Benner v. Porter*, 9 How., 242.

§ 2439. Territorial courts created by act of congress, of which the judges hold office but four years, are not constitutional courts in which the judicial power conferred by the constitution on the general government can be deposited. The jurisdiction with which they are invested is not a part of that judicial power which is defined by the third article of the constitution, but is conferred by congress in the execution of those general powers which that body possesses over the territories. *American Ins. Co. v. Canter*, 1 Pet., 546.

§ 2440. Although within the United States admiralty jurisdiction can only be exercised by courts established under the third article of the constitution, yet the same limitation does not extend to the territories, and a territorial legislature, under authority to establish inferior courts, may establish a court for the trial and determination of salvage cases. *Ibid*.

§ 2441. The legislative power of the territory of New Mexico, being extended by the organic act to all rightful subjects of legislation consistent with the constitution of the United States, a provision in one of its statutes that "in case of appeals in civil suits, if the judgment by the appellate court be against the appellant, it shall be rendered against him and his securities on the appeal bond," is open to no constitutional objection. *Beall v. New Mexico*, 16 Wall., 585.

§ 2442. The act of congress conferring upon a territorial court jurisdiction of offenses committed by Indians is constitutional. *United States v. Cha-to-kah-na-pe-sha*, Hemp., 28.

§ 2443. Political powers.—The seizure of an American vessel within the territorial jurisdiction of a foreign power is an offense against that power which must be adjusted between the two governments, and a federal court can take no cognizance of it. Even though illegal, a subsequent seizure by civil process issuing out of a district court is sufficient to give the court full jurisdiction. *The Ship Richmond v. United States*, 9 Cr., 104. See GOVERNMENT.

§ 2444. Where the terms of a treaty stipulation import a contract—when either of the parties thereby engages to perform a particular act—the treaty addresses itself to the political, not to the judicial, department, and the legislature must execute the contract before it can become a rule for the court. *Humphrey v. United States*,* Dev., 51; *Jones v. Walker*,* 2 Paine, 688.

§ 2445. It does not belong to the judicial department of the government to pass upon the voluntary validity of a treaty, that is, to annul it because it has been broken. The necessary validity of a treaty is a judicial question, but the former is of a political nature. *Jones v. Walker*,* 2 Paine, 698.

§ 2446. A nation becomes independent from its declaration of independence, only as respects its own government. Before it can be recognized by the judiciary of other nations, it must be recognized by the executive authority of those nations. So where papers authenticated by the seal of Buenos Ayres were offered in evidence, it was held that the seals could not prove the papers genuine, since the independence of that government had never been recognized by our executive. *United States v. Hutchings*,* 2 Wheel. Cr. Cas., 543.

§ 2447. *Conferring jurisdiction on state courts.*—It seems that no part of the criminal jurisdiction of the United States can, consistently with the constitution, be delegated to the state courts. *Stearns v. United States*, 2 Paine, 303.

§ 2448. It seems that though jurisdiction has been conferred upon state courts by congress in civil matters arising under the laws of the United States, the state courts are not bound to exercise the jurisdiction thus given, but that it is optional with them whether to do so or not. *Ibid.*

§ 2449. *Enforcing obligations of a state.*—It seems that the judiciary of a state cannot interfere to enforce the bonds and obligations of a state unless authorized to do so by the state itself. *Bank of Washington v. State of Arkansas*, 20 How., 532.

§ 2450. *Suits between citizens of same state.*—The courts of the United States have no power to administer common law relief in a suit between citizens of the same state, though growing out of rights of an author in a literary production not arising under the copyright law. *Boucicault v. Hart*, 13 Blatch., 58.

§ 2451. *Admiralty jurisdiction.*—Under the constitution the jurisdiction of the district courts does not extend to all cases over which the admiralty courts of Great Britain exercised jurisdiction at the time the constitution was adopted. The nature and extent of the admiralty jurisdiction conferred by the constitution must be determined by the laws of congress, the decisions of the supreme court, and the usages prevailing in the courts of the states at the time the constitution was adopted. No other rules are known which it is reasonable to suppose could have been in the minds of the framers of the constitution than those which were then in force in the respective states, and which they were accustomed to see in daily and familiar practice in the state courts. *Ex parte Easton*, 5 Otto, 70; *Waring v. Clarke*, 5 How., 451; *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How., 385; *Bains v. The Schooner James*, Bald., 546. See MARITIME LAW.

§ 2452. Admiralty cases are not cases arising under the constitution and laws of the United States. *American Ins. Co. v. Canter*, 1 Pet., 544.

§ 2453. The extension of the judicial power of the United States to all cases of admiralty and maritime jurisdiction made the maritime law exclusively the law of the United States. It is not subject to be changed by the law of any state. *Roberts v. Skolfield*,* 8 Am. L. Reg., 156.

§ 2454. The courts of the United States have exclusive cognizance of all civil causes of admiralty and maritime jurisdiction, and have it exclusive of the courts of the several states, except as to the common law remedy. *Ashbrook v. The Steamer Golden Gate*, Newb., 298.

§ 2455. Though the limits of the admiralty and maritime jurisdiction of the courts of the United States are not accurately defined by the constitution, yet it is certain that the jurisdiction cannot be enlarged by state legislation; nor can it be enlarged by act of congress, nor can a rule of court extend it beyond its limits as determined by the judicial power. But congress may prescribe modes and forms of procedure. *The Steamer St. Lawrence*, 1 Black, 527; *Watson v. Tarpley*, 18 How., 517.

§ 2456. The admiralty jurisdiction of the United States does not depend in any way upon the regulation of commerce, and it seems that the federal courts have admiralty jurisdiction in cases of collisions, whether one vessel is engaged in commerce between the states or not, and even though the collision may have been within the body of a county. *The Propeller Commerce*, 1 Black, 578.

§ 2457. The admiralty and maritime jurisdiction of the courts of the United States under the constitution extends to cases arising upon the waters of rivers navigable from the sea, though lying within the body of a county and above the ebb and flow of the tide. *The Steamboat Magnolia*, 20 How., 298.

§ 2458. The federal courts have not admiralty jurisdiction over contracts for shipments upon the great lakes between ports of the same state. *The Fashion*, 21 How., 247.

§ 2459. The federal courts have not admiralty jurisdiction over contracts of affreightment made between ports on a river wholly within a state. *The Goliah*, 21 How., 249.

§ 2460. The law of congress of February 26, 1845 (5 Statutes at Large, 726), extending the jurisdiction of the district courts of the United States to certain cases on the great lakes and waters flowing into them, is constitutional, not indeed as being a regulation of commerce, but under the provision of the constitution providing that the judicial power of the United

States shall extend to cases of admiralty and maritime jurisdiction, and as being a regulation of that jurisdiction. *The Propeller Genessee Chief v. Fitzhugh*, 12 How., 451.

§ 2461. The ninth section of the judiciary act of 1789, which declares that "the district courts shall have, exclusively of the courts of the several states, . . . cognizance of all civil causes of admiralty and maritime jurisdiction; . . . saving to suitors in all cases the right of a common law remedy, where the common law is competent to give it," is constitutional. *The Moses Taylor*, 4 Wall., 411.

§ 2462. Though a statute of the state of New York, which prescribes how vessels lying at anchor shall display lights, would doubtless be binding in the courts of that state, it cannot regulate the decisions of the federal courts which administer the general admiralty law. They can be governed only by the principles peculiar to that system as generally recognized in maritime countries, modified by acts of congress, independently of local legislation. *The Steamboat New York*, 18 How., 225.

§ 2463. All state legislation providing for the enforcement of a maritime claim or contract in any other manner than by a common law remedy infringes on the exclusive jurisdiction of the federal courts, and violates the constitution of the United States. *In re Surplus of Ship Edith*, 5 Ben., 438; 11 Blatch., 453; *Jackson v. Steam Propeller Kinnie*,* 8 Am. L. Reg. (N. S.), 471; *The N. W. Thomas*, 1 Biss., 219; *Taylor v. Carryl*, 20 How., 601.

§ 2464. In respect to contracts made in a home port for furnishing supplies and materials to domestic vessels, the states may provide for the creation of liens and their enforcement, provided the law does not amount to a regulation of commerce, and the remedy given for enforcement is a common law remedy. *In re Surplus of Ship Edith*, 5 Ben., 436.

§ 2465. A state law giving a remedy in the nature of a proceeding *in rem* against domestic boats and vessels for materials and supplies furnished within the state is valid, notwithstanding the fact that congress has conferred jurisdiction of such cases on the federal district courts; and when the jurisdiction of the state court attaches, it excludes that of the federal courts. *The Celestine*, 1 Biss., 6.

§ 2466. A state statute, enacting that whenever a debt of a certain sum shall be contracted by the master, owner, agent or consignee of any ship or vessel, within that state, for either of the following purposes: (1) On account of work done or materials furnished within the state for building, repairing or equipping such ship or vessel; (2) for provisions and stores furnished; (3) on account of wharfage and the expenses of keeping such vessel in port,—such debts shall be a lien on such ship or vessel, and be preferred to all other liens except mariners' wages, is constitutional when applied to ships belonging to the ports of that state. But cannot affect in any manner the United States courts in their exercise of admiralty jurisdiction in cases of foreign vessels. *The Barque Chusan*, 2 Story, 455.

§ 2467. The act of October 7, 1864, of the state of Alabama, entitled "Proceedings in Admiralty," giving to the owner of goods shipped on board any steamboat or water-craft, on navigable waters within the state, a lien on such boat for the safe delivery of the goods, and authorizing the courts in that state to enforce such contracts by proceedings *in rem* in the same form as those used in the courts of admiralty of the United States, is void, as conflicting with that provision in the federal constitution extending the judicial power of the United States to all cases of admiralty and maritime jurisdiction, and the acts of congress thereunder. *The Belfast*, 7 Wall., 624.

§ 2468. A state statute, giving an action to the next of kin of any person killed by the negligence of any common carrier, either by steamboat or otherwise, in that state, is not invalid as conflicting with the maritime jurisdiction of the federal courts. And this whether the admiralty courts have jurisdiction of such cases or not. It is not material that this right of action was given by statute since the judiciary act. *Steamboat Co. v. Chase*, 16 Wall., 522.

2. Removal of Causes to Federal Courts.

[As to Practice in Removal Cases, see PRACTICE.]

SUMMARY — *Constitutionality of statutes*, §§ 2469, 2470. — *Removal of cause after trial by jury*, § 2470. — *Agreement by foreign corporation not to remove causes to federal courts*, §§ 2471, 2472.

§ 2469. The judicial power of the federal courts extends to a prosecution against a revenue officer for murder when he justifies the killing as in self-defense while doing his official duty; and the law authorizing the removal of such a case from the state to the federal court is a constitutional exercise of the power vested in congress. *Tennessee v. Davis*, §§ 2473-2500.

§ 2470. The seventh amendment forbids any law which would authorize the federal courts to retry a case once tried in the state courts; it is, therefore, held that so much of the fifth

section of the act of March 3, 1863, as provides for the removal of a judgment in a state court, and in which the cause was tried by a jury, to the circuit court of the United States for a retrial on the facts and law, is void. *The Justices v. Murray*, §§ 2501-2504.

§ 2471. A law forbidding a foreign corporation to do any business in the state until it should sign an agreement to remove no suits against it to the federal courts is void; and such agreement is ineffectual to defeat the constitutional jurisdiction of such courts. *Insurance Company v. Morse*, §§ 2505-2509.

§ 2472. But while an agreement by the corporation to abide by the law cannot prevent its removal of a case to the federal court, yet the state may, in the event of a breach of the agreement, revoke its license to do business; and an injunction will not lie to prevent such revocation. *Doyle v. Continental Ins Co.*, §§ 2510-15.

[NOTES.—See §§ 2516, 2517.]

TENNESSEE *v.* DAVIS.

(10 Otto, 257-302. 1879.)

CERTIFICATE OF DIVISION from the U. S. Circuit Court, Middle District of Tennessee.

STATEMENT OF FACTS.—Davis was indicted for murder in the circuit court for Grundy county, Tennessee. He presented a petition to the United States circuit court, praying for the removal of the case from the state court. Three questions are certified. The first and second are stated in the opinion. The third was, whether, if no mode of procedure is prescribed by the act of congress, a trial of the guilt or innocence of the defendant can be had in the United States circuit court.

Opinion by MR. JUSTICE STRONG.

The first of the questions certified is one of great importance, bringing as it does into consideration the relation of the general government to the government of the states, and bringing also into view not merely the construction of an act of congress, but its constitutionality. That in this case the defendant's petition for removal of the cause was in the form prescribed by the act of congress admits of no doubt. It represented that he had been indicted for murder in the circuit court of Grundy county, and that the indictment and criminal prosecution were still pending. It represented, further, that no murder was committed, but that, on the other hand, the killing was committed in the petitioner's own necessary self-defense, to save his own life; that at the time when the alleged act for which he was indicted was committed he was, and still is, an officer of the United States, to wit, a deputy collector of internal revenue, and that the act for which he was indicted was performed in his own necessary self-defense while engaged in the discharge of his duties as deputy collector; that he was acting by and under the authority of the internal revenue laws of the United States; that what he did was done under and by right of his office, to wit, as deputy collector of internal revenue; that it was his duty to seize illicit distilleries, and the apparatus that is used for the illicit and unlawful distillation of spirits; and that while so attempting to enforce the revenue laws of the United States as deputy collector as aforesaid, he was assaulted and fired upon by a number of armed men, and that in defense of his life he returned the fire. The petition was verified by oath, and the certificate required by the act of congress to be given by the petitioner's legal counsel was appended thereto. There is, therefore, no room for reasonable doubt that a case was made for the removal of the indictment into the circuit court of the United States, if section 643 of the Revised Statutes embraces criminal prosecutions in a state court, and makes them removable, and

if that act of congress was not unauthorized by the constitution. The language of the statute (so far as it is necessary at present to refer to it) is as follows: "When any civil suit or criminal prosecution is commenced in any court of a state against any officer appointed under, or acting by authority of, any revenue law of the United States, now or hereafter enacted, or against any person acting by or under authority of any such officer, on account of any act done under color of his office or of any such law, or on account of any right, title or authority claimed by such officer or other person under any such law," the case may be removed into the federal court. Now, certainly the petition for the removal represented that the act for which the defendant was indicted was done not merely under color of his office as a revenue collector, or under color of the revenue laws, not merely while he was engaged in performing his duties as a revenue officer, but that it was done under and by right of his office, and while he was resisted by an armed force in his attempts to discharge his official duty. This is more than a claim of right and authority under the law of the United States for the act for which he has been indicted. It is a positive assertion of the existence of such authority. But the act of congress authorizes the removal of any cause when the acts of the defendant complained of were done, or claimed to have been done, in the discharge of his duty as a federal officer. It makes such a claim a basis for the assumption of federal jurisdiction of the case, and for retaining it, at least until the claim proves unfounded.

That the act of congress does provide for the removal of criminal prosecutions for offenses against the state laws, when there arises in them the claim of the federal right or authority, is too plain to admit of denial. Such is its positive language, and it is not to be argued away by presenting the supposed incongruity of administering state criminal laws by other courts than those established by the state. It has been strenuously urged that murder within a state is not made a crime by any act of congress, and that it is an offense against the peace and dignity of the state alone. Hence it is inferred that its trial and punishment can be conducted only in state tribunals, and it is argued that the act of congress cannot mean what it says, but that it must intend only such prosecutions in state courts as are for offenses against the United States,—offenses against the revenue laws. But there can be no criminal prosecution initiated in any state court for that which is merely an offense against the general government. If, therefore, the statute is to be allowed any meaning, when it speaks of criminal prosecutions in state courts, it must intend those that are instituted for alleged violations of state laws, in which defenses are set up or claimed under United States laws or authority.

§ 2473. *Section 643 of the Revised Statutes, which authorizes the removal from state courts to federal courts of all criminal prosecutions against persons acting under the revenue laws of the United States, is constitutional.*

We come, then, to the inquiry, most discussed during the argument, whether section 643 is a constitutional exercise of the power vested in congress. Has the constitution conferred upon congress the power to authorize the removal, from a state court to a federal court, of an indictment against a revenue officer for an alleged crime against the state, and to order its removal before trial, when it appears that a federal question or a claim to a federal right is raised in the case, and must be decided therein? A more important question can hardly be imagined. Upon its answer may depend the possibility of the general government's preserving its own existence. As was said in *Martin v. Hunter*, 1

Wheat., 363, "the general government must cease to exist whenever it loses the power of protecting itself in the exercise of its constitutional powers." It can act only through its officers and agents, and they must act within the states. If, when thus acting, and within the scope of their authority, those officers can be arrested and brought to trial in a state court, for an alleged offense against the law of the state, yet warranted by the federal authority they possess, and if the general government is powerless to interfere at once for their protection,—if their protection must be left to the action of the state court,—the operations of the general government may at any time be arrested at the will of one of its members. The legislation of a state may be unfriendly. It may affix penalties to acts done under the immediate direction of the national government, and in obedience to its laws. It may deny the authority conferred by those laws. The state court may administer not only the laws of the state, but equally federal law, in such a manner as to paralyze the operations of the government. And even if, after trial and final judgment in the state court, the case can be brought into the United States court for review, the officer is withdrawn from the discharge of his duty during the pendency of the prosecution, and the exercise of acknowledged federal power arrested.

§ 2474. *The powers of the United States government and its supremacy within the sphere of those powers.*

We do not think such an element of weakness is to be found in the constitution. The United States is a government with authority extending over the whole territory of the Union, acting upon the states and upon the people of the states. While it is limited in the number of its powers, so far as its sovereignty extends it is supreme. No state government can exclude it from the exercise of any authority conferred upon it by the constitution, obstruct its authorized officers against its will, or withhold from it, for a moment, the cognizance of any subject which that instrument has committed to it.

§ 2475. *Judicial power extends to civil and criminal cases.*

By the last clause of the eighth section of the first article of the constitution, congress is invested with power to make all laws necessary and proper for carrying into execution not only all the powers previously specified, but also all other powers vested by the constitution in the government of the United States, or in any department or officer thereof. Among these is the judicial power of the government. That is declared by the second section of the third article to "extend to all cases in law and equity arising under the constitution, the laws of the United States, and treaties made or which shall be made under their authority," etc. This provision embraces alike civil and criminal cases arising under the constitution and laws. *Cohens v. Virginia*, 6 Wheat., 264. Both are equally within the domain of the judicial powers of the United States, and there is nothing in the grant to justify an assertion that whatever power may be exerted over a civil case may not be exerted as fully over a criminal one. And a case arising under the constitution and laws of the United States may as well arise in a criminal prosecution as in a civil suit. What constitutes a case thus arising was early defined in the case cited from 6 Wheaton. It is not merely one where a party comes into court to demand something conferred upon him by the constitution, or by a law or treaty.

§ 2476. *Cases arising under the laws of the United States are such as grow out of the legislation of congress.*

A case consists of the right of one party as well as the other, and may truly be said to arise under the constitution, or a law or a treaty of the United

States, whenever its correct decision depends upon the construction of either. Cases arising under the laws of the United States are such as grow out of the legislation of congress, whether they constitute the right or privilege, or claim or protection, or defense of the party, in whole or in part, by whom they are asserted. Story on the Constitution, sec. 1647; 6 Wheat., 379. It was said in *Osborne v. Bank of United States*, 9 Wheat., 738 (§§ 2363-87, *supra*), "When a question to which the judicial power of the Union is extended by the constitution forms an ingredient of the original cause, it is in the power of congress to give the circuit courts jurisdiction of that cause, although other questions of fact or of law may be involved in it." And a case arises under the laws of the United States when it arises out of the implication of the law. Mr. Chief Justice Marshall said, in the case last cited: "It is not unusual for a legislative act to involve consequences which are not expressed. An officer, for example, is ordered to arrest an individual. It is not necessary, nor is it usual, to say that he shall not be punished for obeying this order. His security is implied in the order itself. It is no unusual thing for an act of congress to imply, without expressing, this very exemption from state control." . . . "The collectors of the revenue, the carriers of the mail, the mint establishment, and all those institutions which are public in their nature, are examples in point. It has never been doubted that all who are employed in them are protected while in the line of their duty; and yet this protection is not expressed in any act of congress. It is incidental to, and is implied in, the several acts by which those institutions are created; and is secured to the individuals employed in them by the judicial power alone; that is, the judicial power is the instrument employed by the government in administering this security."

§ 2477. *The right of congress to authorize the removal of civil suits in which arise federal questions. The same rule applies as well to criminal cases.*

The constitutional right of congress to authorize the removal before trial of civil cases arising under the laws of the United States has long since passed beyond doubt. It was exercised almost contemporaneously with the adoption of the constitution, and the power has been in constant use ever since. The judiciary act of September 24, 1789, was passed by the first congress, many members of which had assisted in framing the constitution; and though some doubts were soon after suggested whether cases could be removed from state courts before trial, those doubts soon disappeared. Whether removal from a state to a federal court is an exercise of appellate jurisdiction, as laid down in Story's Commentaries on the Constitution, section 1745, or an indirect mode of exercising original jurisdiction, as intimated in *Railway Co. v. Whitton*, 18 Wall., 270, we need not now inquire. Be it one or the other, it was ruled in the case last cited to be constitutional. But if there is power in congress to direct a removal before trial of a civil case arising under the constitution or laws of the United States, and direct its removal because such a case has arisen, it is impossible to see why the same power may not order the removal of a criminal prosecution, when a similar case has arisen in it. The judicial power is declared to extend to all cases of the character described, making no distinction between civil and criminal, and the reasons for conferring upon the courts of the national government superior jurisdiction over cases involving authority and rights under the laws of the United States are equally applicable to both. As we have already said, such a jurisdiction is necessary for the preservation of the acknowledged powers of the government. It is essential, also, to a uniform and consistent administration of national laws. It is required for the

preservation of that supremacy which the constitution gives to the general government by declaring that "the constitution, and laws of the United States made in pursuance thereof, and the treaties made or which shall be made under the authority of the United States, shall be the supreme laws of the land, and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." The founders of the constitution could never have intended to leave to the possibly varying decisions of the state courts what the laws of the government it established are, what rights they confer, and what protection shall be extended to those who execute them. If they did, where is the supremacy over those questions vested in the government by the constitution? If, whenever and wherever a case arises under the constitution and laws or treaties of the United States, the national government cannot take control of it, whether it be civil or criminal, in any stage of its progress, its judicial power is, at least, temporarily silenced, instead of being at all times supreme. In criminal as well as in civil proceedings in state courts, cases under the constitution and laws of the United States might have been expected to arise, as, in fact, they do. Indeed, the powers of the general government, and the lawfulness of authority exercised or claimed under it, are quite as frequently in question in criminal cases in state courts as they are in civil cases, in proportion to their number.

§ 2478. *It is no invasion of the sovereignty of a state to withdraw from its courts criminal cases involving federal questions.*

The argument so much pressed upon us, that it is an invasion of the sovereignty of a state to withdraw from its courts into the courts of the general government the trial of prosecutions for alleged offenses against the criminal laws of a state, even though the defense presents a case arising out of an act of congress, ignores entirely the dual character of our government. It assumes that the states are completely and in all respects sovereign. But when the national government was formed, some of the attributes of state sovereignty were partially, and others wholly, surrendered and vested in the United States. Over the subjects thus surrendered the sovereignty of the states ceased to extend. Before the adoption of the constitution each state had complete and exclusive authority to administer by its courts all the law, civil and criminal, which existed within its borders. Its judicial power extended over every legal question that could arise. But when the constitution was adopted a portion of that judicial power became vested in the new government created, and so far as thus vested it was withdrawn from the sovereignty of the state. Now, the execution and enforcement of the laws of the United States, and the judicial determination of questions arising under them, are confided to another sovereign, and to that extent the sovereignty of the state is restricted. The removal of cases arising under those laws, from state into federal courts, is, therefore, no invasion of state domain. On the contrary, a denial of the right of the general government to remove them, to take charge of and try any case arising under the constitution or laws of the United States, is a denial of the conceded sovereignty of that government over a subject expressly committed to it.

§ 2479. *The removal acts of 1789 and 1815.*

It is true the act of 1789 authorized the removal of civil cases only. It did not attempt to confer upon the federal courts all the judicial power vested in the government. Additional grants have from time to time been made. Congress has authorized more and more fully, as occasion has required, the removal of civil cases from state courts into the circuit courts of the United States, and

the constitutionality of such authorization has met with general acquiescence. It has been sustained by the decisions of this court. Nor has the removal of civil cases alone been authorized. On the 4th of February, 1815, an act was passed (3 Stat., 198) providing that if any suit *or prosecution* should be commenced in any state court against any collector, naval officer, surveyor, inspector or any other officer, civil or military, or any other person aiding or assisting, agreeably to the provisions of the act, or under color thereof, for any act done or omitted to be done as an officer of the customs, or for anything done by virtue of the act or under color thereof, it might be removed before trial into the circuit court of the United States, provided the act should not apply to any offenses involving corporal punishment. This act expressly applied to a criminal action or prosecution. It was intended to be of short duration, but it was extended by the act of March 3, 1815 (3 Stat., p. 233, sec. 6), and re-enacted in 1817 for a period of four years.

§ 2480. *The removal act of 1833.*

So, in 1833, by the act of March 2 (4 id., ch. 57, sec. 3), it was enacted that in any case where suit *or prosecution* should be commenced in a state court of any state against any officer of the United States or other person for or on account of any act done under the revenue laws of the United States, or under color thereof, or for or on account of any right, authority or title set up or claimed by such officer or other person, under any such law of the United States, the suit or prosecution might be removed, before trial, into the federal circuit court of the proper district. The history of this act is well known. It was passed in consequence of an attempt by one of the states of the Union to make penal the collection by United States officers within the state of duties under the tariff laws. It was recommended by President Jackson in a special message, and passed in the senate by a vote of thirty-two to one, and in the house by a majority of ninety-two. It undoubtedly embraced both civil and criminal cases. It was so understood and intended when it was passed. The chairman of the judiciary committee which introduced the bill said: "It gives the right to remove at any time before trial, but not after judgment has been given, and thus affects in no way the dignity of the state tribunals.

Whether in criminal or civil cases, it gives this right of removal. Has congress power in criminal cases? He would answer the question in the affirmative. Congress had the power to give the right in criminal as well as in civil cases, because the second section of the third article of the constitution speaks of all cases in law and equity, and these comprehensive terms cover all. . . . It was more necessary that this jurisdiction should be extended over criminal than over civil cases. If it were not admitted that the federal judiciary had jurisdiction of criminal cases, then was nullification ratified and sealed forever; for a state would have nothing more to do than to declare an act a felony or misdemeanor to nullify all the laws of the Union."

§ 2481. *The removal act of 1866.*

The provisions of the act of July 13, 1866 (14 Stat., 171, sec. 67), relative to the removal of suits or prosecutions in state courts against internal revenue officers, provisions re-enacted in section 643 of the Revised Statutes, are almost identical with those of the act of 1833, the only noticeable difference being that in the latter act the adjective "criminal" is inserted before the word "prosecution." This made no change in the meaning. The well understood legal signification of the word "prosecution" is a criminal proceeding at the suit of the government. Thus it appears that all along our history the legis-

lative understanding of the constitution has been that it authorizes the removal from state courts to the circuit courts of the United States, alike civil and criminal cases arising under the laws, the constitution or treaties.

§ 2482. *Cases cited and approved.*

The subject has more than once been before this court, and it has been fully considered. In *Martin v. Hunter*, 1 Wheat., 304, it was admitted in argument by Messrs. Tucker and Dexter that there might be a removal before judgment, though it was contended there could not be after; but the contention was overruled, and it was declared that congress might authorize a removal either before or after judgment; that the time, the process and the manner must be subject to its absolute legislative control. In that case, also, it was said that the remedy of the removal of suits would be utterly inadequate to the purposes of the constitution if it could act only upon the parties and not upon the state courts. Judge Story, who delivered the opinion, adding: "In respect to criminal prosecutions, the difficulty seems admitted to be insurmountable, and, in respect to civil suits, there would in many cases be rights without corresponding remedies." . . . "In respect to criminal prosecutions there would at once be an end of all control, and the state decisions would be paramount to the constitution." The expression that the difficulty in the way of the removal of criminal prosecutions seems admitted to be insurmountable has been laid hold of here, in argument, as a declaration of the court that criminal prosecutions cannot be removed. It is a very shortsighted and unwarranted inference. What the court said was, that the remedy in such cases seems to be insurmountable *if it could not act upon state courts as well as parties*, and it was ruled that it does thus act. The expression must be read in its connection. In *Martin v. Hunter* the removal was by writ of error after final judgment in the state court, which certainly seems more an invasion of state jurisdiction than a removal before trial. The case was followed by *Cohens v. Virginia*, 6 id., 264, a criminal case, in which the defendant set up against a criminal prosecution an authority under an act of congress. There it was decided that cases might be removed in which a state was a party. This also was a writ of error after a final judgment, but it, as well as the former case, recognized the right of congress to authorize removals either before or after trial, and neither case made any distinction between civil and criminal proceedings.

In *The Mayor v. Cooper*, 6 Wall., 247, the validity of the removal acts of 1863, March 3, sec. 5 of ch. 81 (12 Stat., 756), and its amendment of May 11, 1866 (14 id., 1866), which embraced not only civil cases but criminal prosecutions, and authorized their removal before trial, came under consideration, and it was sustained. This court then said: The constitutional power is given in general terms. "No limitation is imposed. The broadest language is used. 'All cases' so arising are embraced. How jurisdiction shall be acquired by the inferior court" (of the United States), "whether it shall be original or appellate, or original in part and appellate in part, and the manner of procedure in its exercise after it has been acquired, is not prescribed. This constitution is silent upon these subjects. They are remitted without check or limitation to the wisdom of the legislature." "Jurisdiction, original or appellate, alike comprehensive in either case, may be given. The constitutional boundary line of both is the same. Every variety and form of appellate jurisdiction within the sphere of the power, extending as well to the courts of the states as to those of the nation, is permitted. There is no distinction in this respect between civil and criminal cases. Both are within its scope. Nor is it any objection that ques-

tions are involved which are not at all of a federal character. If one of the latter exist, if there be a single such ingredient in the mass, it is sufficient." The court added: "We entertain no doubt of the constitutionality of the jurisdiction given by the act under which this case has arisen." See, also, *Com. v. Ashmun*, 3 Grant, Cas., 436; *id.*, 416-418; *State v. Hoskins*, 77 N. C., 530, decided in 1877, where the constitutionality of section 643 of the Revised Statutes was affirmed, after a full and instructive discussion.

§ 2483. *Criminal cases as well as civil may be removed from a state to a federal court in proper cases.*

It ought, therefore, to be considered as settled that the constitutional powers of congress to authorize the removal of criminal cases for alleged offenses against state laws from state courts to the circuit courts of the United States, when there arises a federal question in them, is as ample as its power to authorize the removal of a civil case. Many of the cases referred to, and others, set out with great force the indispensability of such a power to the enforcement of federal law. It follows that the first question certified to us from the circuit court of Tennessee must be answered in the affirmative.

§ 2484. *Trial in a federal court for an offense against "the peace and dignity of the state."*

The second question is, "Whether, if the case be removable from the state court, there is any mode and manner of procedure in the trial prescribed by the act of congress." Whether there is or not is totally immaterial to the inquiry whether the case is removable; and this question can hardly have arisen on the motion to remand the case. The imaginary difficulties and incongruities supposed to be in the way of trying in the circuit court an indictment for an alleged offense against the peace and dignity of a state, if they were real, would be for the consideration of congress. But they are unreal. While it is true there is neither in section 643, nor in the act of which it is a re-enactment, any mode of procedure in the trial of a removed case prescribed, except that it is ordered the cause, when removed, shall proceed as a cause originally commenced in that court, yet the mode of trial is sufficiently obvious. The circuit courts of the United States have all the appliances which are needed for the trial of any criminal case. They adopt and apply the laws of the state in civil cases, and there is no more difficulty in administering the state's criminal law. They are not foreign courts. The constitution has made them courts within the states to administer the laws of the states in certain cases; and, so long as they keep within the jurisdiction assigned to them, their general powers are adequate to the trial of any case. The supposed anomaly of prosecuting offenders against the peace and dignity of a state, in tribunals of the general government, grows entirely out of the division of powers between that government and the government of a state; that is, a division of sovereignty over certain matters. When this is understood (and it is time it should be), it will not appear strange that, even in cases of criminal prosecutions for alleged offenses against a state, in which arises a defense under United States law, the general government should take cognizance of the case and try it in its own courts, according to its own forms of proceeding.

The third question certified has been sufficiently answered in what we have said respecting the second. It must be answered in the affirmative. The first question will be answered in the affirmative, and the second is answered as in the opinion.

Dissenting opinion by MR. JUSTICE CLIFFORD, MR. JUSTICE FIELD concurring.

Civil suits or criminal prosecutions commenced in a state court against a revenue officer of the United States, on account of any act done under color of his office, or on account of any right, title or authority claimed by such officer under such law, may, at any time before the trial or final hearing thereof, be removed for trial into the circuit court next to be holden in the district where the same is pending, in the manner prescribed in the section conferring the right. R. S., sec. 643. Sufficient appears to show that the prisoner was formally indicted of murder in the first degree by the grand jury of the state; that the indictment was duly filed in the proper state court for trial, and that it was subsequently removed into the circuit court of the United States for the district, on motion of the accused. Neither the indictment nor the order of removal is exhibited in the transcript. Instead of that, the statement is that the attorney-general of the state moved, in the circuit court, to remand the cause to the state court in which the indictment was found. Hearing was had, and it appears that the judges of the circuit court were divided in opinion whether the motion of the attorney-general ought or ought not to be granted.

Appended to the first question certified by the judges of the court is a paper which purports to be the petition of the prisoner under which the order of removal was granted. From that it appears that the homicide charged is admitted, but that the defense is that the killing by the prisoner was in self-defense, to save his own life; that he was and still is a deputy collector of internal revenue; and that the act for which he is indicted, as he alleges, was performed in self-defense, while he was engaged in the performance of the duties of his office. Speaking more specifically, he states that it is his duty to seize illicit distilleries and the apparatus that is being used for the illicit and unlawful distillation of spirits, and that, while attempting to enforce the revenue laws, he was assaulted and fired upon by a number of armed men, and that, in defense of his life, he returned the fire.

Three questions are certified, as follows: 1. Is an indictment in a state court for murder, under the facts set forth in the petition for removal in this case, removable to the circuit court under section 643 of the Revised Statutes? 2. If removable from the state court, is there any mode of procedure in the trial prescribed by an act of congress? 3. And, if not, can a trial of the guilt or innocence of the prisoner be had in the circuit court?

Questions of greater importance than those certified here by the circuit court could hardly be presented for discussion, as they involve the necessity of an inquiry into the nature, extent and limitation of the judicial power both of the United States and of the circuit courts established by congress. Judicial power, like other powers granted to the United States by the constitution, is defined by the instrument making the grant. Governed by that rule, we find that the second section of the third article ordains that the judicial power shall extend to all cases in law and equity arising under the constitution, the laws of the United States, and treaties made or which shall be made under their authority, which provision describes the whole extent of the judicial power of the United States conferred by the constitution that it is necessary to examine in the present case. Other clauses in the same section enumerate numerous other subject-matters falling within the cognizance either of the supreme court or of the inferior courts created by congress; but it will not be

necessary to examine those clauses, as they have no bearing upon the questions to be answered.

Pursuant to the first section of the third article, the congress passed the judiciary act, making provision for the organization of the supreme court, and establishing the circuit and district courts. 1 Stat., 73. Jurisdiction of crimes and offenses committed within their respective districts, and cognizable under the authority of the United States to a limited extent, was by that act conferred upon the district courts; but the eleventh section of the act provided that the circuit courts should have exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except where the act otherwise provides, and concurrent jurisdiction with the district courts of the crimes and offenses cognizable in those courts. Id., 78. Neither the district nor circuit courts have jurisdiction of any crimes or offenses by that act, unless the same are cognizable under the authority of the United States. Criminal jurisdiction is not, by the constitution, conferred upon any court, and it is settled law that congress must in all cases make an act criminal and define the offense before either the district or circuit courts can take cognizance of an indictment charging the act as an offense against the authority of the United States. Obvious and undoubted as the proposition is, it admits of but little illustration, and needs nothing more.

§ 2485. *The powers of congress.*

Powers expressly enumerated are granted to congress, and such as shall be necessary and proper for carrying the enumerated powers into execution, or, in other words, the powers of congress are made up of concessions from the people of the several states, with such implied powers as are necessary and proper to carry the express concessions into effect, subject to the limitation that whatever is not expressly granted or necessarily or properly implied to carry the granted powers into effect is reserved to the states respectively, or to the people. Like the other powers specified, the judicial power of the United States is a constituent part of those concessions from the several states, and, as was held by this court at a very early period, it is to be exercised by the supreme court or such inferior courts as the congress may from time to time ordain and establish.

§ 2486. *The powers of all the federal courts, except the supreme court, are subject to the power of congress.*

Of all the courts which the United States may, under their general powers, constitute, one only — the supreme court — possesses jurisdiction derived immediately from the constitution, and of which the legislative power cannot deprive it. All other courts organized by the general government possess no jurisdiction but what is given by the power that created them, and they can be vested with none except what the power ceded to the United States will authorize the congress to confer.

§ 2487. *Common law crimes are not cognizable in the federal courts; they can try only statutory offenses.*

Certain implied powers, it is admitted, must necessarily result to courts of justice,—such as to fine for contempt or imprison for contumacy,—but the jurisdiction of crimes against the authority of the United States is not among such implied powers, the universal rule in the federal courts being that the legislative authority of the Union must first make an act a crime, affix a punishment to it, and prescribe what courts have jurisdiction of such an indictment, before any federal tribunal can determine the guilt or innocence of the supposed

offender. *United States v. Hudson*, 7 Cranch, 32; *United States v. Coolidge*, 1 Wheat., 415; 1 Whart. Crim. Law (7th ed.), sec. 163. In accordance with that rule, it was held by the whole court, Marshall, C. J., delivering the opinion, that the circuit court could not take cognizance of the crime of murder committed on board of one of our ships of war lying in a harbor within state jurisdiction, because the eighth section of the Crimes Act, by which alone any provision had been made for the punishment of such a crime on shipboard, only defines offenses perpetrated upon the high seas or in any river, haven, basin or bay out of the jurisdiction of any particular state. *United States v. Bevans*, 3 Wheat., 336, 387.

It was argued in behalf of the prosecution in that case that the jurisdiction existed because the homicide was committed on board a ship of war; but Mr. Webster denied the proposition and contended that the jurisdiction of the circuit court was only such as had been given to it by an act of congress, and insisted that it was sufficient to maintain for the prisoner that no act of congress authorized the circuit court to take cognizance of any offenses merely because they were committed on ships of war. Instead of that he insisted that it was the nature of the place in which the ship lies, and not the character of the ship itself, that decides the question of jurisdiction; and added, that if committed within the territorial jurisdiction of the state it excluded the jurisdiction of the circuit court by express exception, the language of the act only giving authority to try and punish offenders for offenses committed upon the high seas, or in any river, haven, basin or bay out of the jurisdiction of any particular state. Commenting upon that provision, the chief justice said: It is not the offense, but the bay in which it is committed, which must be out of the jurisdiction of the state, adding that unless the place itself be out of the jurisdiction of the state, congress has not given cognizance of the offense to the circuit courts. *United States v. Wiltberger*, 5 Wheat., 76, 96.

Apply the conclusion reached in those two cases to the question under discussion, and it is clear that, in order to ascertain the jurisdiction of the federal courts in criminal cases, resort must be had to the acts of congress providing for the punishment of crimes; for although such courts are unquestionably to look to the common law, in the absence of statutory provision, for rules of guidance in the exercise of their functions in criminal as well as in civil cases, it is to the acts of congress passed in pursuance of the constitution alone that they must have recourse to determine what constitutes an offense against the authority of the United States, it being settled law that the United States have no unwritten code to which resort can be had as a source of jurisdiction. Conkling's Treatise (5th ed.), 181. Courts of the United States derive no jurisdiction in criminal cases from the common law, nor can such tribunals take cognizance of any act of an individual as a public offense, or declare it punishable as such, until it has been defined as an offense by an act of congress passed in pursuance of the constitution. Argument to show that congress has never defined the act of murder, at a place within the exclusive jurisdiction of a state as an offense against the authority of the United States, is certainly unnecessary, as no sane man will venture to advance such a proposition; nor will any one who ever looked into the record of this case deny that the place where the homicide which is the subject of inquiry was committed, is in the exclusive jurisdiction of the state whose laws were violated by the perpetrator of the felonious act. None of these matters can be denied consistent with the truth of the facts as judicially known to every member of the court.

Offenses against the authority of the United States, defined by an act of congress passed in pursuance of the constitution, are cognizable in the circuit courts by virtue of the eleventh section of the judiciary act, whether committed upon the high seas or in any river, haven, basin or bay out of the jurisdiction of any particular state, or in any fort, dockyard, arsenal, armory or magazine, or any other place the exclusive jurisdiction of which is ceded to the United States. Cognizance in criminal cases may also be given to those courts of offenses against the national authority, if properly defined by an act of congress, when they are committed in violation of such an act passed pursuant to the second section of the third article of the constitution, which extends the judicial power to all cases in law and equity arising under the constitution, the laws of congress and the treaties therein specified. 1 Whart. Cr. Law, 7th ed., 174-180, inclusive.

§ 2488. *A person may commit a crime against both federal and state governments.*

Exceptional cases undoubtedly arise where it may properly be said that the citizen owes allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either, where the same act is a transgression and defined offense under the laws of both. Thus, an assault on the marshal, or hindering him in the execution of legal process, is a high offense against the United States, for which the perpetrator is liable to punishment; and the same act may also be a gross breach of the peace of the state, if it results in a riot, assault or murder, and may subject the same person to the punishment prescribed by the state laws. *Moore v. Illinois*, 14 How., 13. Federal sovereignty as well as the sovereignty of the states is limited and restricted by the constitution. Certain powers, legislative, executive and judicial, are possessed by each, independent of the other; and in the exercise of such powers all agree that they act as separately and independently of each other as if the line of division was traced by landmarks visible to the eye. *Ableman v. Booth*, 21 How., 506, 516. Both governments, though there be but one act, if the jurisdiction is dual, and the act charged is defined by the laws of each as an offense, may subject the offender to punishment; nor can he plead the conviction and sentence in one forum in bar to an indictment in the other, as the act committed was an offense against the authority of each. *Fox v. State of Ohio*, 5 How., 410 (§§ 496-500, *supra*); *United States v. Marigold*, 9 id., 560.

Passing and uttering counterfeit coin was the charge in the first case, and it appears that the defendant, having been convicted in the state court, removed the cause into this court, and assigned for error that the court below had no jurisdiction of the offense; but this court held that the state law was valid, that offenders falling within the power of different sovereignties may be triable in each for the same act, and may properly be subjected to the penalties which each assigns to the perpetration of the act. When carefully examined, it will be found that the second case decides the same point in the same way,—that the same act may in certain cases constitute an offense against both the state and the United States, and that it may draw to its commission the penalties denounced by each for the commission of the act. *United States v. Amy*, 14 Md., 135, n., per Taney, C. J.; *Cooley*, Const. Lim., 4th ed., 25.

Viewed in the light of these suggestions, it seems reasonable to conclude that congress might define the malicious killing of a revenue collector with malice aforethought, while in the performance of his official duties, as murder, and might make provision for the trial and punishment of the offender, even

though the homicide was committed at a place within the exclusive jurisdiction of the state. Congress may provide for the appointment of officers to collect the public revenue, and if so, they may pass constitutional laws for their protection; but congress has not defined the act charged in the state indictment as an offense against the authority of the United States, nor does any act of congress prescribe the punishment to be inflicted for its commission, or declare what court shall have jurisdiction of the offense. Ample power, it was conceded, was vested in congress to provide for the punishment of murder committed by a person serving on board a public ship of war, wherever the ship might be; but inasmuch as congress had not defined the act of killing at that place as a crime, nor affixed a punishment to it, nor declared the court that should have jurisdiction of the offense, this court unanimously decided, Marshall, C. J., giving the opinion, that a murder committed on board a ship of war lying within the harbor of Boston was not cognizable in the circuit court of the district of Massachusetts, and the case was remanded with a certificate to that effect. *United States v. Bevans*, 3 Wheat., 336, 391.

§ 2489. *Circuit courts have no jurisdiction to try offenses unless they are defined by acts of congress which describe the punishment and which specify the court to try them.*

Since that decision the law has been considered as settled that the circuit courts have no jurisdiction to try and sentence an offender, unless it appears that the offense charged is defined by an act of congress, and that the act defining the offense, or some other act, prescribes the punishment to be imposed, and specifies the court that shall have jurisdiction of the offense. *United States v. Wiltberger*, 5 id., 76. Homicide resulting from the acts of a party in opposing an officer, employed in the enrollment of men for the military service during the late rebellion, was defined by an act of congress to be murder and punishable with death; and the same section enacted that the conviction of the party of that offense in the circuit court should not relieve him from liability for any crime committed by him against the laws of the state. 13 Stat., p. 8, sec. 12; *United States v. Gleason*, 1 Woolw., 75; S. C., id., 128.

§ 2490. *The power of congress to define offenses is limited to such subjects and circumstances as relate to the federal government.*

Decided cases everywhere hold that unless congress first defines the offense, affixes the punishment, and declares, in some way, the court that shall have jurisdiction of the accusation, the circuit court can neither try the accused nor sentence him to punishment. Even the power of congress to define offenses and provide for the punishment of offenders is limited to such subjects and circumstances as relate and are peculiar to the federal government. Money may be coined by that government, and, therefore, congress may provide for the punishment of counterfeiting the national coin. Congress may establish post-offices and post-roads, and, therefore, the legislative department may pass laws providing for the punishment of persons robbing the mails; but congress cannot enact laws for punishing persons for counterfeiting state bank issues, or for robbing express companies established by state authority. *United States v. Ward*, id., 17, 20.

§ 2491. *Congress may provide for the punishment of those assaulting or otherwise injuring officers appointed under its laws, while in the discharge of their duties.*

Offices may be created by law of congress, and officers to execute the duties of the same may be appointed in the manner specified in the constitution; and

it is not doubted that congress may pass laws for their protection, and for that purpose may define the offense of killing such an officer when in the discharge of his duties. Concede that, and it follows that if the punishment for the offense is affixed, and the jurisdiction is given to the circuit courts, those courts may try the offender, if legally indicted, and if duly convicted may sentence him to the punishment which the act of congress prescribes. Beyond all question the jurisdiction of the circuit court over such an indictment would be complete; but the difficulty in the way of the prosecutor in this case is that there is no act of congress defining the offense charged in the indictment, nor is there any provision in such law providing for the punishment of such an offense, or which gives the circuit court or any other federal court jurisdiction to try or sentence the offender.

Enough appears in these observations to show that, even if the indictment in this case had been found against a citizen of the state for murdering the revenue officer while engaged in the discharge of his official duties, the circuit court would not, under existing laws, have jurisdiction to try and sentence the offender, for the reason that the offense is not defined by any act of congress, nor is there any act of congress giving such jurisdiction to the circuit courts. Judicial authorities to that effect are numerous and decisive; but the principal question in this case is of a very different character, as the indictment is against the officer of the revenue for murdering a citizen of the state, having in no way any official connection with the collection of the public revenue. Neither the constitution nor the acts of congress give a revenue officer or any other officer of the United States an immunity to commit murder in a state, or prohibit the state from executing its laws for the punishment of the offender.

§ 2492. *The federal courts have no jurisdiction of crimes against state authority.*

Unquestionable jurisdiction to try and punish offenders against the authority of the United States is conferred upon the circuit and district courts; but the acts of congress give those courts no jurisdiction whatever of offenses committed against the authority of a state. Criminal homicide, committed in a state, is an offense against the authority of the state, unless it was committed in a place within the exclusive jurisdiction of the United States. Congress has never defined such an offense when committed within the territorial limits of a state under the circumstances described in the transcript; nor is there any pretense for the suggestion either that the circuit or district courts have any jurisdiction of the case, or that there is any conflict of jurisdiction between the judicial authorities of the state and those of the United States.

Matters of fact are not in dispute; and it appears by the record that the prisoner, at the time mentioned in the petition, was duly indicted of the crime of wilful murder, with malice aforethought, by the grand jury of the county where the homicide was committed, and that the indictment is still pending in the proper court of the state where it was filed. Adjudged cases are not necessary to show that no federal court created by congress had jurisdiction of the offense, as the homicide was committed on land within the state, and not within any place over which the United States had exclusive jurisdiction. None of these matters can be successfully controverted; and, if not, then it follows that the exclusive jurisdiction of the offense was vested in the state court, unless it can be held that the prisoner, merely because he was a deputy collector of the revenue, is privileged to remove the state indictment found by the grand jury of the state into the circuit court for trial. Nobody before

ever pretended that such an offense ever was or could be defined by an act of congress as an offense against the federal authority, or that the circuit court or any other federal court has or ever had any jurisdiction of such a case to try or sentence such an offender for such an offense. Federal courts have no common law jurisdiction in criminal cases, nor can such courts proceed to try or punish any offender, except when authorized by an act of congress, passed in pursuance of the constitution. *State of Pennsylvania v. Wheeling Bridge Co.*, 13 How., 518, 563; *United States v. Worrall*, 2 Dal., 384, 393; *Cooley*, Const. Lim. (4th ed.), 26; *Ex parte Bollman*, 4 Cranch, 75, 98.

Murder is defined by the law of the state as follows: If any person of sound memory and discretion unlawfully kill any reasonable creature, in being and under the peace of the state, with malice aforethought, either express or implied, such person shall be guilty of murder. 3 State Stat., 43. When perpetrated by means of poison, lying in wait, or by any other kind of wilful, deliberate, malicious and premeditated killing, or in the perpetration of or attempt to perpetrate certain other enumerated crimes, it is murder in the first degree; and the petition of the prisoner, in this case, shows that the charge against him is murder in the first degree, as defined by the state statute. Such an offense has never been defined by an act of congress, when committed against the authority of the state, nor even when committed against the national authority, unless when the killing was perpetrated on navigable waters, out of the jurisdiction of any particular state, or in some place within the exclusive jurisdiction of the federal authority.

§ 2493. *Federal crimes classified.*

Crimes defined by an act of congress, and within the jurisdiction of the federal courts, may be divided into two general classes: 1. Such as are committed on the high seas or on navigable waters out of the jurisdiction of any particular state, or within some place under the exclusive jurisdiction of the United States. 2. Such as relate to subjects committed to the charge of the nation, which are comprised within the grant of judicial power over all cases arising under the constitution, laws and treaties of the United States, and cases affecting ambassadors or other public ministers and consuls.

§ 2494. *Judgments of state courts, how re-examined.*

Under existing laws the circuit courts have no jurisdiction whatever to re-examine the judgments of the state courts in any case, civil or criminal, the power to exercise such a revision, even in civil cases involving federal questions, being vested exclusively in the supreme court. Neither the supreme court nor the circuit courts can re-examine the conviction, sentence or judgment of the district court in a criminal case in any form, either by writ of error or appeal. Final judgments or decrees of a state court falling within the condition specified in the twenty-fifth section of the judiciary act, or the second section of the act passed to amend the prior act upon the subject, may be re-examined and reversed or affirmed in the supreme court upon a writ of error. 14 Stat., 386; R. S., sec. 709.

Appellate power in criminal cases decided in the district and circuit courts has not been vested in the supreme court by any act of congress, and of course the power of the court in respect to such cases pending in those tribunals is confined to certificates of division of opinion. *United States v. More*, 3 Cranch, 154; *Ex parte Kearney*, 7 Wheat., 38; *Ex parte Watkins*, 8 Pet., 193. Grant that, but federal judicial power extends to all cases in law or equity arising under the constitution, the laws of the United States, and treaties made or

which shall be made under their authority, and every such question may be re-examined by writ of error in the supreme court under the act of congress passed as a substitute for the before-mentioned section of the judiciary act. Cases which involve some one or more of those questions are often presented in the state courts; and where that occurs, and the decision is adverse to the party setting up the title, right or exemption, whether the suit be a civil or criminal one, he may, when the case is determined by the highest court of the state, sue out a writ of error and remove the cause into the supreme court for re-examination. *Murdock v. Memphis*, 20 Wall., 590, 636.

Writs of error of the kind are within every day's experience; but the rule is universal that, if the transcript when entered here does not present a federal question for re-examination, the case will be dismissed, which shows to a demonstration that it is only the questions which arise under the constitution, the laws of the United States, and treaties made under their authority, which this court is authorized to re-examine. Convincing support to that proposition is found in the countless cases which this court dismisses at every session for the want of jurisdiction, the invariable rule being that, if the transcript does not exhibit some one of the questions specified in the section to which reference has been made, the case must be dismissed. 1 Stat., 85, sec. 25; 14 id., 386, sec. 2. Process to remove the judgment or decree from the state court to the supreme court is not allowed as matter of right. Instead of that, the practice is to submit the record of the state court to a justice of the supreme court, whose duty it is to ascertain whether, in his opinion, any question cognizable in the appellate tribunal is involved and was decided by the proper state court in a way to justify the allowance of the writ, and, if not, to refuse to direct that it shall be issued.

Two other differences between the writ of error to the state court and the common law writ issued under the twenty-second section of the judiciary act deserve to be noticed. By the twenty-second section no case is re-examinable unless the matter in dispute exceeds the sum or value of a prescribed amount; but the section granting the writ of error to the state court makes no reference to the value involved in the controversy, the condition being that some one of the questions specified in the section must have been raised and decided adversely to the applicant for the writ. They also differ in this, that the twenty-second section confines the appellate power to final judgments and decrees in civil cases, but the other provision, when the proper case is presented, extends to criminal as well as civil cases. *Twitchell v. The Commonwealth*, 7 Wall., 321; *Phillip's Prac.* (rev. ed.), 144. Where the matter in dispute is sufficient in value, the common law writ of error to the circuit court will lie in every case, if the judgment is final in the court to which the writ of error is addressed; but the writ of error to the state court will not lie at all, unless the construction of some clause of the constitution, or some act of congress, or treaty, is drawn in question, and the decision was adverse to the party setting up such right or title. If those conditions concur, the writ will lie, irrespective of the amount in dispute, provided it appears that the right or title set up depends on the construction of the constitution, an act of congress, or some constitutional treaty. *Williams v. Norris*, 12 Wheat., 117.

Power to re-examine such cases arises under that clause of the constitution which provides that the judicial power of the United States shall extend to all cases in law or equity arising under the constitution, the laws of the United States, and treaties made or which shall be made under their authority. *State*

courts have no jurisdiction whatever of cases affecting ambassadors, other public ministers or consuls, nor of cases of admiralty and maritime cognizance. In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the supreme court, as the constitution provides, "shall have original jurisdiction." In all other cases mentioned in the article of the constitution granting judicial power, the provision is that "the supreme court shall have appellate jurisdiction both as to law and fact, with such exceptions and under such regulations as the congress shall make."

Early legislation of congress gave the circuit courts original cognizance concurrent with the several states of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of \$500, and the United States are plaintiffs or petitioners, or an alien is a party, or the suit is between a citizen of a state where the suit is brought and a citizen of another state. 1 Stat., 78. By the same section it is also provided to the effect, as before explained, that the circuit courts shall also have exclusive cognizance of all crimes and offenses *cognizable under the authority of the United States*, except as therein otherwise provided.

Jurisdiction both of civil and criminal cases is, beyond doubt, conferred upon the general government by several of the clauses of the third article of the constitution describing the judicial power, entirely exclusive of that possessed by the tribunals of the states; but it is equally clear that none of them, except the introductory clause of section 2 of that article, authorize any federal court to re-examine the judgment of a state court in a criminal case, or to supersede the power of a state court to exercise its lawful jurisdiction in such a case.

When the judicial system was organized under the constitution, congress provided, in the twenty-fifth section of the judiciary act, that cases falling within that clause of the judicial article of the constitution might be reversed or affirmed upon a writ of error, in the same manner and under the same regulations as if the judgment or decree had been rendered or passed in the circuit court. For eighty years that provision remained without any alteration; and the new provision, so far as respects the question before the court, is exactly the same as the original enactment. 1 Stat., 85; 14 id., 386. Earnest opposition was made to that provision when it first went into operation, and it continued to increase until it culminated in two important cases reported in the volumes containing the decisions of the supreme court of that period. *Martin v. Hunter*, 1 Wheat., 304, 323; *Cohens v. Virginia*, 6 id., 264, 375.

Attempt is made in argument to support the proceeding in this case, by which the indictment was removed from the state court into the circuit court, and the refusal of the circuit court to remand the same, by the judgment of the supreme court in those two cases; but it is clear that those judgments do not afford any justification either for the proceeding or the refusal to remand, as both were transferred into the supreme court by writ of error under the twenty-fifth section of the judiciary act. Both of those cases were rightfully removed into the supreme court under that section of the judiciary act, as appears by the respective transcripts annexed to the writs of error, and as appears by the countless cases since decided by this court, and a great number, probably more than one hundred, standing on the docket of the present term for re-examination. Nor is it necessary to look beyond these cases to establish the proposition that they were re-examined under the twenty-fifth section of the judiciary act. Take the first case. It was an action of ejectment, brought in a subordinate state court, for the recovery of a large parcel of land situated in that

part of Virginia then called the Northern Neck. Service was made, and the defendant Martin appeared and pleaded the general issue upon the usual terms of confessing lease, entry and ouster. Title was claimed by the defendant under a royal grant made prior to the Revolution, and he claimed that his title was protected by the treaty. Leave of court being obtained, the parties agreed as to the facts, and the subordinate court rendered judgment in favor of the plaintiff. Prompt appeal was taken by the defendant to the court of appeals, and the appellate court reversed the judgment of the court of original jurisdiction, and rendered judgment for the defendant.

Dissatisfied with the judgment of the court of appeals, the plaintiff sued out a writ of error under the twenty-fifth section of the judiciary act, and removed the cause into this court, where the judgment of the court of appeals was reversed. Pursuant to the usual course, this court sent down its mandate to the court of appeals, which that court refused to execute. No new proceedings took place, but a new writ of error was sued out, and the opinion of the court as reported is the one given in the case when brought here under the second writ of error.

Aid and comfort are attempted to be derived from certain remarks of the court in that case, as warranting the proceedings in the case before the court; but it is clear that they cannot have any such effect, as no such question was involved in the case, and of course the remarks of the court must be understood as applicable only to the matter then in decision. Important federal questions were involved in the case; and we have the authority of the justice who delivered the opinion for saying that the judgment drew in question and denied the validity of a statute of the United States, as appeared on the face of the record, and the court also held that the principles and rules of decision to be applied under the second writ of error were the same as under the first, when the mandate was sent down. Comment upon the opinion of the court in the second case is hardly necessary, as it does not appear to contain anything relating to the present theory of the government, except that it proves, what everybody admits, that a writ of error under the twenty-fifth section of the judiciary act will lie, in a proper case and when the question is properly presented, as well in a criminal as in a civil case, irrespective of the amount in controversy.

Cohens was prosecuted in a state court for vending and selling lottery tickets contrary to the statute of the state. Regular process issued and he was arrested, and the parties entered into an agreed statement of facts. Authority was given to the city of Washington, under an act of congress, to permit the drawing of lotteries for effecting certain improvements in the city, and the defendant, besides pleading the general issue, pleaded a justification under the act of congress. Extended hearing was had, and the state court rendered judgment against the defendant, and he sued out a writ of error under the twenty-fifth section of the judiciary act, and removed the cause into this court. Due appearance was entered for the state, and her counsel moved to dismiss the case for want of jurisdiction. Three causes were assigned in the motion for the dismissal of the writ of error: 1. That a state is the defendant. 2. That no writ of error lies from this court to a state court. 3. That the supreme court had no right to review the judgment of the state court, because neither the constitution nor any law of the United States had been violated by the judgment of the state court.

Extreme views were advanced on behalf of the state, among which was the

proposition that the constitution did not provide any tribunal for its final construction, and that in the last resort the courts of the respective states may exercise that power. Responding to that extraordinary proposition, Marshall, C. J., speaking for the court, said that jurisdiction is given to the courts of the Union in two classes of cases. In the first, their jurisdiction depends on *the character of the cause*, whoever may be the parties, and comprehends "all cases in law and equity arising under the constitution, the laws of the United States, and treaties made or which shall be made under their authority;" and he added, that that clause extends the jurisdiction to all the cases described, without making in its terms any exception whatever, and without any regard to the condition of the party. His description of the second class is, that it comprehends controversies between two or more states, between a state and a citizen of another state, and between a state and foreign states, citizens or subjects. Of course the second proposition of the chief justice must be subject to what is ordained in the eleventh amendment to the constitution. 2 Story, Const., sec. 1724.

Original jurisdiction is vested in the supreme court in certain enumerated cases, and the constitution also gives the same tribunal appellate jurisdiction in all other specified cases. Among those in which the jurisdiction must be exercised in the appellate form are cases arising under the first clause of the second section, including such as relate to the construction of the constitution, the acts of congress and treaties. If a state is a party, the jurisdiction is original, except when the cases arise under the first clause of the second section, in which event the jurisdiction is appellate, as in such a case the jurisdiction can only be practically exercised in that form. Where a state is a party, and the case is such as to admit of its originating in the supreme court, in the opinion of the chief justice as there expressed, the case ought to originate in the supreme court; but where, from the nature of the case, it cannot originate here, he holds that the proper construction of the clause is that the jurisdiction is appellate.

§ 2495. *A state prosecution cannot be removed to the federal courts merely because the accused was a federal officer at the time of the commission of the alleged offense.*

When correctly understood, it is clear that the second case cannot have any tendency whatever to support the proposition that an indictment for wilful and felonious murder with malice aforethought, pending in a state court, and found by a grand jury of the state under a statute of the state, not involving any federal question, may be removed from the state court into the circuit court for trial merely because the prisoner, at the time he committed the homicide, was a deputy collector of the internal revenue. Such a proposition, unsupported as it is by any respectable judicial authority, is only calculated to excite amazement, as the case cited is a direct and conclusive authority the other way, showing to a demonstration that the federal courts cannot exercise any jurisdiction whatever in a criminal case properly pending in a state court, unless it involves some question arising under the first clause of the second section of the article describing the judicial power conferred by the constitution. 2 Story, Const., secs. 1721, 1740; 1 Kent, Com. (12th ed.), 299; Sergeant, Const., 59; Curtis, Com., sec. 9; Pomeroy, Const. (2d ed.), sec. 760.

Commentators on the constitution seem to agree that congress enacted the twenty-fifth section of the judiciary act in order to define the classes of cases originating in state tribunals to which the appellate power of the national

courts might extend by means of the writ of error, to preserve the supremacy and to secure the uniform construction of the constitution, acts of congress, and international treaties. *Curtis, Com.*, sec. 210. All agree that the original jurisdiction of the supreme court is defined and limited by the constitution, and that it can neither be extended nor restricted by an act of congress; and it is equally undeniable that the appellate jurisdiction of that tribunal is granted subject to such exceptions and regulations as the congress may make, from which it follows that appellate jurisdiction can only be exercised by the supreme court in such cases and to such extent as the acts of congress authorize. *Wiscart v. Dauchy*, 3 Dall., 321, 327; 1 *Kent, Com.* (12th ed.), 324; *Clarke v. Bazadone*, 1 Cranch, 212. Acts of congress having been passed providing for the exercise of appellate judicial power, the established rule is that the affirmative description of the cases in which the jurisdiction may be exercised implies a negative on the exercise of such power in all other cases. *Durousseau v. United States*, 6 Cranch, 307, 314; *United States v. More*, 3 id., 159, 170.

Legislative power is undoubtedly vested in congress to pass laws to define and punish offenses against the authority of the United States; but it does not follow by any means that a prisoner charged with murder committed in violation of the laws of a state may claim to be tried in a federal circuit court, or that a state indictment for such an offense constitutes a case arising under the constitution or the laws of the United States, or that it can in any way become cognizable in such a tribunal, certainly not unless it can be removed there in pursuance of some act of congress defining the offense and providing for the trial and punishment of the offender. Persons charged with offenses against the authority of the states find ample guaranties of a fair trial in the laws of the states and the usages of the state courts, and if the federal officers need more, it belongs to congress to provide the remedy in some mode authorized by the constitution. 1 *Kent, Com.* (12th ed.), 340.

§ 2496. *Congress can provide for the removal of any cause originally triable in the federal courts.*

Adjudged cases admit that the power of removal instead of the writ of error, as prescribed in the twenty-fifth section of the judiciary act, may also be exerted when the subject-matter of the suit is such as to bring the case within the first clause of the second section of the article describing the federal judicial power. Frequent cases of the kind of a civil nature arise, and if they could not be transferred to the circuit courts by removal under proper regulations, it might often happen that the object intended to be accomplished by the appellate tribunal would be defeated. Appellate power in the cases mentioned in the provision before referred to is given in the constitution, and it is left to congress to enact the manner of its exercise. *Curtis, Com.*, sec. 148; *Martin v. Hunter*, 1 Wheat., 304, 349. Whether the appellate power is employed by removal or writ of error, the right and extent of jurisdiction is the same; and in both the extent is limited by the constitutional grant, and cannot be extended beyond cases in law and equity arising under the constitution, the acts of congress, and such treaties as are therein described.

Legislative provision of a restricted character for the removal of civil causes from the state courts into the circuit courts was made by the judiciary act which was passed to organize our judicial system. 1 Stat., 79. Since that many other acts of congress have been passed upon the subject by which the power in civil cases has been very much enlarged. Proceedings were also pre-

scribed by a later act, not now in force, which authorized the officers appointed for the collection of the customs to remove any suit or prosecution commenced or pending against them in a state court, for acts done by them as such officers or under color of their respective offices, into the circuit court for trial; but the court is not furnished with any evidence that any such jurisdiction was ever exercised by the circuit court under that enactment in a criminal prosecution. 3 Stat., 198.

Special reference is also made to the second section in the still later act of congress, usually denominated the Force Bill. 4 Stat., 632. Jurisdiction of the circuit courts was by that section extended to all cases in law and equity arising under the revenue laws, for which other provisions are not already made by law, and provision was made to the effect that any revenue officer injured in his person or property, on account of any act done by him for the protection of the revenue, might maintain a suit for such damages in the circuit court for the district where the wrong-doer resided. Property taken or detained by a revenue officer was declared to be irrepleviable, and that it should be deemed in the custody of the law and subject only to the orders and decrees of the federal court having jurisdiction of the same. Offenders who should dispossess or rescue, or attempt to dispossess or rescue, any property so taken or detained were to be deemed guilty of a misdemeanor and punished as therein directed. Section 3 of the same act empowered any such revenue officer to remove any suit or prosecution commenced against him in a state court, on account of any act done by him for the protection of the revenue, into the proper circuit court for trial in the mode therein prescribed.

Properly construed, the act, as originally passed, was intended to furnish protection to the officers engaged in collecting import duties, and a subsequent act provided that it should not be so construed as to apply to cases arising under the internal revenue acts. Unlike that, the fiftieth section of the act to increase duties on imports extended the provisions of the act to cases arising under the laws for the collection of internal duties. Had legislation stopped there, it would be correct to say that the Force Bill is still in force; but the still later act, passed July 13, 1866, repealed that section altogether, subject to a proviso inapplicable to the present case. *Philadelphia v. Collector*, 5 Wall., 728; 13 Stat., 241; 14 id., 172; *Hornthall v. Collector*, 9 Wall., 560, 566; *Assessors v. Osborne*, 9 id., 567, 573.

§ 2497. *Meaning of "prosecution," as used in the act.*

Much stress in the argument was laid upon the word "prosecution," found in the third section of the act; but neither the written nor the oral argument furnished any evidence to show that any indictment found in the state where the difficulty arose which induced congress to pass the act was ever removed from the state court into the circuit court for trial, and it is well known as a historical fact that no such removal of an indictment in that state was ever made. Civil cases pending in the tribunals of other states were in several instances removed under that act into the circuit court, and were there adjudicated to final judgment; but there is no authentic account that any state indictment for an offense against the authority of a state was ever removed under that act into the circuit court for trial or sentence. Grave doubts are entertained whether the congress, in the use of the word "prosecution," intended to extend the operation of the act to such an indictment, as ample provision existed at the time of its passage for the re-examination of every question of federal cognizance arising on the trial of such an indictment, by a writ of

error sued out pursuant to the authority given in the twenty-fifth section of the judiciary act. 1 Kent, Com. (12th ed.), 219.

Litigations of a civil nature, even when the jurisdiction of the circuit court depends entirely upon the character of the parties, may, under regulations enacted by congress, be removed from the state court into the circuit court for trial; but there is no just pretense that a state indictment for an offense against the authority of the state can be removed from the state court where found into the circuit court for trial in any form of proceeding, unless the case, whether a suit at law or in equity, involves some question arising under the constitution, the laws of congress, or treaties made, or which shall be made, under their authority. Com. v. Casey, 12 Allen, 214, 217. Nothing is contained in the section which has any tendency to support the opposite construction, except the words "suit or prosecution;" and it should not be overlooked that it employs no words exclusively applicable to an indictment, and contains many expressions utterly repugnant to the theory that the proceedings to effect the removal of process were intended to extend to a criminal and indictable offense. Every word of the section speaks a different intent, as is conclusively shown by the distinguished judge who gave the opinion of the court in the case last cited. Confirmation of that view is also derived from the fact that every reported case, where the removal was effected under that act, was a civil action, as appears from the following examples: Wood v. Matthews, 2 Blatch., 370; Murray v. Patrie, 5 id., 343; Fisk v. The Union Pacific Railroad Co., 6 id., 362; S. C., 8 id., 243; Tod v. Fanfield Com. Pleas, 15 Ohio St., 377, 387.

Formal application to the supreme court of Maine was made under that act of congress to remove an indictment for an offense against the authority of the state into the circuit court of the district for trial, but the court unanimously denied the application, for the same reasons as those given by the supreme court of Massachusetts in the case before cited. State v. Elder, 54 Me., 381. Taken together, these two cases ought to be regarded as decisive that a state indictment for an offense against the authority of the state could not be removed from the state court, under that act of congress, into the circuit court for trial. Subordinate federal courts find no other rules to guide them in the exercise of their functions than are to be found in the acts of congress, and they can have no other recourse than to those enactments to determine what constitutes an offense against the authority of the United States. Conkling's Treatise (5th ed.), 181. Offenses against the nation are defined and their punishment prescribed by acts of congress. Cooley, Const. Lim. (4th ed.), 26. Like power was given to the defendant, by the act relating to *habeas corpus*, for the removal into the circuit courts, after judgment, of suits or prosecutions commenced in a state court against officers, civil or military, for acts done or committed by virtue of an order of the president, or pursuant to an act of congress. 12 Stat., 756.

Pending an action in a state court against a marshal, in which the verdict and judgment were in favor of the plaintiff, the defendant instituted proceedings in the state court for the removal of the cause into the circuit court, but the state court refused to send up the case. Thereupon the circuit court issued an alternative *mandamus* to the state court, which was followed by the peremptory process, when the plaintiff sued out a writ of error, and removed the cause into this court. Due hearing was had here, and this court *unanimously* held that so much of the act as provided for the removal of a judgment in a state court, in which the issue was tried by a jury, is not in pursuance of the

constitution, and is void. *The Justices v. Murray*, 9 Wall., 274 (§§ 2501-2504, *infra*); *McKee v. Rains*, 10 id., 22, 25.

Governed by that rule of decision, it must be considered that the power of removal, when the facts have been found by a jury, cannot be exercised in such a case after judgment. Statutory power to remove an action from a state court into the circuit, says Judge Story, if it exists before judgment because it is included in the appellate power, must exist after judgment for the same reason, as he held that the same objection exists as to the removal before judgment as after, and that both must stand or fall together. *Martin v. Hunter*, 1 Wheat., 304, 349; 2 Story, Const., sec. 1745. None of the advocates of the power of removal, as applied to criminal cases, pretend that it may be exercised after judgment in any other mode than by a writ of error; from which it would seem to follow, if the authorities cited are good law, that a state indictment for an offense against the authority of the state cannot be removed at all into the circuit court for trial, nor into the supreme court, except by writ of error.

Section 643 of the Revised Statutes, under which the removal in this case was made, is a revision of the sixty-seventh section of the act to reduce internal taxation. 14 Stat., 171. Officers appointed under that act may, before trial, in any case, civil or criminal, where suit or prosecution is commenced against them in a state court, remove the said suit or prosecution into the circuit court for trial. R. S., 643. Further remarks in exposition of the enactment seem to be unnecessary, as it is clear that it is in all essential respects the same as its predecessors, some of which were passed and went into operation even before the actual close of the second war of independence. Considering the long period the provision has been in operation, it would naturally be expected, if it was intended by its framers to include state indictments pending in state courts for offenses against the authority of the state, that the advocates of such a construction would be able to produce some authoritative exposition of the enactment to support such an improbable and extraordinary theory. Nothing of the kind is produced, and for the best possible reason, that no removal of such an indictment from a state court into the circuit court for trial was ever before made in our judicial history.

Should it be suggested that a recent case, cited in the brief for the prisoner, is a precedent where a criminal case was removed from a state court into the circuit court for trial, the answer to the suggestion is that the case does not support the proposition, for several reasons: 1. Because the order of removal was never carried into effect. 2. Because nothing was done in the circuit court except to pass the order for removal. 3. Because the opinion of the court, as reported, admits that the circuit courts have no power to try offenses against the peace and dignity of the state, nor to control the state courts in any such case. 4. Because the court admit in that case that no man charged with an offense against the authority of the state can defend himself by the fact that he is a federal officer. 5. Because it does not appear that the state indictment was ever transferred into the circuit court for trial. 6. Because it appears that the court giving the opinion in that case entirely overlooked the settled rule that the circuit courts have no jurisdiction of any act of an individual as an offense, unless the same is defined as such by an act of congress, nor unless some act of congress prescribes the punishment annexed to the commission of the offense, and designates the court to try and sentence the offender. 7. Because the indictment, for aught that appears to the contrary, is still pending in

the state court, the report failing to show that it has ever been in fact transferred into the circuit court. *State v. Hoskins*, 77 N. C., 530, 546.

Viewed in any light the proposition to remove a state indictment for felony, from a state court having jurisdiction of the case, into the circuit court, where it is substantially admitted that the prisoner cannot be tried until congress shall enact some mode of procedure, approaches so near to what seems to me both absurd and ridiculous, that I fear I shall never be able to comprehend the practical wisdom which it doubtless contains. Were the object to give felons an immunity to commit crime, and to provide a way for their escape from punishment, it seems to me that it would be difficult to devise any mode more effectual to that end than the theory embodied in that proposition.

§ 2498. *Difficulties attending the trial of state crimes in the federal courts.*

Difficulties almost without number would arise if any attempt should be made to try such an indictment in a circuit court. It was suggested at the argument that the attorney-general of the state might appear in the circuit court as the public prosecutor, but he may not deem it any part of his duty to conduct criminal prosecutions in any other tribunals than those of the state from which he received his commission. Public prosecutions against the authority of the United States are in the circuit courts within the exclusive direction of the district attorneys, but they have nothing to do with prosecutions against the statutes, peace and dignity of a state. *Confiscation Cases*, 7 Wall., 454.

Service of process is often required in a criminal case, and the question would arise whether it should be made by the sheriff or marshal. Subpoenas must be issued, and the inquiry would arise whether they should be issued in the name of the state or of the president. Expenses must be incurred for the service of process and for the travel and attendance of witnesses, and it would at once become a question whether the amount would be chargeable to the United States or to the state, and if to the latter, may the state be compelled to respond to the claim. Persons indicted of murder and other high crimes are entitled to a copy of the indictment and process to compel the attendance of witnesses, and the inquiry arises whether it would be the duty of the circuit court clerk or the clerk of the state court to comply with that constitutional requirement. Under the state law the prisoner, if the charge is of felony punishable with death, is entitled to thirty-five challenges, whereas under the act of congress he is entitled only to twenty; and the inquiry would immediately arise, whether the right of the prisoner in that regard must be governed by the act of congress or the state law. 2 State Stat., sec. 4014; R. S., sec. 819.

By the common law it was error, for which the judgment might be reversed, if the clerk did not in capital felonies inquire of the prisoner before sentence whether he had anything to say why judgment of death should not be pronounced against him, and the question would arise whether this inquiry should be made by the clerk of the state court whose laws were offended by his crime, or by the clerk of the circuit court to which the indictment had been transferred. 1 Chitty, Cr. Law, 700, 717. Juries in the federal courts are not the judges of the law as well as the fact, consequently they are usually sworn in capital cases that they will well and truly try, and true deliverance make of the prisoner they have in charge, according to the law and the evidence. Where such is the practice the question will arise whether the law referred to is federal or state law, or both combined, including the common law, as is suggested for the other rules of decision in conducting the trial. State rules of

evidence or of procedure, adopted since the passage of the act of congress organizing the federal courts, do not apply in criminal cases where the indictment is found in the circuit courts, and the question may immediately arise, which system of evidence and of procedure will furnish the rule of decision where the indictment is found in the state court and the prisoner is tried in the circuit court. *United States v. Reid*, 12 How., 361, 365.

It was in view of these and many other equally embarrassing questions which might be suggested that induced Judge Story to remark, in one of his leading judgments upon the subject, that in respect to criminal prosecutions the difficulty seems admitted to be insurmountable, which is fully equivalent to a declaration that the power of removal in such a case does not exist. *Martin v. Hunter*, 1 Wheat., 304, 349. Ingenious effort was made in the argument at the bar to show that such was not the meaning of the learned justice when he gave utterance to that important qualification to his antecedent remarks in the same connection; but the effort is in vain, as the same learned magistrate made the same admission in his valuable commentaries on the constitution, published nearly twenty years later. 2 Story, Const. (3d ed.), sec. 1746. Whether conclusive or not, it must be conceded that great weight is due to those admissions, and they are also much strengthened by a similar admission in the commentaries of another learned writer upon constitutional law. *Curtis*, Com., sec. 15.

Embarrassing questions, it is admitted, may arise in the exercise of such a peculiar and hitherto unknown jurisdiction; but the attempt is made to furnish a panacea for them all by referring to section 722 of the Revised Statutes, which seems to contemplate that where the laws of the United States are insufficient to define offenses and punish offenders, resort may be had to the common law as modified and changed by the state wherein the federal court exercising jurisdiction is held, both in the trial of the accused and in the infliction of punishment. Examined in the most favorable light, the provision is a mere jumble of federal law, common law, and state law, consisting of incongruous and irreconcilable regulations, which in legal effect amounts to no more than a direction to a judge sitting in such a criminal trial to conduct the same as well as he can, in view of the three systems of criminal jurisprudence, without any suggestion whatever as to what he shall do in such an extraordinary emergency if he should meet a question not regulated by any one of the three systems. Unless some better remedy than what is contained in that section can be found, it seems to me that it would be better to close the discussion without suggesting any, as it is plain that there is nothing in that enactment which will enable the judge sitting in such a criminal trial to solve any considerable number of the embarrassing questions which it may well be expected will arise in the trial of such a criminal case.

§ 2499. *The distribution of police power between the states and the federal government.*

State police in its widest sense comprehends the whole system of internal regulation by which the state seeks not only to preserve the public order and to prevent offenses against her authority, but also to establish for the intercourse of one citizen with another those rules of justice, morality and good conduct which are calculated to prevent a conflict of interests and to insure to every one the uninterrupted enjoyment of his own, as far as is reasonably consistent with a like enjoyment of equal rights by others. Public police is in effect defined by the great commentator of the common law as the due regula-

tion of domestic order, whereby the citizens of a state are bound to conform to the rules of propriety and good conduct, and to be moral, industrious and inoffensive in their respective stations. 4 Bl. Com., 162.

Police, says Bentham, is a system of precaution, either for the prevention of crimes or calamities; and he divides the subject into many heads, of which three only will be mentioned: 1. Police for the prevention of offenses. 2. Police for the prevention of calamities. 3. Police for the prevention of endemic diseases. Bentham's Works, title Offenses against Police, vol. iii, p. 169, Edinburgh ed. Unlike the conceded right to appropriate private property when the public exigency requires it, the power in question is one, says Shaw, C. J., vested in the legislature to make, ordain and establish all manner of wholesome and reasonable laws, statutes and ordinances, either with penalties or without, not repugnant to the constitution, as they shall judge to be for the good and welfare of the state and of the subjects of the same. *Commonwealth v. Alger*, 7 Cush., 53, 85. It extends, says another eminent judge, to the protection of the lives, limbs, health, comfort and quiet of all persons and of all property within the state, as exemplified in the maxim, *Sic utere tuo ut alienum non lædas*. *Thorpe v. Rutland & B. R. Co.*, 27 Vt., 140, 147.

Ordinary regulations of police, says Cooley, have been left with the states, nor can it be taken from them and exercised under legislation by congress. Nor can the national government through any of its departments or officers assume any supervision of the police regulations of the states. All that the federal authority can do is to see that the states do not, under cover of this power, invade the sphere of national sovereignty, obstruct or impede the exercise of any authority which the constitution has confided to the nation, or deprive any citizen of rights guarantied by the federal constitution. Cooley, Const. Lim. (4th ed.), 715. No direct general power over these objects, says Marshall, C. J., is granted to congress, and consequently they remain subject to state legislation. *Gibbons v. Ogden*, 9 Wheat., 203 (§§ 1183-1201, *supra*). Within state limits, says Chase, C. J., an act of congress upon the subject can have no constitutional operation. *United States v. Dewitt*, 9 Wall., 41-45.

§ 2500. *Acts of congress cannot supersede the police powers of the state.*

Acts of congress cannot properly supersede the police powers of the state, nor can the police powers of the state override the national authority, as the power of the state in that regard extends only to a just regulation of rights with a view to the due protection and enjoyment of all; and if the police law of the state does not deprive any one of that which is justly and properly his own, it is obvious that its possession by the state, and its exercise for the regulation of the actions of the citizens, can never constitute an invasion of national jurisdiction or afford a basis for an appeal to the protection of the national authorities.

Startling propositions are advanced in argument; but it is not probable that any one will contend that it would be competent for congress to define as murder against the authority of the United States the homicide charged in the petition for removal, or that such act of homicide is now defined as murder by any act of congress now in operation or which was ever passed by the legislative department since the constitution was adopted. Had the officer been killed, the proposition of removal would be less astonishing than the one set forth in the petition. Judging from the petition, the indictment is against the officer for wilfully, premeditatedly and deliberately killing and murdering the deceased, against the peace and dignity of the state. No special ground is set

forth for the removal, nor anything that can be tortured into a reason for withdrawing the case from the jurisdiction of the state court, unless it be that the prisoner is a deputy collector of the revenue, and that he alleges in the petition that the killing was in his own necessary self-defense to save his own life, which is a defense that can as well be made in the state court as in the circuit court, unless it be assumed that a federal officer is entitled, as a matter of right, to transfer every indictment against him for crime, when found in a state court, into a federal court for trial. Persons accused of capital or otherwise infamous crimes must be indicted by a grand jury, and when the offense is committed in a state, they must be tried in the state where it was committed; but attention is not called to any article or section of the constitution that forbids that a federal officer shall be tried in a state court for murder committed in the open state, against the peace and dignity of the state, and contrary to the form of the state statute defining the offense.

Large concessions were made by the states to the United States, but they never ceded to the national government their police powers or the power to define and punish offenses against their authority, as admitted by all courts and all commentators upon the constitution, which leads me to the following conclusions: 1. That the section of the Revised Statutes in question does not authorize the removal of a state indictment for an offense against the laws of the state from the state court where it is pending into the circuit court of the United States for trial. 2. That if it does purport to confer that authority, it is unconstitutional and void. 3. That the answer to each of the three questions certified here from the circuit court should be in the negative.

THE JUSTICES v. MURRAY.

(9 Wallace, 274-282. 1869.)

ERROR to U. S. Circuit Court, Southern District of New York.

STATEMENT OF FACTS.—An action was brought against Murray and Buckley for assault and battery and false imprisonment. The special defense set up was that Murray was a United States marshal and that Buckley was his deputy, and that they arrested and detained the plaintiff under orders from the president. There was verdict and judgment for the plaintiff in the state court, and subsequently a writ of error issued from the circuit court of the United States for the southern district of New York to remove the cause from the state court. The state court made no return to the writ, and a *mandamus* was awarded. To the writ of *mandamus* there was a return, setting forth the fact of a trial and judgment in the cause. A demurrer to this return was sustained and a peremptory *mandamus* awarded.

§ 2501. *A cause is not removable to a federal court after trial and judgment in the state court.*

Opinion by MR. JUSTICE NELSON.

This case has received the most deliberate consideration of the court. As we have arrived at the conclusion that the seventh amendment, upon its true construction, applies to a cause tried by a jury in a state court, this opinion will be confined to considerations involved in the second question submitted to us for argument at the bar. The decision of that in the affirmative disposes of the case. The seventh amendment is as follows: "In suits at common law, where the value in controversy shall exceed \$20, the right of trial by jury

shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the common law."

It must be admitted that, according to the construction uniformly given to the first clause of this amendment, the suits there mentioned are confined to those in the federal courts; and the argument is, perhaps, more than plausible, which is that the words, "and no fact tried by a jury," mentioned in the second, relate to the trial by jury as provided for in the previous clause. We have felt the full force of this argument, and if the two clauses were necessarily to be construed together, and to be regarded as inseparable, we think the argument would be conclusive. But this is not the view that has been taken of it by this court. In *Parsons v. Bedford*, 3 Pet., 447, 448, Mr. Justice Story, in delivering the opinion of the court, referring to this part of the amendment, observed "that it should be read as a substantial and independent clause;" and that it was "a prohibition to the courts of the United States to re-examine any facts tried by a jury in any other manner." The history of the amendment confirms this view. Debates in Congress, by Gales & Seaton, vol. 1, pp. 452, 458, 784. He further observed that "the only modes known to the common law to re-examine such facts was the granting of a new trial by the court where the issue was tried, or the award of a *venire facias de novo*, by the appellate court, for some error of law that had intervened in the proceedings."

§ 2502. *The ten amendments to the constitution are limitations upon the powers of the federal government.*

Another argument mainly relied upon against this construction is that the ten amendments proposed by congress and adopted by the states are limitations upon the powers of the federal government, and not upon the states; and we are referred to the cases of *Barron v. Mayor, etc., of Baltimore*, 7 Pet., 243; *Livingston v. Moore*, id., 551; *Twitchell v. The Commonwealth*, 7 Wall., 321, as authorities for the position. This is admitted, and it follows that the seventh amendment could not be invoked in a state court to prohibit it from re-examining, on a writ of error, facts that had been tried by a jury in the court below. But this would seem to be the only consequence deducible from these cases or from the principles they assert. They have no pertinent, much less authoritative, application to the question in hand. That question is not whether the limitation in the amendment has any effect as to the powers of an appellate state court, but what is its effect upon the powers of the federal appellate court? Is the limitation confined to cases of writs of error to the inferior federal courts, or does it not also apply to writs of error to state courts in cases involving federal questions? The latter is the precise question for our determination. Now, it will be admitted that the amendment, in terms, makes no such discrimination. They are: "And no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law." It is admitted that the clause applies to the appellate powers of the supreme court of the United States in all common law cases coming up from an inferior federal court, and also to the circuit court in like cases, in the exercise of its appellate powers. And why not, as it respects the exercise of these powers in cases of federal cognizance coming up from a state court? The terms of the amendment are general, and contain no qualification in respect to the restriction upon the appellate jurisdiction of the courts, except as to the class of cases, namely, suits at common law where the trial has been by jury. The natural inference is that no other was intended. Its language, upon any reasonable, if not necessary, interpretation, we think, applies

to this entire class, no matter from what court the case comes, of which cognizance can be taken by the appellate court.

It seems to us also that cases of federal cognizance, coming up from state courts, are not only within the words, but also within the reason and policy, of the amendment. They are cases involving questions arising under the constitution, the laws of the United States, and treaties, or under some other federal authority; and, therefore, are as completely within the exercise of the judicial power of the United States, as much so as if the cases had been originally brought in some inferior federal court. No other cases tried in the state courts can be brought under the appellate jurisdiction of this court or any inferior federal court on which appellate jurisdiction may have been conferred. The case must be one involving some federal question, and it is difficult to perceive any sensible reason for the distinction that is attempted to be made between the re-examination by the appellate court of a case coming up from an inferior federal, and one of the class above mentioned coming up from a state court. In both instances the cases are to be disposed of by the same system of laws and by the same judicial tribunal.

Mr. Hamilton, in the eighty-second number of the *Federalist*, speaking of the relation that would subsist between the national and state courts in the instances of concurrent jurisdiction, observes that the constitution in direct terms gives an appellate jurisdiction to the supreme court in all the enumerated cases of federal cognizance in which it is not to have an original one, without a single expression to confine its operations to the inferior federal courts. The objects of appeal, not the tribunals from which it is to be made, are alone contemplated. From this circumstance, he observes, and from the reason of the thing, it ought to be construed to extend to the state tribunals. "The courts of the latter will, of course, be national auxiliaries to the execution of the laws of the Union, and an appeal from them will as naturally lie to that tribunal which is destined to unite and assimilate the principles of national justice and the rules of national decisions."

This idea of calling to the aid of the federal judiciary the state tribunals, by leaving to them concurrent jurisdiction in which federal questions might be involved, with the right of appeal to the supreme court, will be found to be extensively acted upon in the distribution of the judicial powers of the United States in the act of 1789, known as the judiciary act. Besides the general concurrent jurisdiction in the judiciary act, a striking instance of this is found in the thirty-third section of the act, which provides "that for any crime or offense against the United States the offender may, by any justice or judge of the United States, or by any justice of the peace or other magistrate of any of the United States where he may be found, agreeably to the usual mode of process against offenders in such state, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by this act has cognizance of the offense." And a series of acts were also passed in the earlier sessions of congress, conferring upon the state and county courts cognizance to hear and determine upon offenses, penalties and forfeitures, and for the collection of taxes and duties arising and payable under the revenue laws, or under a direct tax or internal duties, and which were continued down till the state courts refused to entertain jurisdiction of the same. 1 *Brightly's Digest*, 281, and note *g*, p. 282. The state courts of New York continued to exercise jurisdiction, under these acts till as late as 1819. *United States v. Lathrop*, 17 Johns., 4.

The reasons, therefore, for the application of this clause of the seventh amendment to cases coming up for review from the state courts were as strong as in cases from the inferior federal courts, and the history of the amendment will show that it was the apprehension and alarm in respect to the appellate jurisdiction of this court over cases tried by a jury in the state courts that led mainly to its adoption.

§ 2503. *Appellate jurisdiction. Scope of the seventh amendment.*

The appellate jurisdiction of this court, after defining its original jurisdiction, is as follows: "In all other cases before mentioned the supreme court shall have appellate jurisdiction both as to law and fact, with such exceptions and under such regulations as congress shall make."

Mr. Hamilton, in the eighty-first number of the *Federalist*, after quoting the provision, observes: "The propriety of this appellate jurisdiction has been scarcely called in question in regard to matters of law, but the clamors have been loud against it as applied to matters of fact. Some well-intentioned men in this state, deriving their notions from the language and forms which obtain in our courts, have been induced to consider it as an implied supersedure of the trial by jury in favor of the civil law mode of trial." And he then enters into an argument to show that there is no real ground for alarm or apprehension on the subject, and suggests some regulations by congress by which the objections would be removed. He observes, also, that it would have been impracticable for the convention to have made an express exception of cases which had been originally tried by a jury, because in the courts of some of the states all causes were tried in this mode, and such exception would preclude the revision of matters of fact, as well where it might be proper as where it might be improper. He then suggests that congress has full power to provide that in appeals to the supreme court there should be no re-examination of the facts where the causes had been tried by a jury according to the common law mode of proceeding. Now, it is quite clear that the restrictions upon this appellate power by congress, pointed out by Mr. Hamilton for the purpose of quieting the public mind, had a direct reference to the revision of the judgments of the state courts as well as the inferior federal, and what is significant on the subject is, that the amendment submitted in the first session of congress by Mr. Madison adopts the restriction suggested by Hamilton, and almost in the same words. We will simply add, there is nothing in the history of the amendment indicating that it was intended to be confined to cases coming up for revision from the inferior federal courts, but much is there found to the contrary. *Wetherbee v. Johnson*, 14 Mass., 412; *Patrie v. Murray*, 43 Barb., 331.

§ 2504. *Act held unconstitutional.*

Our conclusion is, that so much of the fifth section of the act of congress, March 3, 1863, entitled "An act relating to *habeas corpus*, and regulating proceedings in certain cases," as provides for the removal of a judgment in a state court, and in which the cause was tried by a jury, to the circuit court of the United States for a retrial on the facts and law, is not in pursuance of the constitution, and is void.

The judgment of the court below must, therefore, be reversed, the cause remanded with direction to dismiss the writ of error and all proceedings under it.

INSURANCE COMPANY v. MORSE.

(20 Wallace, 445-459. 1874.)

ERROR to the Supreme Court of Wisconsin.

STATEMENT OF FACTS.—The Home Insurance Company of New York undertook to do business in Wisconsin, and agreed, in accordance with the law of that state, not to remove into the federal court any cases in which it might be concerned in the state courts of Wisconsin. Having been afterwards sued in one of those courts by Morse, the company sought to remove the cause into the federal court, but the state court refused to permit the removal, and the supreme court of the state affirmed its decision. The company sued out this writ of error.

Opinion by MR. JUSTICE HUNT.

The refusal of the state court of Wisconsin to allow the removal of the case into the United States circuit court of Wisconsin, and its justification under the agreement of the company and the statute of Wisconsin, form the subject of consideration in the present suit. The state courts of Wisconsin held that this statute and their agreement under it justified a denial of the petition to remove the case into the United States court. The insurance company deny this proposition, and this is the point presented for consideration.

§ 2505. *An agreement beforehand, on whatsoever consideration, to forego the right of trial by any special lawful tribunal, is absolutely void. Parties cannot by contract oust the ordinary tribunals of their jurisdiction.*

Is the agreement thus made by the insurance company one that, without reference to the statute, would bind the party making it? Should a citizen of the state of New York enter into an agreement with the state of Wisconsin, that in no event would he resort to the courts of that state or to the federal tribunals within it to protect his rights of property, it could not be successfully contended that such an agreement would be valid. Should a citizen of New York enter into an agreement with the state of Wisconsin, upon whatever consideration, that he would in no case, when called into the courts of that state or the federal tribunals within it, demand a jury to determine any rights of property that might be called in question, but that such rights should in all such cases be submitted to arbitration or to the decision of a single judge, the authorities are clear that he would not thereby be debarred from resorting to the ordinary legal tribunals of the state. There is no sound principle upon which such agreements can be specifically enforced.

We see no difference in principle between the cases supposed and the case before us. Every citizen is entitled to resort to all the courts of the country, and to invoke the protection which all the laws or all those courts may afford him. A man may not barter away his life or his freedom, or his substantial rights. In a criminal case, he cannot, as was held in *Cancemi's Case*, 18 N. Y., 128, be tried in any other manner than by a jury of twelve men, although he consent in open court to be tried by a jury of eleven men. In a civil case he may submit his particular suit by his own consent to an arbitration, or to the decision of a single judge. So he may omit to exercise his right to remove his suit to a federal tribunal, as often as he thinks fit, in each recurring case. In these aspects any citizen may no doubt waive the rights to which he may be entitled. He cannot, however, bind himself in advance by an agreement, which may be specifically enforced, thus to forfeit his rights at all times and on all occasions, whenever the case may be presented. That the agreement of the

insurance company is invalid upon the principles mentioned, numerous cases may be cited to prove. *Nute v. Hamilton Ins. Co.*, 6 Gray, 174; *Cobb v. New England Marine Ins. Co.*, id., 192; *Hobbs v. Manhattan Ins. Co.*, 56 Me., 421; *Stephenson v. P. F. and M. Ins. Co.*, 54 id., 70; *Scott v. Avery*, 5 H. of L. Cas., 811. They show that agreements in advance to oust the courts of the jurisdiction conferred by law are illegal and void.

In *Scott v. Avery* (one of the cases) the lord chancellor says: "There is no doubt of the general principle that parties cannot by contract oust the ordinary courts of their jurisdiction. That has been decided in many cases. Perhaps the first case I need refer to was a case decided about a century ago. *Kill v. Hollister*, 1 Wils., 129. That case was an action on a policy of insurance in which there was a clause that in case of any loss or dispute it should be referred to arbitration. It was decided there that an action would lie, although there had been no reference to arbitration. Then, after the lapse of half a century, occurred a case before Lord Kenyon, and from the language that fell from that learned judge, many other cases had probably been decided which are not reported. But in the time of Lord Kenyon occurred the case, which is considered the leading case on the subject, of *Thompson v. Charnock*, 8 Term R., 139. That was an action upon a charter-party, in which it was stipulated that if any difference should arise it should be referred to arbitration. That clause was pleaded in bar to the action brought upon breach of the contract, with an averment that the defendant was, and always had been, ready to refer the same to arbitration. This was held to be a bad plea, upon the ground that a right of action had accrued, and that the fact that the parties had agreed that the matter should be settled by arbitration did not oust the jurisdiction of the courts." Upon this doctrine all the judges who delivered opinions in the house of lords were agreed.

And the principle, Mr. Justice Story, in his commentaries on equity jurisprudence (section 670), says is applicable in courts of equity as well as in courts of law. "And where the stipulation, though not against the policy of the law, yet is an effort to divest the ordinary jurisdiction of the common tribunals of justice, such as an agreement in case of dispute to refer the same to arbitration, a court of equity will not, any more than a court of law, interfere to enforce the agreement, but it will leave the parties to their own good pleasure in regard to such agreements. The regular administration of justice might be greatly impeded or interfered with by such stipulations if they were specifically enforced."

In *Stephenson v. P. F. and M. C. Ins. Co.*, 54 Me., 70, the court say: "While parties may impose as condition precedent to applications to the courts that they shall first have settled the amount to be recovered by an agreed mode, they cannot entirely close the access to the courts of law. The law and not the contract prescribes the remedy, and parties have no more right to enter into stipulations against a resort to the courts for their remedy in a given case, than they have to provide a remedy prohibited by law; such stipulations are repugnant to the rest of the contract, and assume to divest courts of their established jurisdictions; as conditions precedent to an appeal to the courts, they are void." Many cases are cited in support of the rule thus laid down. Upon its own merits, this agreement cannot be sustained.

§ 2506. *State legislation can neither enlarge nor limit the jurisdiction of federal courts.*

Does the agreement in question gain validity from the statute of Wisconsin which has been quoted? Is the statute of the state of Wisconsin, which enacts

that a corporation organized in another state shall not transact business within its limits, unless it stipulates in advance that it will not remove into the federal courts any suit that may be commenced against it by a citizen of Wisconsin, a valid statute, in respect to such requisition, under the constitution of the United States? The constitution of the United States declares that the judicial power of the United States shall extend to all cases in law and equity arising under that constitution, the laws of the United States, and to the treaties made or which shall be made under their authority, . . . to controversies between a state and citizens of another state, and between citizens of different states. Art. 3, § 2. The jurisdiction of the federal courts, under this clause of the constitution, depends upon and is regulated by the laws of the United States. State legislation cannot confer jurisdiction upon the federal courts, nor can it limit or restrict the authority given by congress in pursuance of the constitution. This has been held many times. *Railway Co. v. Whitton*, 13 Wall., 286; *Payne v. Hook*, 7 id., 427; *The Moses Taylor*, 4 id., 411, and cases cited.

§ 2507. *A corporation is for judicial purposes a citizen of the state granting its charter, and for such purposes has all the rights of a natural person.*

It has also been held many times that a corporation is a citizen of the state by which it is created, and in which its principal place of business is situated, so far as that it can sue and be sued in the federal courts. This court has repeatedly held that a corporation was a citizen of the state creating it, within the clause of the constitution extending the jurisdiction of the federal courts to citizens of different states. *Express Co. v. Kountze*, 8 Wall., 342; *Cowles v. Mercer Co.*, 7 id., 118; *Railway v. Whitton*, 13 id., 275; *Ohio & Mississippi R. Co. v. Wheeler*, 1 Black, 286.

§ 2508. *What causes are removable.*

The twelfth section of the judiciary act of 1789 provides that if a suit be commenced in any state court by a citizen of the state in which the suit is commenced, against a citizen of another state, where the matter in dispute exceeds \$500, and the defendant at the time of entering his appearance shall file a petition for the removal of the cause for trial into the next circuit court of the United States, and shall offer good bail for his proceedings therein, "it shall be the duty of the state court to accept such security and proceed no farther in the cause." This applies to all the citizens of another state, whether corporations, partnerships or individuals. It confers an unqualified and unrestrained right to have the case transferred to the federal courts upon giving the security required. In the case recently decided in this court, of *Insurance Co. v. Dunn*, 19 Wall., 214, it was held that no power of action thereafter remained to the state court, and that every question, necessarily including that of its own jurisdiction, must be decided in the federal court.

The statute of Wisconsin, however, provides as to a certain class of citizens of other states, to wit, foreign corporations, that they shall not exercise that right, and prohibits them from transacting their business within that state, unless they first enter into an agreement in writing that they will not claim or exercise that right. The Home Insurance Company is a citizen of New York, within this provision of the constitution. As such citizen of another state, it sought to exercise this right to remove to a federal tribunal a suit commenced against itself in the state court of Wisconsin, where the amount involved exceeded the sum of \$500. This right was denied to it by the state court, on the ground that it had made the agreement referred to, and that the statute of the state authorized and required the making of the agreement.

We are not able to distinguish this agreement and this requisition, in principle, from a similar one made in the case of an individual citizen of New York. A corporation has the same right to the protection of the laws as a natural citizen, and the same right to appeal to all the courts of the country. The rights of an individual are not superior in this respect to that of a corporation. The state of Wisconsin can regulate its own corporations and the affairs of its own citizens, in subordination, however, to the constitution of the United States. The requirement of an agreement like this from their own corporations would be *brutum fulmen*, because they possess no such right under the constitution of the United States. A foreign citizen, whether natural or corporate, in this respect, possesses a right not pertaining to one of her own citizens. There must necessarily be a difference between the *status* of the two in this respect.

We do not consider the question whether the state of Wisconsin can entirely exclude such corporations from its limits, nor what reasonable terms they may impose as a condition of their transacting business within the state. These questions have been before the court in other cases, but they do not arise here. In *Paul v. Virginia*, 8 Wall., 168 (§§ 1052-59, *supra*), Mr. Justice Field used language, in speaking of corporations, which has been supposed to sustain the statute in question. "Having (he says) no absolute right of recognition in other states, but depending for such recognition, and the enforcement of its contracts, upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those states may think proper to impose. They may exclude the foreign corporation entirely, they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as, in their judgment, will best promote the public interest."

So in the *Bank of Augusta v. Earle*, 13 Pet., 519 (CORPORATIONS, §§ 1123-35), the language of Chief Justice Taney has been invoked for the same purpose.

In each of these cases, the general language of the learned justice is to be expounded with reference to the subject before him. They lay down principles in general terms which are to be understood only with reference to the facts in hand. Thus, the case in which the opinion was delivered by Mr. Justice Field was one involving the construction of that clause of the United States constitution which declares that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states," and of that clause regulating commerce among the states, not of the one now before us. It involved the question whether the state might require a foreign insurance company to take a license for the transaction of its business, giving security for the payment of its debts, and decided that taking insurance risks was not a transaction of commerce, within the meaning of the two clauses of the constitution cited. It had no reference to the clause giving to citizens of other states the right of litigation in the United States courts, and certainly had no bearing upon the right of corporations to resort to those courts, or the power of the state to limit and restrict such resort.

It was not intended to impair the force of the language used by Mr. Justice Curtis in *La Fayette Ins. Co. v. French*, 18 How., 407 (CORPORATIONS, §§ 1140-1145), where he says: "A corporation created by Indiana can transact business in Ohio only with the consent, express or implied, of the latter state. This consent may be accompanied by such conditions as Ohio may think fit to impose, and these conditions must be deemed valid and effectual by other

states, and by this court; *provided*, they are not repugnant to the constitution and laws of the United States, or inconsistent with those rules of public law which secure the jurisdiction and authority of each state from encroachment by all others, or that principle of natural justice which forbids condemnation without opportunity for defense." Nearly the same language is used by Mr. Justice Nelson in *Ducat v. City of Chicago*, 10 Wall., 410. None of the cases so much as intimate that conditions may be imposed which are repugnant to the constitution and laws of the United States, or inconsistent with those rules of public law which secure the jurisdiction and authority of each state from encroachment by others.

The case of the *Bank of Columbia v. Okely*, 4 Wheat., 236 (§§ 2522–25, *infra*), is relied upon by the court below to sustain the statute and the agreement in question. In that case it was provided in the fourteenth section of the charter of the bank that whenever a borrower of the bank should make his note by an agreement in writing negotiable at the bank and neglect its payment when due, the president of the bank should cause a demand in writing to be served upon the delinquent, and if the money was not paid within ten days after such demand, it was made lawful for the bank to present to the county clerk the note so unpaid, with proof of the demand, and to require him to issue an execution or attachment against the debtor. Before such execution could issue the bank was required to file an affidavit of the amount due on the note. "If the defendant shall dispute the whole or any part of the debt (the statute adds) on the return of the execution, the court shall order an issue to be joined and a trial to be had, and shall make such other proceedings that justice may be done in the speediest manner." This statute was sustained in the case cited. Mr. Key, for the plaintiff, argued in its support on the theory that the whole effect of the provision was to authorize the commencement of a suit by attachment instead of the usual common law process. Mr. Jones, *contra*, contended that it was in violation of the provision of the constitution of Maryland and of the United States, securing to parties the right of trial by jury when the value in controversy exceeded \$20. In rendering the decision the court say: "This court would ponder long before it would sustain this action if we could be persuaded that the act in question produced a total prostration of the trial by jury, or even involved the defendant in circumstances which rendered that right unavailing for his protection. . . . If the defendant does not avail himself of the right given to him of having an issue made up and the trial by jury, which is tendered to him by the act, it is presumable that he cannot dispute the justice of the claim."

§ 2509. *A state statute forbidding corporations of other states to remove causes to the federal courts is unconstitutional and void.*

We are not able to discover in this case any countenance for the statute of Wisconsin which we are considering. On this branch of the case the conclusion is this: 1st. The constitution of the United States secures to citizens of another state than that in which suit is brought an absolute right to remove their cases into the federal court, upon compliance with the terms of the act of 1789. 2d. The statute of Wisconsin is an obstruction to this right, is repugnant to the constitution of the United States and the laws in pursuance thereof, and is illegal and void. 3d. The agreement of the insurance company derives no support from an unconstitutional statute and is void, as it would be had no such statute been passed.

We are of opinion, for the reasons given, that the Winnebago county court

erred in proceeding in the case after the filing the petition and the giving the security required by the act of 1789, and that all subsequent proceedings in the state court are illegal and should be vacated. The judgment in that court, and the judgment in the supreme court of Wisconsin, should be reversed, and the prayer of the petition for removal should be granted.

The CHIEF JUSTICE and MR. JUSTICE DAVIS dissented, holding that, upon the facts, the state court was authorized to find that the company was, for all the purposes of the action, a citizen of Wisconsin, and refuse the order of removal.

DOYLE v. CONTINENTAL INSURANCE COMPANY.

(4 Otto, 535-544. 1876.)

APPEAL from U. S. Circuit Court, Western District of Wisconsin.

STATEMENT OF FACTS.—This bill was filed by the insurance company to enjoin Doyle, secretary of state of Wisconsin, from revoking the license of the company to do business in the state. The bill alleged that the company was established in the state prior to the passage of the act of March 4, 1870, and that it complied with the provisions of that law by entering into an agreement not to remove into the federal courts cases brought against it in the state courts. It also appeared that it did remove a case into the federal court, and that a demand was made upon Doyle to revoke its license. There was a decree for a perpetual injunction, and the defendant appealed.

§ 2510. *Insurance Company v. Morse*, 20 Wall., 445, affirmed.

Opinion by MR. JUSTICE HUNT.

The case of *Insurance Co. v. Morse*, 20 Wall., 445 (§§ 2505-2509, *supra*), is the basis of the bill of complaint in the present suit. We have carefully reviewed our decision in that case, and are satisfied with it. In that case, an agreement not to remove any suit brought against it in the state courts of Wisconsin into the federal courts had been made by the company, in compliance with the Wisconsin statute of 1870. The company, nevertheless, did take all the steps required by the United States statute of 1789 to remove its suit with *Morse* from the state court into the federal courts. Disregarding that action, the supreme court of Wisconsin allowed the action in the state court to proceed to judgment against the company, as if no transfer had been made. When the judgment thus obtained was brought into this court, we held it to be illegally obtained, and reversed it. It was held, first, upon the general principles of law, that although an individual may lawfully omit to exercise his right to transfer a particular case from the state courts to the federal courts, and may do this as often as he thinks fit in each recurring case, he cannot bind himself in advance by an agreement which may be specifically enforced thus to forfeit his rights. This was upon the principle that every man is entitled to resort to all the courts of the country, to invoke the protection which all the laws and all the courts may afford him, and that he cannot barter away his life, his freedom, or his constitutional rights.

§ 2511. *Statute abridging the right of removal, how far void.*

As to the effect of the statutory requirement of the agreement, the opinion, at page 458 of the case as reported, is in these words:

"On this branch of the case the conclusion is this: 1st. The constitution of the United States secures to citizens of another state than that in which suit is brought an absolute right to remove their cases into the federal court, upon

compliance with the terms of the act of 1789. 2d. The statute of Wisconsin is an obstruction to this right, is repugnant to the constitution of the United States and the laws in pursuance thereof, and is illegal and void. 3d. The agreement of the insurance company derives no support from an unconstitutional statute, and is void, as it would be had no such statute been passed."

The opinion of a court must always be read in connection with the facts upon which it is based. Thus, the second conclusion above recited, that the statute of Wisconsin is repugnant to the constitution of the United States and is illegal and void, must be understood as spoken of the provision of the statute under review; to wit, that portion thereof requiring a stipulation not to transfer causes to the courts of the United States. The decision was upon that portion of the statute only, and other portions thereof, when they are presented, must be judged of upon their merits.

§ 2512. *A state may impose conditions on the right of a foreign corporation to do business within its territory.*

We have not decided that the state of Wisconsin had not the power to impose terms and conditions as preliminary to the right of an insurance company to appoint agents, keep offices and issue policies in that state. On the contrary, the case of *Paul v. Virginia*, 8 Wall., 168 (§§ 1052-59, *supra*), where it is held that such conditions may be imposed, was cited with approval in *Insurance Co. v. Morse*. That case arose upon a statute of Virginia providing that no foreign insurance company should transact business within that state until it had taken out a license, and had made a deposit with the state treasurer of bonds varying in amount from \$30,000 to \$50,000, according to the amount of its capital. This court sustained the power of the legislature to impose such conditions, and sustained the judgment of the state court convicting Paul upon an indictment for violating the state law in issuing policies without having first complied with the conditions required. *Ducat v. Chicago*, 10 Wall., 410, decided that the statute of the state of Illinois requiring a license to be taken out by foreign insurance companies, for which \$6 each should be paid, and the filing of an appointment of an attorney, with power to accept service of process, was a legal condition; and a requirement that, when such company was located in the city of Chicago, it should also pay to the treasurer of that city \$2 upon the \$100 upon the amount of all premiums received, was held to be legal.

In *Lafayette Ins. Co. v. French*, 18 How., 404 (CORPORATIONS, §§ 1140-45), the court say: "A corporation created by Indiana can transact business in Ohio only with the consent, express or implied, of the latter state. 13 Pet., 519. This consent may be accompanied by such conditions as Ohio may think fit to impose; and these conditions must be deemed valid and effectual by other states and by this court, provided they are not repugnant to the constitution or laws of the United States, or inconsistent with those rules of public law which secure the jurisdiction and authority of each state from encroachment by all others, or that principle of natural justice which forbids condemnation without opportunity for defense."

Neither did *Insurance Co. v. Morse*, *supra*, undertake to decide what are the powers of the state of Wisconsin in revoking a license previously granted to an insurance company, for what causes or upon what grounds its action in that respect may be based. No such question arose upon the facts, or was argued by counsel or referred to in the opinion of the court.

The case now before us does present that point, and with distinctness. The

complainant alleges that a license had been granted to the Continental Insurance Company, upon its executing an agreement that it would not remove any suit against it from the tribunal of the state to the federal courts; that in the case of Drake it did, on the 10th day of March, 1875, transfer his suit from the Winnebago circuit of the state to the circuit court of the United States; that Drake thereupon demanded that the defendant, who is secretary of state of Wisconsin, should revoke and annul its license, in accordance with the provisions of the act of 1872; that it is insisted that he has power to do so summarily, without notice or trial; that the complainant is fearful that he will do so, and that it will be done simply and only for the reason that the complainant transferred to the federal court the case of Drake, as above set forth. The cases of *Bank of Augusta v. Earle*, *Ducat v. Chicago*, *Paul v. Virginia* and *Lafayette Ins. Co. v. French* establish the principle that a state may impose upon a foreign corporation, as a condition of coming into or doing business within its territory, any terms, conditions and restrictions it may think proper that are not repugnant to the constitution or laws of the United States. The point is elaborated at great length by Chief Justice Taney in the case first named, and by Mr. Justice Field in the case last named.

§ 2513. *License to foreign corporation to enter a state may be revoked.*

The correlative power to revoke or recall a permission is a necessary consequence of the main power. A mere license by a state is always revocable. *Rector v. Philadelphia*, 24 How., 300 (§ 2283, *supra*); *People v. Roper*, 55 N. Y., 629; *People v. Commissioners*, 47 N. Y., 50. The power to revoke can only be restrained, if at all, by an explicit contract upon good consideration to that effect. *Humphrey v. Pegues*, 16 Wall., 244; *Tomlinson v. Jessup*, 15 id., 454 (§ 2316, *supra*). A license to a foreign corporation to enter a state does not involve a permanent right to remain. Subject to the laws and constitution of the United States, full power and control over its territories, its citizens and its business belong to the state.

§ 2514. — *and the reasons by which the state is influenced cannot be questioned.*

If the state has the power to do an act, its intention or the reason by which it is influenced in doing it cannot be inquired into. Thus, the pleading before us alleges that the permission of the Continental Insurance Company, to transact its business in Wisconsin, is about to be revoked, for the reason that it removed the case of Drake from the state to the federal courts. If the act of an individual is within the terms of the law, whatever may be the reason which governs him, or whatever may be the result, it cannot be impeached. The acts of a state are subject to still less inquiry, either as to the act itself or as to the reason for it. The state of Wisconsin, except so far as its connection with the constitution and laws of the United States alters its position, is a sovereign state, possessing all the powers of the most absolute government in the world. The argument that the revocation in question is made for an unconstitutional reason cannot be sustained. The suggestion confounds an act with an emotion or a mental proceeding, which is not the subject of inquiry in determining the validity of a statute. An unconstitutional reason or intention is an impracticable suggestion, which cannot be applied to the affairs of life. If the act done by the state is legal, is not in violation of the constitution or laws of the United States, it is quite out of the power of any court to inquire what was the intention of those who enacted the law.

In all cases where the legislation of a state has been declared void, such leg-

islation has been based upon an act or a fact which was itself illegal. Thus, in *Crandall v. Nevada*, 6 Wall., 35 (§§ 1269-73, *supra*), a tax was imposed and collected upon passengers in railroad and stage companies. In *Almy v. State of California*, 24 How., 169 (§ 1465, *supra*), a stamp duty was imposed by the legislature upon bills of lading, for gold or silver transported from that state to any port or place out of the state. In *Brown v. State of Maryland*, 12 Wheat., 419 (§§ 1466-70, *supra*), a license, at an expense of \$50, was required before an importer of goods could sell the same by the bale, package or barrel. In *Henderson v. Mayor of New York*, 92 U. S., 265 (§§ 1336-42, *supra*), the statute required the master to give a bond of \$300 for each passenger, conditioned that he should not become a public charge within four years, or to pay the sum of \$1.50. In the *Passenger Cases*, 7 How., 572 (§§ 1284-1335, *supra*), the requirement was of a like character. In all these cases, it was the act or fact complained of that was the subject of judicial inquiry, and upon the act was the judgment pronounced.

§ 2515. *A state may compel a foreign corporation to abstain from the federal courts or cease to do business within the state.*

The statute of Wisconsin declares that if a foreign insurance company shall remove any case from its state court into the federal courts, contrary to the provisions of the act of 1870, it shall be the duty of the secretary of state immediately to cancel its license to do business within the state. If the state has the power to cancel the license, it has the power to judge of the cases in which the cancellation shall be made. It has the power to determine for what causes and in what manner the revocation shall be made. It is said that we thus indirectly sanction what we condemn when presented directly; to wit, that we enable the state of Wisconsin to enforce an agreement to abstain from the federal courts. This is an "inexact statement." The effect of our decision in this respect is that the state may compel the foreign company to abstain from the federal courts, or to cease to do business in the state. It gives the company the option. This is justifiable, because the complainant has no constitutional right to do business in that state; that state has authority at any time to declare that it shall not transact business there. This is the whole point of the case, and, without reference to the injustice, the prejudice, or the wrong that is alleged to exist, must determine the question. No right of the complainant under the laws or constitution of the United States, by its exclusion from the state, is infringed; and this is what the state now accomplishes. There is nothing, therefore, that will justify the interference of this court.

Decree reversed and cause remanded with instructions to dismiss the bill. (a)

MR. JUSTICE BRADLEY dissented (JUSTICES MILLER and SWAYNE concurring), holding that while a state may prohibit foreign corporations from doing business within its territory, yet it has no power to impose unconstitutional conditions upon their doing so; that the citizens of the United States, whether as individuals or associations, corporate or incorporate, have a constitutional right, in proper cases, to resort to the courts of the United States, and that any agreement, stipulation, or state law precluding them from this right is absolutely void,—just as void as would be an agreement not to resort to the state courts for redress of wrongs, or defense of unjust actions; or as would be a city ordinance prohibiting an appeal to the state courts from municipal prosecutions.

(a) This reverses the ruling in *Hartford Fire Ins. Co. v. Doyle*, 6 Biss., 461.

§ 2516. *Removal of causes.*—Congress has constitutional power to remove from the state courts into the United States courts for trial there, criminal prosecutions under the state laws commenced in the state courts against persons executing the revenue laws of the United States, for acts done under the color of those laws, or on account of rights claimed by such persons under those laws, and to prohibit the state courts from proceeding further with such prosecutions after the prescribed steps for removal have been taken. *Findley v. Satterfield*, 8 Woods, 504.

§ 2517. The act of congress of March 2, 1867, which enacts that in suits then pending, or which might be subsequently brought in a state court, "in which there is a controversy between a citizen of the state in which the suit is brought and a citizen of another state, and the matter in dispute exceeds the sum of \$500, exclusive of costs, such citizen of another state, whether he be plaintiff or defendant, if he will make and file in such state court an affidavit stating that he has reason to and does believe that, from prejudice or local influence, he will not be able to obtain justice in such state court, may, at any time before the final hearing or trial of the suit, file a petition in such state court," and have the suit removed to a federal court, is constitutional. *Railway Co. v. Whitton*, 13 Wall., 270.

3. Trial by Jury.

[As to Juries and Trials by Jury in Civil Cases, see PRACTICE. In Criminal Cases, see CRIMES.]

SUMMARY—*Constitutional provision*, § 2518.—*Waiver of right*, § 2519.—*Summary process*, § 2520.—*Seizure and forfeiture of property*, § 2521.

§ 2518. "In suits at common law, where the value in controversy shall exceed \$20, the right of trial by jury shall be preserved." Const., Amend. 7. See § 847.

§ 2519. The right of trial by jury may be waived by consent of the parties, express or implied. *Bank of Columbia v. Okely*, §§ 2522-25.

§ 2520. An act giving a bank summary process against its debtors who have, by express or implied consent, agreed thereto, is constitutional, and does not deprive them of any rights to trial by jury guarantied them either by the federal or state constitution. *Ibid*.

§ 2521. A law authorizing the seizure upon search warrant of liquors, on complaint that they are kept for the purposes of sale contrary to law, and prescribing notice to the owner, if known, of the time and place of trial, and providing for their forfeiture and confiscation if the charge of the complaint be substantiated before a justice of the peace, and for the punishment by fine of the owner, if he appears to contest the charge, and requiring him, in case of conviction, to give security for the payment of all fines in case of his conviction on appeal, and denying him the right of appeal in case of his neglect to furnish such security, and authorizing an increased punishment on appeal, and a conviction of a greater misdemeanor than that charged against him, if the evidence should establish such greater offense, is in conflict with the requirement of the constitution that all persons should be entitled to a speedy and impartial trial by jury, and giving an accused person the right to be fully informed of the charge against him. *Greene v. Briggs*, §§ 2526-40.

[NOTES.—See §§ 2541-2559.]

BANK OF COLUMBIA v. OKELY.

(4 Wheaton, 235-246. 1819.)

ERROR to the Circuit Court for the District of Columbia.

This was a proceeding on a motion to quash an execution issued under a Maryland statute. The motion was sustained, and the cause came up on writ of error.

Opinion by MR. JUSTICE JOHNSON.

STATEMENT OF FACTS.—In this case the defendant contended that his right to a trial by jury, as secured to him by the constitution of the United States, and of the state of Maryland, has been violated. The question is one of the deepest interest; and if the complaint be well founded, the claims of the citizen on the protection of this court are peculiarly strong.

The seventh amendment of the constitution of the United States is in these words: "In suits at common law, where the value in controversy shall exceed

§20, the right of the trial by jury shall be preserved; and no fact tried by a jury shall be otherwise re-examined, in any court of the United States, than according to the rules of the common law."

The twenty-first article of the declaration of rights of the state of Maryland is in the words of Magna Charta: "No freeman ought to be taken or imprisoned, etc., or deprived of his life, liberty or property, but by the judgment of his peers, or by the law of the land."

The act by which this bank is incorporated gives a summary remedy for the recovery of notes indorsed to it, provided those notes be made expressly negotiable at the bank in their creation. This is a note of that description; but it is contended that the act authorizing the issuing of an execution, either against the body or effects of the debtor, without the judgment of a court, upon the oath and demand of the president of the bank, is so far a violation of the rights intended to be secured to the individual, under the constitution of the United States, and of the state of Maryland. And as the clause in the act of incorporation, under which this execution issued, is express as to the courts in which it is to be executed, it is further contended that there is no provision in the law of congress for executing it in this District. We readily admit that the provisions of this law are in derogation of the ordinary principles of private rights, and, as such, must be subjected to a strict construction, and, under the influence of this admission, will proceed to consider the several questions which the case presents.

§ 2522. *Validity of Maryland laws in the District of Columbia.*

The laws of the state of Maryland derive their force, in this District, under the first section of the act of congress of the 27th of February, 1801. But we cannot admit that the section which gives effect to those laws amounts to a re-enactment of them, so as to sustain them, under the powers of exclusive legislation given to congress over this District. The words of the act are: "The laws of the state of Maryland, as they now exist, shall be and continue in force in that part of the said District which was ceded by that state to the United States." These words could only give to those laws that force which they previously had in this tract of territory, under the laws of Maryland; and if this law was unconstitutional in that state, it was void there, and must be so here. It becomes, then, unnecessary to examine the question whether the powers of congress be despotic in this District, or whether there are any, and what, restrictions imposed upon it, by natural reason, the principles of the social compact or constitutional provisions.

§ 2523. *Act of assembly of Maryland of 1793, chapter 30, giving a corporation summary process against its debtors who have, by express or implied written consent, agreed thereto, is constitutional.*

Was this act void as a law of Maryland? If it was, it must have become so under the restrictions of the constitution of the state or of the United States. What was the object of those restrictions? It could not have been to protect the citizen from his own acts, for it would then have operated as a restraint upon his rights. It must have been against the acts of others. But, to constitute particular tribunals for the adjustment of controversies among them, to submit themselves to the exercise of summary remedies or to temporary privation of rights of the deepest interest, are among the common incidents of life. Such are submissions to arbitration; such are stipulation bonds, forthcoming bonds and contracts of service. And it was with a view to the voluntary acquiescence of the individual, nay, the solicited submission to the law of the

contract, that this remedy was given. By making the note negotiable at the Bank of Columbia, the debtor chose his own jurisdiction; in consideration of the credit given him, he voluntarily relinquished his claims to the ordinary administration of justice, and placed himself only in the situation of an hypothecator of goods, with power to sell on default, or a stipulator in the admiralty, whose voluntary submission to the jurisdiction of that court subjects him to personal coercion. It is true, cases may be supposed, in which the policy of a country may set bounds to the relinquishment of private rights. And this court would ponder long before it would sustain this action, if we could be persuaded that the act in question produced a total prostration of the trial by jury, or even involved the defendant in circumstances which rendered that right unavailing for his protection. But a power is reserved to the judges, to make such rules and orders "as that justice may be done;" and, as the possession of judicial power imposes an obligation to exercise it, we flatter ourselves that in practice the evils so eloquently dilated on by the counsel do not exist. And if the defendant does not avail himself of the right given him, of having an issue made up, and the trial by jury, which is tendered to him by the act, it is presumable that he cannot dispute the justice of the claim. That this view of the subject is giving full effect to the seventh amendment of the constitution is not only deducible from the general intent, but from the express wording of the article referred to.

§ 2524. *The right of trial by jury may be waived.*

Had the terms been, that "the trial by jury shall be preserved," it might have been contended that they were imperative, and could not be dispensed with. But the words are, that the right of trial by jury shall be preserved, which places it on the foot of a *lex pro se introducta*, and the benefit of it may therefore be relinquished. As to the words from Magna Charta, incorporated into the constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this: that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice. With this explanation, there is nothing left to this individual to complain of. What he has lost he has voluntarily relinquished, and the trial by jury is open to him, either to arrest the progress of the law in the first instance, or to obtain redress for oppression, if the power of the bank has been abused. The same answer is equally applicable to the argument founded on the third article of the Maryland constitution. In giving this opinion, we attach no importance to the idea of this being a chartered right in the bank. It is the remedy and not the right, and, as such, we have no doubt of its being subject to the will of congress. The forms of administering justice, and the duties and powers of courts as incident to the exercise of a branch of sovereign power, must ever be subject to legislative will, and the power over them is unalienable, so as to bind subsequent legislatures. This subject came under consideration in the case of *Young v. Bank of Alexandria*, 4 Cranch, 384, and it was so decided.

§ 2525. *Courts of the District of Columbia have power to execute the provisions of the act of the assembly of Maryland of 1793, chapter 30.*

The next question is, whether the courts of this District are empowered to carry into effect the summary remedy given to the bank in this case. The law requires the application for process to be made to the clerk of the general court, or of the county court for the county in which the delinquent resides,

and obliges such clerk to issue the execution, returnable to the court to which such clerk is attached. Unless, therefore, the clerk of this District is vested with the same power, and the courts with jurisdiction over the case, the bank would not have the means of resorting to this remedy. The third section of the act of February, 1801, does not vest in the courts that power. It only clothes the courts and judges of this District with the jurisdiction and powers of the circuit courts and judges of the United States. But we are of opinion that this defect is supplied by the fifth section of the same act, taken in connection with the fifth section of the act of March 3, 1801 (2 Stats. at Large, 115). By the former section, the courts of the District are vested generally with jurisdiction of all causes in law and equity; and, by the latter, the clerks of the circuit court are required to perform all the services then performed by the clerks of the counties of the state of Maryland. Among those services is that of instituting a judicial proceeding in favor of this bank, and the return of that process is required to be to the court with which such clerk is connected. That court has jurisdiction of all cases in law arising in this District, and thus the suit is instituted by the proper officer, by writ returnable to a court having a jurisdiction communicated by terms which admit of no exception.

Upon the whole, we are of opinion that the law is constitutional, and the jurisdiction vested in the courts of the District; and, therefore, that the judgment must be reversed, and the cause remanded for further proceedings.

Judgment reversed.

GREENE v. BRIGGS.

(Circuit Court for Rhode Island: 1 Curtis, 811-839. 1852.)

Opinion by CURTIS, J.

STATEMENT OF FACTS.—This is an action of replevin for a quantity of wine and spirits, alleged to have been unlawfully taken and detained by the defendants, who justify the taking and detention by virtue of certain proceedings set forth in their avowry. These proceedings depend, for their validity, upon an act of the general assembly of the state of Rhode Island, passed at its May session in the year 1852, and entitled “An act for the suppression of drinking-houses and tippling-shops.” The plaintiff, having demurred to the avowry, insists that some of the provisions of this act, necessary to maintain the validity of these proceedings, are in conflict with the constitution of the state, and, therefore, void; and so the taking and detention complained of are not justified.

The plaintiff is a citizen of the state of New York. Under the constitution and laws of the United States he is entitled to come into this court, and find here a remedy for any legal wrong done to him by citizens of Rhode Island. An adjudication upon his rights may, and in this case does, involve important questions arising under the constitution and laws of the state; but in such a case it is our duty to determine them; a duty which we should neither seek nor avoid, but perform.

§ 2526. *Under the constitution of the state of Rhode Island the right to a trial by jury is absolutely reserved to all defendants in criminal cases.*

The constitution of Rhode Island (art. 1, sec. 15) declares: “The right to the trial by jury shall remain inviolate.”

The tenth section of the same article is as follows: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury; to be informed of the nature and cause of the accusation,

to be confronted with the witnesses against him, to have compulsory process for obtaining them in his favor, to have the assistance of counsel in his defense, and shall be at liberty to speak for himself; nor shall he be deprived of life, liberty or property, unless by the judgment of his peers, or the law of the land."

Taking these two sections together, it may be said of them in general, that while the fifteenth section recognizes the existence of the right of trial by jury, and makes effectual provision for its preservation, as it existed when the constitution was formed, the tenth section declares, not only that this right is to exist in all criminal cases, but is to be accompanied by certain incidents and modes of proceeding which are therein prescribed and defined.

§ 2527. — *and in civil cases in which it had been practiced down to the time of the adoption of the constitution.*

In other terms, in civil causes, a trial by jury is to be had in those classes of cases in which it had been practiced down to the time when the constitution was formed; and such trial is to be substantially in accordance with such modes of proceeding as had then existed, or might thereafter be devised by the legislature without impairing the right itself. But in all criminal cases, the right to a trial by jury, accompanied by the other privileges enumerated and defined, is absolutely to exist.

§ 2528. *This right to a trial by jury cannot be subjected to the performance of a condition precedent.*

In order to decide whether those parts of this act, necessary to sustain the avowry, are in conflict with these fundamental laws, we must have a clear view of what the act contains; and, as it provides for modes of proceeding quite anomalous, and some of its clauses need construction, I shall begin by stating what these parts of the act, in my judgment, authorize and require; and I shall then consider whether the proceedings, thus authorized and required, are in harmony with the constitution of the state. Under this act, three voters, in the town or city where the complaint is made, may make a complaint in writing, under oath, to some justice of the peace, setting forth that they have reason to believe, and do believe, that spirituous or intoxicating liquors are kept or deposited and intended for sale in that town or city, by some person not authorized to sell the same under the provisions of the act. It is not required that any particular person should be named in the complaint as the person intending to sell such liquors contrary to law, nor was any person in fact named in the complaint which was the foundation of the proceedings in question. Upon the filing of such a complaint, the justice of the peace is to issue a warrant of search, directed to the sheriff, his deputy, the town sergeants, or constables in the county, one of whom is to proceed to search the premises described in the warrant; and if any spirituous or intoxicating liquors are there found, he is to seize, secure and keep them, until final action shall be had thereon. The officer is further required to summon the owner, or keeper of the liquors seized, if known to him; but there is no other provision for giving notice to the owner or possessor, prior to an adjudication of forfeiture. There is a provision, that, in case the owner is unknown to the officer, the liquors shall not be destroyed until they shall have been advertised for two weeks, to enable the agent of any town, duly authorized to sell such liquors, to appear and claim them; and upon making due proof of title, the liquors are to be delivered to him, and not destroyed. But this has no application to any other owner, and the law expressly requires the justice to adjudge a forfeiture, if the owner fail to appear.

Upon the return of the warrant, if the owner or keeper do appear, and the justice is of opinion that the liquors have been kept or deposited for sale, contrary to the provisions of the act, he is to adjudge a forfeiture, cause them to be destroyed, and inflict a fine of \$20; or, if this fine be not paid, imprisonment for thirty days upon such owner or keeper. An exception is made in favor of imported liquors, contained in their original packages; but the burden of proof is put upon the party appearing to make out this defense. If the person claiming the liquors shall appeal to the court of common pleas, he is required to enter into a recognizance in a sum not less than \$200, with good and sufficient sureties, conditioned, among other things, that he will pay all fines and costs that may be awarded against him; and if the final decision shall be against the appellant, that such liquors were intended by him for sale, contrary to the provisions of the act, and the quantity seized exceed five gallons, he is to be adjudged "a common seller of intoxicating liquors," and punished as such by a fine of \$100; or, in default of its payment, by imprisonment for sixty days; and he is also subjected to increased penalties on a second conviction. On reviewing these proceedings it will be seen that, in order to obtain a trial by jury, the party must give security in a sum not less than \$200, with two sufficient sureties, to pay all fines and costs which may be adjudged against him, and must subject himself to the hazard of having the fine, inflicted by the justice of the peace, increased fivefold, if the quantity of liquor seized should exceed, as in this case it did exceed, five gallons.

§ 2529. *The words "law of the land," as used in the constitution of the state, mean "due process of law."*

To require security for the payment of the penalty and costs, as a condition for having a trial, so far as I am informed, is a novelty in criminal jurisprudence; and, in my opinion, it is not only essentially unjust, but in conflict with that clause of the constitution which secures the accused from being deprived of his life, liberty or property, unless by the judgment of his peers or the law of the land. Natural right requires that no man should be punished for an offense until he has had a trial and been proved to be guilty; and a law which should provide for the infliction of punishment upon a mere accusation, without any trial, if the accused should fail to furnish two sureties to pay the penalty which might, after the trial, be adjudged against him, would be viewed by all just minds as tyrannical; for it would treat the innocent who are unable to furnish the required security as if they were guilty, and would punish them, while still presumed innocent, for their poverty or want of friends. And it is equally clear that such a law would not be "the law of the land," within the settled meaning of that important clause in the constitution. Certainly this does not mean any act which the assembly may choose to pass. If it did, the legislative will could inflict a forfeiture of life, liberty or property without a trial. The exposition of these words, as they stand in Magna Charta, as well as in the American constitutions, has been that they require "due process of law;" and in this is necessarily implied and included the right to answer to and contest the charge, and the consequent right to be discharged from it unless it is proved. Lord Coke, giving the interpretation of these words in Magna Charta, 2 Inst., 50, 51, says they mean due process of law, in which is included presentment or indictment, and being brought in to answer thereto. And the jurists of our country have not relaxed this interpretation. *Hoke v. Henderson*, 4 Dev., 15; *Taylor v. Porter*, 4 Hill, 146, 147; 3 Story, Com. on the Const., 661; 2 Kent, 13, n.

§ 2530. *A law authorizing the conviction of one without a jury, and denying him the right of appeal except upon his furnishing security for the payment of penalties, is unconstitutional.*

It follows that a law which should preclude the accused from answering to and contesting the charge, unless he should first give security in the sum of \$200, with two sufficient sureties, to pay all fines and costs, and which should condemn him to fine and forfeiture unheard, if he failed to comply with this requisition, would deprive him of his liberty or property, not by the law of the land, but by an arbitrary and unconstitutional exertion of the legislative power. And if this would be the character of a law which made the right to any trial dependent on such a condition, can it be maintained that to prescribe such a condition does not impair the right to a trial by jury? In such a case the appeal has annulled the sentence of the justice of the peace. The accused is presumed to be innocent. He has had no such trial as he has a right to have. He now claims this particular kind of trial as the prescribed constitutional means of determining whether he is to be punished. A condition which would impair his right to any trial, if prescribed as the condition of his having any, impairs his right to this trial, if prescribed as a condition for his having it.

The fourteenth section of the first article of this constitution declares: "Every man being presumed innocent, until he is pronounced guilty by the law, no act of severity, which is not necessary to secure an accused person, shall be permitted."

Undoubtedly this clause has reference chiefly to acts of severity against the person of the accused. But it not only contains the great principle of the presumption of innocence until the accusation is proved, but points out the security of the person that he may be tried as the only just or admissible reason for exercising any control over one still presumed to be innocent. And in my judgment any law which disregards these principles, and introduces a new object, namely, the security of the payment of the fine and costs, and denies a trial by jury, unless the security is given, does not allow the right to such a trial to remain unimpaired. If this were not so there would be no limit to legislative control over this right; for if one onerous condition may be imposed, so may any number, until the right becomes so difficult of attainment that it ceases to be a common right and can be enjoyed only by a few.

§ 2531. *A law increasing the penalty for a crime, upon conviction on appeal, is void as impairing the right of trial by jury.*

I find it equally difficult to reconcile the increase of penalties upon a conviction after an appeal with the unimpaired enjoyment of the right of trial by jury. The act inflicts a fine of \$20 if a conviction takes place before a justice of the peace. It must be that the legislature considered this the appropriate penalty for the offense. Certainly it cannot be said that the offense is aggravated by the accused having claimed a trial by jury. For what, then, is the additional penalty of \$80, or the additional imprisonment of thirty days, inflicted? If the offense remains the same, and the offender has done nothing but claim an appeal in order to have his case tried by a jury, must not these additional penalties be founded on the exercise of that right? Here, also, it is manifest that this right is not secured by the constitution, but is wholly under the control of the legislative power if it can annex penalties to the exercise of the right.

§ 2532. *A law authorizing the seizure of property and its forfeiture upon trial and the fining and imprisonment of its owner if he appears to contest the forfeiture, is a law providing criminal process.*

These proceedings are clearly criminal in their nature. Their object is to inflict upon the person fine or imprisonment, and at the same time to adjudicate a forfeiture of the liquors. The process and the judicial action under it are directed both against the offender and his property. It is true the warrant does not require the officer to arrest any one, but only to seize and hold the property and summon the owner or keeper if known to him. But the arrest of property to compel an appearance is a known and effectual mode of proceeding against the owner of that property. Indeed, all mesne process, both civil and criminal, which results in giving bail for an appearance, is only a mode of binding a certain amount of property to a forfeiture on non-appearance. And when this law provides that the property is to be seized and detained, and adjudged forfeited, if the owner or keeper fail to appear, and, if he do appear, that he shall be fined or imprisoned, if found guilty, it has brought into action a criminal process both against the owner and his property. That spirituous or intoxicating liquors are still property, notwithstanding this act, is certain. The act nowhere declares the contrary, and it recognizes them as property by providing for the appointment of public agents, to buy and sell them, by expressly declaring that they may lawfully be held by chemists and others, and by not interfering with the title to them, under any circumstances, unless they are held, in some town in the state, for sale within that town. Indeed, the very terms employed to describe the judgment to be entered by the justice of the peace, "they shall be adjudged forfeited," "and the owner shall pay a fine," etc., are applicable only to property, and clearly imply that there is deemed to be some title to be divested, something for such a judgment to operate upon, and something which, until forfeiture, had an owner.

§ 2533. *An accusation must be directly lodged against the defendant, in order to conform with the constitutional clause requiring "the accused to be informed of the nature and cause of the accusation."*

This being a criminal prosecution, directed against person and property, having for its end both fine or imprisonment and forfeiture, it becomes necessary to compare the law, authorizing this prosecution, with another requirement of the tenth section of the first article of the constitution of the state, already quoted. The accused is "to be informed of the nature and cause of the accusation." This act does not require that any particular person should be charged; and in the case at bar, the complaint charges no one. It merely sets forth that the complainants have reason to believe, and do believe, that spirituous or intoxicating liquors are kept or deposited in several buildings which are mentioned, or in the yards or cellars thereto belonging, and are intended for sale in the city of Providence, by a person not authorized to sell the same. Whether these particular liquors, or others seized at the same time, and claimed by different persons, were referred to; whether the plaintiff, who owned these liquors, or some other person, in whose care they were left, had this unlawful intent, is not stated or shown by the complaint. There being no accusation whatever against the plaintiff, how can he be said to be informed of its nature and cause. When the constitution requires that the accused should be informed of the nature and cause of the accusation, it clearly implies that there is to be an accusation against him. An accusation against another, or against no one

in particular, is not such an accusation as will satisfy this clause of the constitution. It stands in the same article which demands a conformity to "the law of the land," that is, due process of law, and should be interpreted as requiring that certainty which the common law has deemed essential to the protection of the accused. Certainty, in respect to the person charged, is not the least essential particular to which the constitutional requisition extends. *Sandford v. Nichols*, 13 Mass., 286; *Reed v. Rice*, 2 J. J. Marsh. R., 45; *Commonwealth v. Davis*, 11 Pick., 432; *Commonwealth v. Phillips*, 16 Pick., 211. If the complaint had charged the owner of particular liquors, so described as to be capable of being distinguished from all others, with an unlawful attempt to sell them, perhaps this might be sufficient; though, when it is borne in mind that this is a proceeding *in personam*, as well as *in rem*, such a mode of presentment would be novel, especially as applied to a case in which the unlawful intent of a particular person is the substance of the offense. But here it does not appear the owner was intended to be charged. The complaint alleges only that some person has this unlawful intent; but whether the owner, or some person to whom he had confided the possession, or a mere wrong-doer, who had possession, does not appear. Nor is there any description of the property, capable of distinguishing it from all other of like kind, and, consequently, of identifying the owner, if he should appear, as the person intended to be charged. The only description given is, that the property is liquors, spirituous or intoxicating; and that they are in one or all of three storehouses mentioned in the complaint, or in the cellars or yards belonging thereto. If it should turn out, as it did in this case; that more than one person had, or claimed to have, such liquors, in one of those places, how is the accusation to be treated, and which claimant is to be selected as the one to be tried, and who is to make the selection; or, under a complaint charging a person, to the complainants unknown, with a criminal intent, is a trial to be had of all claimants who may appear, however numerous they may be? The complainants having sworn that some one person is believed by them to be guilty, is the justice to go on and try all comers, till he finds some one guilty, and there stop and discharge the rest, or proceed and convict two or three, or any other number, if he find evidence enough, under a complaint against one only?

§ 2534. *A law authorizing a conviction of a higher offense than that alleged in the complaint is in conflict with the constitutional requirement that the accused be informed of the charge against him.*

But this is by no means the only difficulty. The accused has an absolute right to a trial by jury. He has, also, a right to be so charged that when that trial takes place, the jury shall pass upon the whole charge, so far as it involves matter of fact, and, under the direction of the court, shall apply the law to all mixed questions of law and fact. Now, if the owner of liquors seized reach a jury trial by an appeal, and the quantity of liquors seized exceed five gallons, the court is required to adjudge him "a common seller of intoxicating liquors," and he is to be punished accordingly. But the complaint does not charge him with being such a common seller, nor with having and intending to sell over five gallons; and no such fact is required to be, or can be, put to the jury, to be tried. Yet upon this fact the judgment that he is guilty of a distinct offense, and the higher punishment appropriate to that offense, are rested. So that he is to be convicted of this higher offense without being charged with it, and without a trial by jury of one of the facts essential to constitute it.

§ 2535. *A mere proceeding for the forfeiture of property for violation of law is a criminal prosecution, entitling the owner to trial by jury.*

It is urged, however, that, nevertheless, this may be a valid proceeding against the property, although the court could not thus convict the person. If this were simply a proceeding to forfeit property, it would, nevertheless, be a criminal prosecution within the meaning of this clause in the constitution; and the owner would be entitled to a trial by jury, and to have the accusation relied upon to work the forfeiture set forth substantially, in accordance with the rules of the common law, so that he could discern its nature and cause. And I should more than doubt whether a complaint stating only that some liquors were in one or all of several buildings mentioned, and were intended by some person to be sold, would be sufficient. Suppose it is all admitted, *non constat*, that the liquors seized are those referred to, or that their owner, or any person to whom he had intrusted the possession, had any unlawful intent.

§ 2536. *A criminal charge must contain enough to show the appropriate punishment which should be inflicted.*

It may be so, but it also may not be so; and a criminal charge, not only according to the rules of common law, but from the nature of the thing, should at least contain enough to show that, if true, the appropriate punishment should be inflicted. Yet here all that the complaint avers may be true, and yet the property of the plaintiff never held for sale in Providence by him or his agent. It is to be borne in mind that this complaint is not merely the ground for issuing a warrant of search, and for the arrest and detention of the property, but it is the sole basis for judicial action afterwards. It is the only presentment of the offense; and, therefore, if the proceeding was to result only in a forfeiture of property, I should still consider the complaint as so deficient in the requisite certainty as to be bad for that cause. But it is not possible thus to separate the proceedings, under this act, against the property, from the proceedings against the person, on appeal. The court is to order the property to be destroyed only in the event "if the final decision shall be against the appellant." If there is no accusation upon which the appellant can lawfully be tried, there can be no final decision against him, and the property cannot be destroyed. When this writ of replevin was served, this property was held under an order of forfeiture which was invalid for two reasons: First, because there was no sufficient complaint; and secondly, because the plaintiff was deprived of his property by a criminal prosecution, in which he neither had, nor could have, a trial by jury, without submitting to conditions which the legislature had no constitutional power to impose.

§ 2537. *An order by a justice concerning a matter without his jurisdiction is absolutely void.*

In general, a judicial act is not void, but voidable only; and therefore it is necessary to consider whether this order comes within that class of acts which are only voidable by some appropriate legal proceeding in the same case, or was absolutely void. An order made by a justice of the peace concerning a matter not within his jurisdiction is void; and he and all ministerial officers who execute that order are trespassers. *Wise v. Withers*, 3 Cranch, 331; Cowp., 140; 7 B. & C., 536; 5 M. & S., 314; 11 Conn., 95; 7 Wend., 200.

§ 2538. — *and such an order confers no authority to detain property.*

Such an order confers no authority to detain property, and is not a defense to an action of replevin by its owner. The inquiry, therefore, is whether the

magistrate had jurisdiction to make this order; and I am of opinion that he had not. It has already been stated that this is a criminal prosecution. So far as this law attempts to confer jurisdiction upon justices of the peace to inflict fine and forfeiture, a trial by jury being at the same time denied, unless the accused should comply with conditions to which he is not bound to submit, it is in conflict with the constitution, and is wholly inoperative.

§ 2539. *The legislature may confer on justices of the peace power to punish offenses, but it must not impair the right of trial by jury upon appeal.*

The legislature may confer on justices of the peace power to punish offenses, but it must be so done as to preserve, unimpaired, the right of trial by jury; otherwise the whole proceeding is void, *ab initio*. The constitution declares that, "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury." The act now under consideration provides that the right shall not be enjoyed in all criminal prosecutions; but under this act, only in those cases in which security shall be given to pay all fines and costs.

It is not practicable to consider the grant of jurisdiction to the justice valid, and the condition imposed on the exercise of the right of appeal void, because an appeal in a criminal case can exist only by force of a statute; and if the statute has given it only on certain conditions, the magistrate must execute his judgment, and cannot allow the appeal; and the appellate court cannot entertain it, unless those conditions are complied with. In substance, it is a grant of final jurisdiction to a justice of the peace, in all cases in which such security is not given; and this is such a criminal jurisdiction as cannot be created under the constitution of Rhode Island.

I am of opinion, also, that the complaint in this case was so defective as to render all proceedings under it void. Here, also, the rule is that if the process, though erroneous, is voidable only, it must be avoided by some proper legal proceedings; and while it stands, they who act under it are not trespassers. But this is not an authorized legal proceeding, in which an error has occurred. The complaint is in the form required by the act. The difficulty is that the act has authorized a criminal prosecution, founded on a complaint which is not "due process of law." This act, so far as it authorizes such a prosecution, being in conflict with the constitution, is inoperative, and it seems to be a necessary conclusion that it confers no jurisdiction to receive and proceed upon such a complaint. This may be illustrated by supposing a law authorizing a criminal prosecution without any complaint. In such case there could be no doubt that the whole proceeding would be absolutely void. I think it would be difficult to make a sound distinction between no complaint, and one which does not satisfy this requisition of the constitution, which, therefore, is no legal complaint, and is not "due process of law," within the definition by Lord Coke of the words "law of the land," in Magna Charta.

§ 2540. *That the acts of a justice should be jurisdictional, he must have jurisdiction not only of the subject-matter, but also of the process.*

It has long been settled (*Martin v. Marshall*, Hob., 63) that the magistrate must not only have a jurisdiction of the subject-matter, but of the process. And if the law conferring jurisdiction is fatally defective, as respects the process, which is the foundation of the jurisdiction, the jurisdiction does not exist. *Grumon v. Raymond*, 1 Conn., 40. For both these reasons, I am of opinion that the proceedings before the court of magistrates were inoperative to divest

the owner of this property of his legal rights; and, consequently, neither the taking nor detention are justified by the avowry.

Several other questions have been argued at the bar in this case, but I do not find it necessary to consider them. They involve important rights under the constitution and laws of the state. If any case should come here for judgment, requiring their decision, I shall pass upon them. This case is determined without doing so. My opinion is, that there should be a judgment for the plaintiff, upon the demurrer; and if he claims damages for the taking and detention, their amount must be assessed by a jury.

PITMAN, D. J., concurred.

§ 2541. In general.—The constitutional provision securing trial by jury does not apply to the states. *Livingston v. Moore*, 7 Pet., 469 (§§ 1835-44).

§ 2542. A state law providing for trial without a jury is constitutional. *Kennard v. Louisiana*, 2 Otto, 490 (§§ 698, 694).

§ 2543. In order to ascertain the meaning of the phrase "trial by jury," as it is used in that clause of the constitution which secures this right, resort must be had to the common law. As it existed at the time of the adoption of the constitution, it was the right to a trial of issues of fact by twelve men under the direction and superintendence of the court. This superintending power extended to the verdict, which might be sustained or set aside, and this power to sustain or set aside rested wholly within the discretion of the court, and was not subject to revision by appeal or writ of error. *United States v. 1363 Bags of Merchandise*,* 25 Law Rep., 601.

§ 2544. The words, "suits at common law," as used in the seventh amendment to the constitution of the United States, mean not merely suits which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable remedies were administered, or where, as in admiralty, a mixture of public law and of maritime law and equity are often found in the same suit. In general the amendment embraces all suits which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights. *Parsons v. Bedford*, 3 Pet., 446.

§ 2545. It seems that by the adoption of the seventh amendment to the constitution the people of the United States have declared that the right of trial by jury shall depend neither on legislative nor judicial discretion. *Baker v. Biddle*, Bald., 404.

§ 2546. An act prohibiting a trial by jury of matters of fact, in personal actions founded upon contracts for services and exceeding in value the sum of \$20, is unconstitutional and void. *Webster v. Reid*, 11 How., 460.

§ 2547. Right may be waived.—In suits at common law the right of trial by jury, guaranteed by the provisions of the seventh amendment to the constitution of the United States, may be waived by a party. *Parsons v. Armor*, 3 Pet., 425.

§ 2548. Trial in police court.—So much of the act of congress of June 17, 1870, as provides for the trial of crimes, triable by jury at common law, without a jury in the police court of the District of Columbia, is repugnant to subdivision 3 of section 2 of article 3 of the constitution, and the sixth amendment, and therefore void, although an appeal is allowed to the criminal court of the District, where a jury trial may be had. *In re Dana*,* 7 Ben., 1.

§ 2549. Fixing rates of fare.—A law providing that the decision of railroad commissioners, that railroad rates are unreasonable, shall be sufficient evidence thereof, in a suit against the railroad, works no deprivation of trial by jury. *Tilley v. Savannah, etc., Co.*, 5 Fed. R., 641 (§§ 2148-57).

§ 2550. Suits in admiralty.—In the trial of an information *in rem* on the admiralty side of the district court, a jury is not required by the constitution. Such a suit is not a suit at common law. *Clark v. United States*, 2 Wash., 519. *The Steamship Queen*,* 12 Int. Rev. Rec., 48.

§ 2551. Suits in equity.—The seventh amendment to the constitution, relating to the preservation of the right of trial by jury, cannot be made to embrace the established exclusive jurisdiction of courts of equity, nor that which they have exercised as concurrent with courts of law, but should be understood as limited to rights and remedies peculiarly legal in their nature, and such as might be properly asserted in courts of law, and by the appropriate modes and proceedings of courts of law. *Shields v. Thomas*, 18 How., 263.

§ 2552. *Proceedings under fugitive slave law.*—The provision of the seventh amendment to the constitution, that the right of trial by jury shall be preserved, does not apply to proceedings under the fugitive slave law to test the question whether the fugitive is held to service. The provision relates to proceedings at common law, and the proceeding in question is purely statutory. *Miller v. McQuerry*, 5 McL., 481; *In re Martin*, 2 Paine, 354.

§ 2553. *Suit against master of ship for penalty.*—The expression, "suits at common law," as used in the seventh amendment to the constitution, means all civil suits in which legal rights are to be ascertained and determined, which are not of equity or admiralty jurisdiction, whatever may be the peculiar form of such suits. So an action against a master of a ship for a penalty is a suit at common law, and the defendant is entitled to a jury trial. *United States v. The Steamship Queen*, 4 Ben., 248.

§ 2554. *Judges of law and facts.*—The constitutional provision, that all trials for crime shall be by jury, does not make the jury judges of the law as well as the facts, but they are obliged to take the law from the court and apply it to the facts as they shall find them. *United States v. Morris*, 1 Curt., 48.

§ 2555. *Military trials.*—The authority of the federal government being unopposed in Indiana during the rebellion, and its courts always open to hear criminal accusations and redress grievances, no usages of war could sanction a military trial there, for any offense whatever, of a citizen in civil life and unconnected with military service. Such a citizen had a right under the constitution to a trial according to law in the courts of the United States, and by jury. *Ex parte Milligan*, 4 Wall., 2.

§ 2556. *Suits in court of claims.*—The act of congress of March 3, 1863 (12 Statutes at Large, 765; R. S., 1059-61), which provides that, in suits against the United States in the court of claims, judgment may be rendered against the claimant on set-offs in favor of the government, is not in violation of the seventh amendment to the constitution, which preserves the right of trial by jury in cases at common law. The proceedings in the court of claims are not suits at common law within the true meaning of the constitution. *McElrath v. United States*, 12 Otto, 489.

§ 2557. *Act providing for assessment of damages for taking land by commissioners.*—An act of the state legislature chartering a railway company, and providing that the damages for the taking of land should be assessed by commissioners instead of by a jury, is constitutional. The right of trial by jury is preserved inviolate in the sense of the constitution, where, in criminal cases, and in civil cases where a right is in controversy in a court of law, it is secured to each party. But in condemnation proceedings the right to take and the right to compensation are admitted, and the question of the amount may be submitted to any impartial tribunal which the legislature may designate. *Bonaparte v. Camden & Amboy R'y Co.*, Bald., 219.

§ 2558. *Production of books and papers.*—The fifth section of the revenue act of June 22, 1874 (18 Statutes at Large, 186), which provides that a district court, on motion of the district attorney, in an action other than criminal under the revenue laws, may compel the production of all books and papers relating to alleged fraudulent transactions, on penalty of having the allegations of the motion taken as confessed, is not in violation of the seventh amendment of the constitution of the United States, as impairing the right of trial by jury. *United States v. Distillery No. 28*, 6 Biss., 489.

§ 2559. *Trial of issues at law.*—Where an injunction has been granted restraining the use of a patented article, and motions have been made to dissolve the injunction, and various affidavits and other evidence put into the case on each side, the court on weighing the evidence may order an issue at law and continue the injunction until the suit at law is determined. Such a continuance of the injunction is no infringement of the right of trial by jury. *Woodworth v. Rogers*, 3 Woodb. & M., 135.

XII. STATE CONSTITUTIONS.

§ 2560. *When amendment takes effect.*—The court, in this case, adheres to its former ruling, following the decisions of the supreme court of Illinois, to the effect that the provision in the constitution of that state, adopted in 1870, relating to "municipal subscriptions to railroads or private corporations," took effect on July 2, 1870, the day the people voted for its adoption. *Wade v. Walnut*,* 15 Otto, 1.

§ 2561. *Construction of adopted clause.*—Where one state adopts from another a constitutional clause, it is presumed that the practical and judicial construction which it has before received is also adopted. *Talcott v. Township of Pine Grove*,* 1 Flip., 120.

§ 2562. *Requirement that act embrace but one subject, to be expressed in title.*—Where the constitution of a state provides that not more than one subject shall be embraced in a

legislative act, and that that shall be stated in the title, only the general purpose need be indicated; and an act, expressed in its title to be for the sale of a railroad, the foreclosure of a lien thereon, and to amend its charter, sufficiently complies with the constitutional requirement. *Murdock v. Woodson*, 2 Dill., 206.

§ 2563. When an act of the legislature expresses in its title the object of the act, the title embraces and expresses any lawful means to achieve the object. *San Antonio v. Mehaffy*, 6 Otto, 815.

§ 2564. The provision of a state constitution, that no act shall embrace more than one subject, and that that shall be embraced in its title, does not apply to an act incorporating a city. This is obvious from the fact that many subjects are to be provided for in such an act, and though they all, in a certain sense, pertain to one object, this could not be expressed in its title. *Judson v. City of Plattsburg*, 3 Dill., 188.

§ 2565. A statute upon a subject compound in its character, involving alternations mutually dependent or consequent, whose title specifies all the purposes of the act except one, which is directly consequential, does not infringe a constitutional provision which prohibits the enactment of any law containing more than one subject, and requires that subject to be clearly expressed in the title. *Leger v. Rice*, * 8 Phil., 167.

§ 2566. That clause of the constitution of Missouri requiring that every law enacted shall relate to one subject only, and that that shall be expressed in the title, is not violated by an act entitled "An act attaching certain territory to the town of W., to enable said town to take stock in a railroad." Such provision is not violated because a collateral and necessary incident to the main power conferred is found in the act. *Henderson v. Jackson County*, 2 McC., 619.

§ 2567. One section of an act entitled "An act to incorporate the San Antonio Railway Company," provided that a certain city might subscribe to the capital stock of the railway and issue bonds therefor. *Held*, that the provision in question was not repugnant to the provisions of the state constitution which required that "every law enacted by the legislature shall contain but one object, and that shall be expressed in the title." *San Antonio v. Mehaffy*, 6 Otto, 815.

§ 2568. Under the constitution of Oregon, declaring that "every act shall embrace but one subject, and matters properly connected therewith, which subject shall be expressed in the title; but if any subject shall be embraced in an act which shall not be embraced in the title, such act shall be void only as to so much thereof as shall not be expressed in the title," an act entitled "An act to regulate and tax foreign insurance, banking, express and exchange corporations and associations doing business in the state," is void so far as its provisions concern corporations other than of the kind mentioned. The mere fact that a corporation loans money will not constitute it a banking corporation within the purview of the title. Under such a title, the act may require the corporations mentioned to maintain a resident attorney within the state. *O. & W. T. & I. Co. v. Rathbun*, 5 Saw., 33.

§ 2569. A court cannot say that the "subject" of an act is not expressed in its title because it may appear that, owing to unintentional errors and imperfections in its composition, its practical operation may be somewhat or altogether different from what was expressed or intended. Thus, where an act purports to be for the distribution of an insolvent debtor's property among his creditors, it cannot be said that the subject of the act is not expressed because its effect will be to secure an *unjust* distribution. *Mayer v. Cahalin*, * 5 Saw., 355.

§ 2570. Where the "subject" of an act, as set forth in the title, purports to be the distribution of an insolvent debtor's property, the act may provide for the dissolution of attachments. *Ibid.*

§ 2571. The act of March 31, 1868, of the legislature of Missouri, passed in pursuance of its constitutional authority to provide for the sale of the property of a certain railroad company upon default in the payment of its indebtedness to the state, which act is entitled "An act for the sale of the Pacific Railroad, and to foreclose the state's lien thereon, and to amend the charter thereof," is not in conflict with the provision in the Missouri constitution which forbids the assembly to pass any law relating to more than one subject, which shall be expressed in its title, because it also contains a provision authorizing the railroad company to prevent the sale by paying a certain sum by way of compromise, upon the receipt of which the governor is to release the company from all claims of the state. Such provision is upon the same subject as the rest of the act. *Woodson v. Murdock*, * 22 Wall., 351.

§ 2572. An act legalizing two elections held by the people of a county, the first to decide whether the county should issue its bonds to a certain amount in aid of a certain railroad, and the second to decide whether it should subscribe a certain amount to the stock of the same road and issue its bonds in payment therefor, and declaring valid any bonds issued or to be issued in pursuance of said elections, and authorizing certain townships to subscribe to the stock of the said company and issue their bonds in payment therefor, contained but one

subject, to wit: the railroad company, and is not open to the constitutional objection that it embraces subjects not expressed in its title. *Unity v. Burrage*,* 13 Otto, 447.

§ 2573. Under a constitutional provision that no private or local law shall embrace more than one subject, and that shall be expressed in the title, so much of an act as relates to other subjects than the one expressed in its title, falls and the rest stands. *Ibid*.

§ 2574. The act of 1852, consolidating the corporation and municipalities of New Orleans, and, among other things, authorizing the consolidation of the debt of all the municipalities, and the issue of consolidated bonds, and entitled "An act to consolidate the city of New Orleans, and to provide for the government and administration of its affairs," is not in conflict with that provision of the Louisiana constitution which declares that all laws "shall embrace but one subject, to be expressed in the title," the provision for the consolidation of the debt being incidental to the consolidation of the city. *Louisiana v. Pillsbury*, 15 Otto, 278 (§§ 1869-76).

§ 2575. Attainder and confiscation.—The act of the legislature of Georgia of May 4, 1782, banishing certain persons from the state and confiscating their property, was not in violation of the constitution of that state, since that constitution did not expressly interdict the passing of an act of attainder and confiscation, and it was not shown that the offenses committed by the persons banished were committed within any of the counties of the state, and therefore the manner and place of their trial provided for by the constitution. *Cooper v. Telfair*,* 4 Dal., 14.

§ 2576. Forfeiture without trial.—So much of the act of the legislature of Rhode Island of 1853, entitled "An act for the more effectual suppression of drinking-houses and tipling-shops," as authorizes proceedings to arrest and forfeit property, without providing for any trial of the question whether the property seized is held for sale in violation of the law, and without informing the owner of the nature and cause of the accusation by reason of which the forfeiture is sought, is contrary to the constitution of the state. *Greene v. James*,* 2 Curt., 187.

§ 2577. Special legislation.—The inhibition in the constitution of Nebraska, upon the passage by the state legislature of any "special act conferring corporate powers," applies to all corporations, public or private, and renders void an act authorizing a school district "to issue its bonds for the purpose of erecting its school building," and ordering the payment to it of all penalties imposed for any breach of the ordinances of a certain city, as well as of all moneys received for licenses for the sale of liquors or other commodities, or for the transaction of any business; and such bonds are void, although they might have been valid if issued under the general law. *School District v. Insurance Co.*,* 13 Otto, 707.

§ 2578. There is nothing in the Illinois constitution which forbids the legislature from granting a privilege by special act to a corporation organized under the general laws. *Unity v. Burrage*,* 13 Otto, 447.

§ 2579. A law providing for the erection and maintenance of a normal school in the county, town or city that will make the best appropriation of money or land, to the satisfaction of a board of officers designated by the act, is a general law, and not a special act in violation of a constitutional provision forbidding special legislation with reference to certain classes of subjects. *Briggs v. Johnson Co.*,* 4 Dill., 148.

§ 2580. Where the constitution of a state provides that "the general assembly shall pass no special law for any case for which provision can be made by general law, but shall pass general laws providing, so far as it may deem necessary, for the cases enumerated in this section, and for all other cases where a general law can be made applicable," if the law in question is not within the enumerated cases it is for the legislature and not for the courts to determine when a general law can be made applicable, and the objection that such a law is special cannot be maintained. *Murdock v. Woodson*, 2 Dill., 205.

§ 2581. The act of the state of California of April 4, 1870, which authorizes the Southern Pacific Railroad Company to change the line of its road, and accept the grant made by, and to build the road provided for in, an act of congress, is not void as contravening the clause in the constitution of that state, providing that "corporations may be formed under general laws, but shall not be created by special act except for municipal purposes." *Southern Pac. R. Co. v. Orton*, 6 Saw., 157.

§ 2582. An act of a state legislature which legalized a special election in a certain city, and authorized such city to issue bonds to aid a specified private manufacturing enterprise, is a special act conferring corporate powers within the meaning, and contrary to the prohibition, of the state constitution. *Commercial National Bank of Cleveland v. City of Iola*, 2 Dill., 355.

§ 2583. The constitution of Tennessee provided that "the legislature shall have no power to suspend any general law for the benefit of any particular individual; nor to pass any law for the benefit of individuals, inconsistent with the general law of the land, nor pass any law granting to any individual or individuals rights, privileges, immunities or exemptions, other

than such as may be, by the same law, extended to any member of the community who may be able to bring himself within the provisions of such law; provided, always, the legislature shall have power to grant such charters of incorporation as may be deemed expedient for the public good." *Held*, that the grant of power to create corporations with such charters as the legislature might deem expedient for the public good, was not limited or restrained in its operation by the prohibitions in the same section against special rights, privileges, immunities or exemptions; in other words, that the legislature, as to corporations, could grant special rights and privileges which, but for the proviso, might be deemed obnoxious to the prohibitory clauses of that section. *County of Tipton v. Locomotive Works*, 18 Otto, 525.

§ 2584. *Power of federal courts.*—The federal courts have no power to revise the laws of a state upon any grounds of justice, policy or consistency to the constitution of the state. *Carpenter v. Commonwealth of Pennsylvania*, 17 How., 456 (§§ 600-602). They have no power to declare a state law void because in conflict with the state constitution. *Calder v. Bull*, 3 Dal., 386 (§§ 582-599).

§ 2585. *Uniform operation of laws.*—The requirement of a state constitution, that "all laws of a general nature shall have a uniform operation," is not violated by a law dividing the various railroads of the state into various classes, according to different standards, and regulating the rates of transportation to be charged by each class, although the rates are not uniform. The constitution only requires that those who occupy the same situation shall enjoy uniform privileges. *Chicago, etc., R. Co. v. Iowa*, 4 Otto, 155 (§§ 2138-42).

§ 2586. A law regulating railroad rates is not lacking in uniformity because it does not prescribe the same rates for all roads. *Tilley v. Savannah, etc., R. Co.*, 5 Fed. R., 641 (§§ 2148-57).

§ 2587. *Revised or amended act to be set forth.*—The constitution of Oregon provides that no act shall be revised or amended by mere reference to its title, but the act revised, or section amended, shall be set forth and published at full length. *Held*, that this applies to repeals by implication as well as to amendments; that a law providing for the distribution of insolvents' estates, and which necessarily repealed or modified the attachment law of the state, was within the meaning of the provision, but that the federal court was bound by a contrary ruling by the state court. *Mayer v. Cahalin*,* 5 Saw., 355.

§ 2588. Under a provision in a state constitution that "no act shall ever be revised or amended by mere reference to its title, but the act revised, or section amended, shall be set forth and published at full length," a statute cannot be amended by simply repealing a certain portion of it. *Sayles v. Or. Cent. R'y Co.*, 6 Saw., 81.

§ 2589. *Uniformity of taxation.*—A state constitution requiring uniformity of taxation requires that all kinds of property should equally bear the burden of public expenditures and indebtedness, and a law throwing upon the real property of a city the entire burden of paying interest and principal of the bonds of the city, given in aid of a railroad, is void. *Gilman v. City of Sheboygan*, 2 Black, 510.

§ 2590. A state constitutional provision for the taxation of all property within the taxing district, forbidding the exemption of any except such as the constitution declares may be exempted, and requiring that all taxes shall be equal and uniform, is not violated by a law exempting two wards of a city from taxation to pay debts incurred by the city upon contracts made by it for improvements before such wards were annexed, and from which they never derived any benefit, such law being merely a provision confining the burden of local benefits to those the value of whose property was directly enhanced. *United States v. Memphis*, 7 Otto, 285 (§§ 1838-87).

§ 2591. Article 27 of the constitution of 1845 of Louisiana, providing that taxation should be "equal and uniform throughout the state," that all property should be taxed "in proportion to its value," that "no one species of property" "should be taxed higher than another species of property of equal value on which taxes shall be levied," applies only to taxes levied by the state, and furnishes no rule for the levy of taxes by municipalities; nor does it restrain municipalities from levying taxes. *Louisiana v. Pilsbury*, 15 Otto, 278 (§§ 1869-76).

§ 2592. Where several municipalities are consolidated, and the tax for the payment of interest on the consolidated indebtedness is ordered to be proportioned according to the indebtedness of each municipality, and such proportion to be paid by the property in that municipality, the tax is not objectionable on the ground of want of uniformity, it being a fair adjustment of burdens. *Ibid*.

§ 2593. The mere fact that a state adopts four equalizing boards for different classes of property, and that their operations may differ, and thus one class of property be more favored than others, does not establish such lack of uniformity of taxation as was contemplated by the constitutional prohibition; but when different rules of valuation are notoriously employed, so that one class of property is taxed at one-third of its value, and another class at its full value, a state of things is revealed showing so plain a violation of the constitutional prohibi-

tion as to authorize a court to interfere and restrain the collection of the tax upon the latter property. *Cummings v. National Bank*, 11 Otto, 158.

§ 2594. An act authorizing the construction and maintenance of a normal school in a certain county, in consideration of its appropriation of its bonds in payment of the greater portion of the expense incurred by the same, to be paid by taxation in said county, is not in violation of the constitutional restraint upon unequal taxation, the contribution having been voluntarily made by an election held in the county, and the benefit to the county being a sufficient consideration for the assumption of the special burden. *Briggs v. Johnson Co.*,* 4 Dill., 148.

§ 2595. The constitution of the state of Illinois provides that in general taxation shall be uniform and based upon valuation, but that certain persons and corporations engaged in certain pursuits, among which were corporations owning franchises, should be taxed as the legislature might direct, provided the rule prescribed should make the taxation equal in each particular class. *Held*, that each of the classes specially mentioned was taken out of the rule as to uniformity prescribed by the first part of the provision of the constitution, and that each class enumerated might be taxed differently, provided the individuals in it were taxed uniformly; and that a law providing a rule for the taxing of railroads different from that provided for taxing individuals, but which applied uniformly to all railroads, was valid both under the constitution of Illinois and of the United States. *State Railroad Tax Cases*, 2 Otto, 610.

§ 2596. It is held, in accordance with the decisions of the supreme court of Louisiana, that a law of that state, imposing a higher tax on foreign corporations doing business within the state than is imposed on its own domestic corporations, is not a violation of the constitutional provision of that state, requiring all taxation to be uniform throughout the state. *Insurance Co. v. New Orleans*, 1 Woods, 85.

§ 2597. Under the constitution of the state of Illinois it was proper for the legislature of that state to provide that gas companies should be assessed and taxed upon their capital stock, and that purely manufacturing companies should be exempt from such taxation. These companies are not of the same class within the meaning of the constitutional provision. *Williams v. Rice*, 9 Biss., 497.

§ 2598. Assessments.—Benefits.—The statute of the state of California with reference to the reclamation of swamp lands, providing that the commissioners "shall jointly view and assess, upon each and every acre to be reclaimed or benefited thereby, a tax proportionate to the whole expense, and to the benefit which will result from such works," requires an apportionment according to benefits, and is therefore constitutional. *Reclamation District v. Hagar*,* 6 Saw., 567.

§ 2599. Provision of Missouri constitution for establishment of schools.—The mere fact that the constitution of Missouri provides that the legislature shall establish free schools and a state university, and makes no provision for normal schools, except under the provision for a "state university, with departments for instruction in teaching, in agriculture, and in natural science," does not authorize any presumption that a prohibition of normal schools is contemplated. The constitution having vested all legislative power, not prohibited by the federal constitution, in the general assembly, the establishing of normal schools, it is fair to presume, was intended to be left with the legislature. *Briggs v. Johnson Co.*,* 4 Dill., 148.

§ 2600. Release of lien on railroad.—The release by the legislature of Missouri, by the act of March 31, 1868, of the indebtedness to the state of the Pacific Railroad Company, for a sum less than the amount of the indebtedness, does not violate the provision in the constitution of Missouri of 1865, that "the general assembly shall have no power, for any purpose, to release the lien held by the state upon any railroad." The provision is intended to prevent the legislature from impairing the security while the debt remains, and not to deprive it of the power to compromise the indebtedness. (*MILLER and DAVIS, JJ., dissented.*) *Woodson v. Murdock*,* 22 Wall., 851.

§ 2601. The provision of the constitutional ordinance of the state of Missouri of 1865, that shall either of certain railroad companies to which the state loaned its bonds refuse or neglect to pay the principal or interest of any of said bonds, or any part thereof remain due and unpaid, "the general assembly shall provide by law for the sale of the railroad and other property, and the franchise of the company that shall be thus in default, under the lien reserved to the state, and shall appropriate the proceeds of such sale to the payment of the amount remaining due and unpaid from said company," does not prevent the legislature from selling the said property, except at public auction, or for an amount less than the amount of the debt, or without the reservation of a lien for the unpaid balance after the application of the amount realized. *Ibid.*

§ 2602. Where a state loaned its credit for a large amount to a railroad company to enable it to raise money to construct its road, the enabling act providing that such claim should be

a first lien upon the road; and the constitution subsequently adopted provided that all claims of the state should be fairly enforced and not released or compromised, a subsequent act of the legislature authorizing the company to issue a large amount of bonds to raise money to repair the road, it badly needing repair, and giving the purchasers of such bonds a prior lien on the road to that of the state, it was held not to be a violation of the constitutional provision, there being no release of the claim of the state, but a mere postponement of the lien, and the road being greatly enhanced in value by the new outlay. *Darby v. Wright*, * 3 Blatch., 170.

§ 2603. Legislature of Missouri may change town to city by amendment of charter.— Under the constitution of Missouri, the legislature can amend the charter of a town corporation by making it a city corporation. *Judson v. City of Plattsburg*, 3 Dill., 183.

§ 2604. Townships in Missouri subscribing for railroad stock.— The statute of Missouri of 1868, usually called the "Township Aid Act," which authorized towns to subscribe to the capital stock of railway companies, whenever it appears by the return of an election, duly called for that purpose, "that not less than two-thirds of the qualified voters of the township voting at such election are in favor of such subscription," is not repugnant to the constitution of that state, which provides that the legislature shall not authorize any county, city or town to become a stockholder in, or loan its credit to, any company, association or corporation, unless two-thirds of the qualified voters of such municipality shall assent thereto at a regular or special election (overruling *Harshman v. Bates County*, 2 Otto, 569, as far as it conflicts). *County of Cass v. Johnston*, 5 Otto, 365; *County of Cass v. Jordan*, id., 374.

§ 2605. The constitution of Missouri of 1865 provided that the legislature should not authorize any municipality to loan its credit to any corporation, unless on an affirmative vote of two-thirds of the qualified voters of such municipality. A law of 1871 provided that it should be lawful for a city or incorporated town to purchase lands, and sell, donate or lease the same to a railway company, as it should see fit, on the vote of a majority of the qualified electors of such town or city. *Held*, that this law was void, as contravening the constitutional provision above mentioned. *Jarrold v. Moberly*, 13 Otto, 585.

§ 2606. Restricting power of municipalities to contract indebtedness.— The act of the legislature of Wisconsin of March 24, 1871, provided that the city of Fond du Lac should be allowed to contract indebtedness in aid of a certain railway, upon the condition that the company should first present to the city a written proposition which should state the amount, kind and description of stock or bonds desired to be subscribed, and that such proposition should be accepted by the legal voters of the city. No limit was imposed by the act upon the amount of indebtedness which might be thus contracted, except the amount named in the written proposition. *Held*, that this act was not in violation of section 3 of article 11 of the state constitution, which provided that it should be the duty of the legislature to restrict the power of municipalities to contract indebtedness. *Smith v. City of Fond du Lac*, 3 Fed. R., 291.

§ 2607. Wisconsin constitution requiring free rivers does not forbid improvement thereof.— The provision in the constitution of Wisconsin, "that the navigable waters leading into the Mississippi and the St. Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the state as to the citizens of the United States, without any tax, impost or duty therefor," does not prevent the legislature from authorizing a dam across the Wisconsin river, for purposes of public improvement, which only partially hinders the navigability of the stream. *Woodman v. Kilbourn Mfg. Co.*, * 6 Am. L. Reg. (N. S.), 238.

§ 2608. State of Indiana not bound to distribute school funds ratably among the townships.— A statute of the state of Indiana provided that, in apportioning the school fund among the townships of the state, the whole amount of the school fund of each county, including the proceeds of the sixteenth section of each township, should be added together and distributed among the different townships therein in proportion to the number of children in such township, provided that the whole amount received by any township for the proceeds of such sixteenth section should be expended therein. *Held*, that this statute was constitutional and valid, even though it might happen that, owing to the fact that the sixteenth section had been advantageously disposed of, a township might receive no share of the other school funds of the county. The state is under no obligation to distribute its school funds ratably among the different townships. *Springfield Township v. Quick*, 22 How., 68.

§ 2609. Permitting waiver of exemptions.— A state statute which permits a debtor to waive the benefit of exemptions guaranteed to him by the constitution of the state is constitutional. *In re Solomon*, 2 Hughes, 165.

§ 2610. Authorizing guardian to invest property.— Unless restrained by some constitutional provision, a state legislature has the power to authorize the guardian of the property of

non-resident infants, situated within the state, to invest such property for their benefit. The legislature may exercise this power as *parens patriæ* in behalf of persons not *sui juris*. The passage of such laws is not an act of judicial power, although by general laws the discretion to pass upon such cases might be confided to the courts. Such laws are not judgments upon any person's rights, but they confer powers, upon the exercise of which judgments may afterwards be given. *Hoyt v. Sprague*, 13 Otto, 633.

§ 2611. **Rhode Island — Guardians over property of non-residents.**— The legislature of Rhode Island has authority to pass a law for the appointment of guardians of the property of non-resident infants, situate in that state, and has power to prescribe the manner in which such guardians shall perform their duties as regards the care, management, investment and disposal of such property, and this power is as full and complete as where the minors are residents. *Ibid*.

§ 2612. **Loaning credit of state — Aiding railroads.**— The act of March 22, 1869, of Michigan, enabling any township, city or village to pledge its aid, by loan or donation, to any railroad company, then chartered or organized under and by virtue of the laws of that state, in the construction of its road, is not repugnant to the provision in the constitution of Michigan that "the credit of the state shall not be granted to, or in aid of, any person, association or corporation; that the state shall not be interested in the stock of any corporation, and that the state shall not subscribe to, or be interested in, any work of internal improvement." *Township of Pine Grove v. Talcott*, 19 Wall., 666; 1 Flip., 120.

§ 2613. The words "due process of law," as used in the constitution of Michigan, have no reference to the objects and purposes of a statute, but to the mode in which rights are ascertained. They do not in any way apply to the right of the legislature to authorize taxation in aid of a railroad. *Talcott v. Township of Pine Grove*,* 1 Flip., 120.

§ 2614. The legislature of a state may authorize the issue of municipal bonds in aid of a railroad beneficial to the interests of the community, when not restrained by the state constitution. *Ibid*.

§ 2615. It is held that the discretion of the legislature to prescribe districts for the purposes of local taxation is unlimited, and cannot be controlled by the courts; and that a statute authorizing a township to aid in the construction of a railroad is not in conflict with a provision in the local constitution requiring taxation to be uniform, although all the towns along the road do not contribute upon some basis fixed by law. *Ibid*.

§ 2616. **Debt in excess of limit.**— An amendment of the constitution of Louisiana, adopted in 1870, provided that no debt should thereafter be created which, added to the debt of the state then existing, would swell the total amount above \$25,000,000. Afterwards, and in pursuance of a law passed April 20, 1871, and entitled "An act to relieve the state from its obligation to guaranty the second mortgage bonds of the New Orleans, Mobile & Chattanooga Railroad Company," certain state bonds were issued, and the petition in this case was filed to prevent their payment, on the ground that the limit of indebtedness was reached before they were issued. Certain intervenors claimed that the bonds were valid, as they were issued in lieu of an obligation of the state existing when the constitutional amendment was adopted. But the court finds that the prior obligation of the state was only conditional — to become surety or guarantor on certain bonds, with ample security against loss — while the issue of the new bonds, and the taking of their amount in stock of the railroad company, was the creation of a new debt, and that the bonds, being in excess of the constitutional limit, were void. *Williams v. Louisiana*,* 13 Otto, 637.

§ 2617. **Deprivation of property by the law of the land.**— The act of the state of Maryland of 1890, known as the oyster law, providing that the officers shall seize and take into custody the vessel found violating its provisions, and if, upon trial and conviction, the offenders do not pay the fine imposed within twenty days, the justice shall direct the vessel to be sold after twenty days' notice, is not repugnant to the constitution of Maryland, which declares that no man ought to be deprived of his property, except by the judgment of his peers or the law of the land. *The Ann*,* 8 Fed. R., 923.

XIII. STATUTES AND STATE LAWS.

1. In General.

§ 2618. **Proviso.**— An exception in a statute is that which would otherwise be included in the category from which it is excepted. The office of a proviso is either to except something from the enacting clause, or to qualify or restrain its generality, or to exclude some ground of misinterpretation of it, as extending to cases not intended to be brought within its operation. *United States v. Cook*, 17 Wall., 168; *O'Reilly v. Morse*, 15 How., 128.

§ 2619. Where the enacting clause of a statute is general in its language and objects, and a proviso is afterwards introduced, that proviso must be construed strictly, and takes no case out of the enacting clause which does not fall fairly within its terms. In short, a proviso carves special exceptions only out of the enacting clause, and those who set up any such exception must establish it as being within the words as well as within the reason thereof. *United States v. Dickson*, 15 Pet., 165.

§ 2620. If to construe the second section of a statute as excepting certain cases out of the first would affix to the first section a meaning which would be inconsistent with the great and leading purpose of the legislature, and at the same time be arbitrary and unjust, and if, when viewed as an exception, the cases can on no just principle be distinguished from those left unexcepted, then manifestly it should not be construed as an exception, but as a substantive enactment, prescribing for the particular cases a new rule of law not provided for in the first section. *Carroll v. Carroll*, 16 How., 282.

§ 2621. And those who set up any such exception must establish it as being within the words as well as the reason thereof. *Ryan v. Carter*, 3 Otto, 83.

§ 2622. A proviso inconsistent with the authority given by the body of an act controls the whole act. *Tatum v. Town of Tamaroa*, 9 Biss., 473.

§ 2623. A proviso in a statute is intended generally to except a particular case out of a general principle, where, from peculiar circumstances attending the supposed case, there would be a hardship if the exception were not made. To understand the proviso, it is best to discover the mischief or hardship to be removed, and it should be so construed as to afford the remedy. *Huidekoper v. Burrus*, 1 Wash., 109.

§ 2624. Recital of fact, evidence of its existence.—It seems that the recital of a fact in the preamble of a public act of parliament is evidence to prove the existence of that fact. *Watkins v. Holman*, 16 Pet., 55.

§ 2625. Temporary act.—In the construction of a temporary act, such as the annual appropriation act, if any special provision applicable to the subject-matter of the act has been inserted, it will not be presumed, in the absence of clear evidence of such intention, that the legislature meant to make such special provision permanent. *United States v. Jarvis, Dav.*, 277.

§ 2626. Penal laws.—It is not necessary that each section of an act should contain or disclose the penalty for its infraction. *United States v. Crosby*, 1 Hughes, 453.

§ 2627. The courts of no country execute the penal laws of another. *The Antelope*, 10 Wheat., 66.

§ 2628. Criminal statutes should be explicit.—Laws which create crimes ought to be so explicit in themselves, or by reference to some other standard, that all men subject to their penalties may know what acts it is their duty to avoid. *United States v. Sharp*, Pet. C. C., 118.

§ 2629. Government affected by a statute, when.—When general words are used in a statute they do not include the government, or affect its rights, unless such intention is made clear and indisputable by express words in such statute. *United States v. Howell*, 4 Hughes, 485.

§ 2630. To the rule of the common law, that the king, as representing the public, was not bound by a statute unless he was specially mentioned therein, there seems to have been many exceptions. Indeed, the privilege seems to be confined to cases where the king might otherwise be deprived of some legal or personal right, and not to mere provisions of general law arising from principles of policy alone. So in relation to suits by the government for a penalty, if the public has not been excepted from the operation of the general law, or given peculiar privileges, it is entitled to no different procedure. *United States v. Mundell*, 1 Hughes, 486.

§ 2631. Statutes made both for the United States and for individuals will be considered as embracing the United States, where provisions adapted to them are made broad enough to include them, though not expressly mentioned. *Jacob v. United States*, 1 Marsh., 525.

§ 2632. The United States are not bound by the words of a statute, unless named therein, if the statute tends to restrain or diminish the powers, rights or interests of the United States; and hence the United States are not bound by the Bankrupt Act of 1867, inasmuch as they are not named in any of the provisions of the act except the one which provides that all debts due the United States, and all taxes and assessments under the laws thereof, shall be entitled to priority or preference, and inasmuch as many of the provisions describing the rights, duties and obligations of creditors are in their nature inapplicable to the United States, and, if held to include the United States, could not fail to become a constant and irremediable source of public inconvenience and embarrassment. *United States v. Herron*, 20 Wall., 251.

§ 2633. The United States, as a creditor, are not affected by state insolvent laws, discharging debtors. *Glenn v. Humphreys*, 4 Wash., 424.

§ 2634. State exemption laws cannot apply to any debt, obligation, duty or liability due from a citizen to the United States. *United States v. Howell*, 4 Hughes, 496.

§ 2635. Though, as a general rule, the government is not bound by a statute unless expressly mentioned therein, yet it is bound by laws of remedy and process, excepting always the statute of limitations. So the act of congress adopting the modifications of the law of imprisonment for debt in force in the states, binds the United States, though they are not named therein. *United States v. Tetlow*, 2 Low., 161.

§ 2636. The statute of limitations does not apply to the government in an action brought by it in its own courts, unless it is expressly named therein. This is not only a prerogative right, but it may be derived from the presumed legislative intent. Where the government is not included, either expressly or by necessary implication, it ought to be clear from the nature of the mischief to be redressed, or the language used, that the government itself was in the contemplation of the legislature, before a court would be authorized to put such an interpretation upon any statute. In general, acts of the legislature are meant to regulate and direct the acts and rights of citizens, and in most cases the reasoning applies with very different and often contrary force to the government itself. It appears, therefore, to be a safe rule, founded on the principles of the common law, that the general words of a statute ought not to include the government, or affect its rights, unless that intention be clear and indisputable upon the text of the act. *United States v. Hoar*, 2 Mason, 818; *Smith v. United States*, 5 Pet., 299; *United States v. Hewes*, Crabbe, 311.

§ 2637. A state statute relating to the payment of the debts of deceased persons, which provides for the exclusive jurisdiction of the state probate courts, and for the proof of debts against the deceased, and enacts that all not presented within a certain time shall be barred, cannot affect claims of the general government, though it may apply to private claims. Such statute cannot affect the claims of the government, nor affect the remedies given to it under its own laws. Such a rule of procedure would subject the action of the federal government to the regulations of a state government. *United States v. Backus*, 6 McL., 445.

§ 2638. The rule that the government is not bound by a statute unless expressly named does not apply to acts of legislation which lay down general rules for procedure in civil cases. The express exception of executors, administrators and guardians warrants an inference that the government is not excepted. *Green v. United States*, 9 Wall., 655.

§ 2639. The general rule that the government is not bound by a statute unless named therein does not apply to a discharge in bankruptcy of a surety on a bond of a public officer. *United States v. Davis*, 3 McL., 435.

§ 2640. The contracts of the government with respect to subjects within its constitutional competency are not local, and confined in their effect and operation strictly to the *situs* of the subjects to which they relate. Within the provisions prescribed by the constitution, and by the laws enacted in accordance with the constitution, the acts and powers of the government are to be interpreted and applied so as to create and maintain a system, general, equal and beneficial as a whole. So the regulation of a territorial government, that no trust shall result in favor of a person who furnishes money to another to purchase land in case the latter shall take title in his own name, does not apply to sales by the United States of public lands within such territory. *Irvine v. Marshall*, 20 How., 563.

§ 2641. Repugnant provisions.—The forty-eighth section of the Internal Revenue Act of 1864, as amended by the act of 1866, enacts that "All goods, wares, merchandise, articles or objects, on which taxes are imposed by the provisions of law, which shall be found in the possession, or custody, or within the control, of any person or persons in fraud of the internal revenue laws, or with design to avoid payment of said taxes, may be seized, etc., and shall be forfeited to the United States." The forty-fifth section of this latter act provides that "All distilled spirits found elsewhere than in a bonded warehouse, not having been removed from such warehouse according to law, and the tax imposed by law not having been paid, shall be forfeited." Another section of the same provides for forfeiture, and an additional penalty for executing false and fraudulent bonds for the purpose of drawing spirits from any bonded warehouse. It is held that, as there is nothing incongruous or repugnant between these sections, they can stand, and an information may be founded on both or either. *The Distilled Spirits*, 11 Wall., 356.

§ 2642. Public acts.—A statute legalizing elections held by the people of a certain county on the question of issuing the negotiable bonds of the county in aid of certain railroad companies therein named, and authorizing all the townships in counties lying on or near the line of a certain railroad, on certain specified conditions, to subscribe to the stock of that company, and issue their negotiable coupon bonds therefor, is a public act. *Unity v. Burrage*,* 13 Otto, 447.

§ 2643. Where an act is declared in its terms to be a public act, it cannot be said that an

act which supplements and amends, and thereby becomes a part of it, is a private and not a public act. *Ibid.*

§ 2644. A public law is notice to all the world, and all persons affected by obligations incurred thereunder are chargeable with notice of any violation thereof. *Root v. Godard*, 3 McL., 103; *The Brig Ann*, 1 Gall., 64.

§ 2645. Where an act is re-enacted by a public act it thereby becomes itself a public act. *Bank of Alexandria v. Young*, 1 Cr. C. C., 460.

§ 2646. Where the statute makes it an offense to steal the notes of any particular incorporated bank, the statute incorporating such bank is thereby made a public statute. *United States v. Porte*, 1 Cr. C. C., 369.

§ 2647. The provision of an act of incorporation, that it should be considered a public act, must be regarded in courts of justice, and its provisions noticed without being specially pleaded, as would be necessary if the act were private. *Beaty v. Knowler*, 4 Pet., 167.

§ 2648. Private acts.—A private act of incorporation cannot affect the rights of individuals who do not assent to it, and in this respect it is considered in the light of a contract. Assent to such an act may be implied from the acceptance of benefits arising under it. *Ibid.*

§ 2649. The recitals in a private act bind none but those who apply for it. *Branson v. Wirth*, 17 Wall., 32.

§ 2650. Effect of Virginia laws in northwest territory.—The cession by Virginia of the territory northwest of the Ohio to the United States being completed in 1784, a law of Virginia passed in 1785, to take effect in 1787, was never in force in such territory. *McCool v. Smith*, 1 Black, 467.

§ 2651. Operation of federal laws in territory of Oregon.—When congress, in organizing the territory of Oregon, declared that the laws of the United States should be in force in said territory "so far as the same, or any provision thereof, may be applicable," it did not mean that any particular one of such laws should be enforced, but only such as were determined "to be applicable." Under this state of things, so far as the rights of persons and property are concerned, authority is necessarily given to the courts to decide what laws are applicable, and what not, and consequently what are in force and what not. *Lownsdale v. City of Portland*, Deady, 10.

§ 2652. In derogation of common rule.—Parties cannot claim under a statute which derogates from the general rule of law, without showing a strict compliance with the statute. *In re Merrill*, 12 Blatch., 224.

§ 2653. Limitation acts have general operation.—Where a statute of limitations is not restricted to particular causes of action, but provides that the action, by its technical denomination, shall be barred if not brought within a limited time, every cause for which the action may be prosecuted is within the statute. And such a general state statute will bar an action even against a federal officer for his misconduct. *M'Cluny v. Silliman*, 3 Pet., 278.

§ 2654. Entailment of real estate.—The provisions of the constitution of Ohio, and acts passed thereunder, restraining the entailment of real estate, were intended to apply to individuals only, and not to corporations. *Perrin v. Carey*, 24 How., 496.

§ 2655. Amendments.—When existing laws are amended by enactments that such a section shall read in an altered manner, and the altered section contains in part the old law, and in part new provisions, the latter will be construed to relate to subsequent acts, and the former will be considered as having been the law from the time of its first enactment; and where there is no express repeal of the law as it stood at the time of the amendment, the law will, in the absence of express provisions to the contrary, be deemed to apply to, and to govern the validity and consequences of, acts done before it was amended. Especially is this true where the amendatory law contains provisions fixing the period of its retroaction in certain specified cases, for this leads to the conclusion that no retroactive effect was intended in other cases. *Oxford Iron Company v. Slafter*, 13 Blatch., 456.

§ 2656. The repeal of an old law, and a re-enactment at the same time of a new law, incorporating in it the old and amendments thereto, does not interfere with the continuous operation of the old law. *Torrens v. Hammond*, 4 Hughes, 605.

§ 2657. By-laws do not abrogate common law.—A by-law, punishing the setting up of a gaming table, enacted under the power given to a city in its charter to "restrain and prohibit all kinds of gaming," does not abrogate the common law offense. *United States v. Holly*, 3 Cr. C. C., 659.

§ 2658. Permissive as to penalty.—A law which provides that a person committing an offense shall be liable to pay a certain penalty or to be imprisoned, is permissive and not imperative in its terms, and a court may select one penalty and not the other in the exercise of its discretion. *United States v. Foster*, 2 Biss., 456.

§ 2659. Mandatory and directory.—The question whether a statute is mandatory depends on whether the thing directed to be done is the essence of the thing required; and where the

words of a statute are mandatory in form, and nothing else is required, and without this the statute would be utterly inoperative, it will be held to be mandatory. *In re Comstock*, 3 Saw., 218.

§ 2660. It seems that even though the terms of a statute are permissive only, and mean no more than words generally employed in statutes imparting a grant of authority or power to a public officer to do a certain act, still it is well settled that all such acts are to be construed as mandatory whenever the public interest or individual rights call for the exercise of the power conferred. *Ralston v. Crittenden*, 3 McC., 349; *Supervisors v. United States*, 4 Wall., 435; *City of Galena v. Amy*, 5 Wall., 705.

§ 2661. In construing an act of congress, a distinction is to be observed between those things which are of the essence of the thing to be done, and those which are merely accessory. If the affirmative words of the act are absolute, explicit and peremptory, and show that no discretion is intended to be given, the law will be held mandatory and not directory. *Henderson v. United States*,* 4 Ct. Cl., 83.

§ 2662. The act of congress of June 2, 1862 (12 Statutes at Large, 411), providing that all contracts made by the secretaries of war, navy or the interior, or by officers acting under them, shall be reduced to writing and returned with the advertisements and proposals to the proper office, and providing penalties for failure to make the proper returns, is mandatory, and not directory merely; at least so far as it requires that the contract be in writing, and a verbal contract made in such a case is void. *Henderson v. United States*,* 4 Ct. Cl., 80; *Todd v. United States*,* Dev., 44.

§ 2663. When statutory requisitions, prescribed for the guidance of public officers, are intended for the protection of the citizen, and to prevent a sacrifice of his property, and by a disregard of which his rights might be and generally would be injuriously affected, they are not directory but mandatory. And hence the provision in a statute that the sheriff, in sales for delinquent taxes, shall only sell the smallest quantity of the property which any purchaser will take and pay the judgment and costs, being intended for the protection of the tax-payer, is mandatory. *French v. Edwards*, 13 Wall., 506.

§ 2664. A statute providing that a board of pilot commissioners "may appoint a secretary," and defining the duties of such secretary, will be construed to be mandatory, when the importance of the duties required of the secretary, both to the public and individuals, manifests an intention on the part of the legislature to require the appointment of a secretary. *The California*, 1 Saw., 596.

§ 2665. An act of congress authorizing the head of a department to perform an act is directory and not mandatory. Where the terms of an act leave any room for administrative discretion, the enactment is not mandatory. *Mandatory Statute*,* 8 Op. Att'y Gen'l, 40; *id.*, 43; *Construction of Statutes*, *id.*, 113; *United States v. DeVisser*, 10 Fed. R., 648.

§ 2666. Publication of laws.—In a country governed by laws, it is not only necessary that they be passed by the supreme or legislative power, but that they be published to the people who are expected to obey them. The manner in which this may be done may vary, but whatever mode is adopted, it should be such as to afford a reasonable opportunity to every person who is to be affected by them, of being as early as possible acquainted with them. *The Ship Cotton Planter*, 1 Paine, 27.

§ 2667. A law authorizing a city to issue bonds for the stock of a railroad is not a general law within the meaning of the constitutional provision which provides that no general law shall be in force until published, and an issue of bonds in pursuance of such an act is valid, though the act was not published until after the bonds were issued, and then only in the volume of private and local laws. *Luling v. City of Racine*, 1 Biss., 316.

§ 2668. The constitution of Wisconsin of 1848 provides that no general law shall take effect until it is published. In 1852 the legislature made it the duty of the secretary of state and the attorney-general to classify the laws, separating the general laws from the private acts, so that each might be published in a different volume. In March, 1853, the legislature authorized certain counties to issue bonds. This act was not published until October, when it was classified by the above officials as a private act, and in the mean time the bonds were issued. It was held that the classification made by these officers made the act a private one, and that it must be considered to have been such at that time, although the supreme court of the state subsequently decided otherwise. *Havemeyer v. Iowa County*,* 3 Wall., 294.

§ 2669. Extraterritorial force.—The laws of a nation do not extend beyond its own territory, except so far as regards its citizens. They can have no force to control the sovereignty or rights of any other nation within its own jurisdiction. And however general and comprehensive the phrases used in our municipal laws may be, they must always be restricted in construction to places and persons upon whom the legislature have authority and jurisdiction. *The Apollon*, 9 Wheat., 362; *The Celestine*, 1 Biss., 6; *De Brimont v. Penniman*, 10 Blatch., 442.

§ 2670. The bankrupt law of a foreign country is incapable of operating a legal transfer of property in the United States. *Harrison v. Sterry*, 5 Cr., 302.

§ 2671. Where a deed of lands in Missouri was made in New York, and the acknowledgment was defective according to the laws both of New York and Missouri, a subsequent curative statute of New York was held ineffectual to remedy the defect, as it could have no extraterritorial operation. *Wright v. Taylor*, 2 Dill., 26.

§ 2672. Circumstances making a law inoperative.—In 1802, while the Wyandotte Indians were far removed from civilization, congress passed a law prohibiting intercourse with all Indian tribes and regulating commerce with them, except such tribes as were at that time surrounded by dense white settlements. In due process of time the Wyandotte reservation was restricted and became surrounded by dense settlements, and roads were opened through the reservation, intercourse was carried on with the Indians as among the adjacent whites, the territory was erected into a state, a county was organized, including the reservation, and by act of the legislature state laws were extended over the reservation. *Held*, that the law of 1802 was rendered inoperative by force of circumstances, and that the state of things existing in 1885 having been produced by the joint action of the state and the federal governments, it must be presumed that as to this tribe the latter intended to abrogate the law. *United States v. Cisa*, 1 McL., 261.

§ 2673. Law ceases to be operative when reasons for its passage cease.—The act of February 26, 1845, which gave the right of trial by jury in the federal courts in cases arising on the lakes, having been passed on the mistaken idea that the admiralty jurisdiction of the United States was limited to tide water, the act itself, including the clause giving the right of trial by jury, became inoperative on the determination of falsity of the assumption on which it was passed. *Gillet v. Pierce*, Brown, 554.

§ 2674. Though a statute may not be repealed, yet it may become inoperative by reason of the subject-matter having expired. So an act fixing the salary of the consul at Algiers, which was at that time an independent Mohammedan country, at a certain sum, became inoperative when the country became a colony of France, and the salary became subject to the regulations fixed as to French colonies. *Mahony v. United States*, * 3 Ct. Cl., 156.

§ 2675. Waiver of provisions.—Laws founded upon public policy cannot be waived or abrogated by stipulation of the parties to a contract. So a contract by a seaman in the shipping articles that he will pay for all medical advice and medicines, without any stipulation that the ship shall carry a medicine chest as prescribed by act of congress, is void. *Harden v. Gordon*, 2 Mason, 559; *White v. Connecticut Mutual Life Ins. Co.*, 4 Dill., 182.

§ 2676. Where no principle of public policy is concerned, a party is at liberty to waive a statutory provision made for his benefit, but the intention to waive such benefit should be clear. So to hold that a party waives the protection of a statute relating to life insurance policies by simply accepting a policy of the form in use before the statute was enacted, and which produced the evils intended to be obviated by the statute, would be to defeat the precise end the legislature had in view, and to perpetuate the mischief and nullify the remedy. *White v. Connecticut Mutual Life Ins. Co.*, 4 Dill., 183.

§ 2677. Mistakes in statutes.—A plain mistake apparent upon the face of a statute, which may be corrected by other language in the act, is not fatal. But in an act renewing a patent, where the descriptive words constituted the very essence of the patent to be renewed, it was held that the description must be so clear and accurate as to refer to a particular patent, and to be incapable of being applied to any other; and that a mistake in the date of the patent referred to might be cured by a correct description, and that a correct date might cure a defective description; but both being wrong the mistake was fatal. *Blanchard v. Sprague*, * 3 Sumn., 279.

§ 2678. If there is a plain mistake apparent upon the face of an act, which may be corrected by other language in the act itself, the mistake is not fatal. If there is a misnomer in the name of a person or corporation named in the act, the mistake is not fatal, if the person really intended can be collected from the terms of the act. *Ibid*.

§ 2679. The mistakes of a transcriber or printer cannot change the law; and where the original manuscript of an act as enrolled differs from the published copies, the latter must give way to the former. But where the mistake is not discovered for many years, and two successive legislatures enact new codes, adopting in each case the act as published, the published copy is thus made the declared will of the legislature, and the manuscript can afford no evidence of what the law is. *Pease v. Peck*, * 18 How., 595; *S. C.*, *Peck v. Pease*, * 5 McL., 486.

§ 2680. Renewal of patent.—In a statute renewing a patent the descriptive words constitute the very essence of the patent which is to be renewed. Unless the description is so clear and accurate as to refer to a particular patent, and to be incapable of being applied to any other, the mistake is fatal. So where a statute, the object of which was to prolong a patent,

recited a patent granted as of a different date from the one alleged to have been contemplated, and as covering an invention of "a machine for turning or cutting irregular forms," whereas the one alleged to have been contemplated covered an invention of "an engine for turning or cutting irregular forms, out of wood, iron, brass or other material or substance, which can be cut by ordinary tools, called Blanchard's self-directing machine," the mistake, not being cured by any other words apparent in the act, was held to be fatal, although the act renewed the patent from the very day referred to as the date of the original patent. *Blanchard v. Sprague*,* 3 Sumn., 280.

§ 2681. *May be revived.*—Congress may revive an act which has expired by its own limitation. It may make such revival dependent upon the happening of a future event, the occurrence of such event to be declared by executive proclamation. If the reviving act declares that the original act "shall be revived and have full force and operation," its operation begins at the time of the passage of the reviving act, and not from the date of the executive proclamation. *Cargo of Brig Aurora v. United States*,* 7 Cranch, 382.

2. *Enactment of Laws.*

§ 2682. *Requirement as to style of laws merely directory.*—The constitution of a state declares that the style of the laws shall be: "It is enacted by the general assembly as follows." *Held*, that even if this is more than simply directory, it cannot be held to apply to joint resolutions. *Hoyt v. Sprague*, 13 Otto, 635.

§ 2683. *Proof of existence of law.*—The different states, by their constitutions and laws, prescribe what shall be conclusive evidence of the existence or non-existence of a statute; but the question of such existence or non-existence being a judicial one in its nature, the mode of ascertaining and using that evidence must rest in the sound discretion of the court on which the duty in a particular case depends. *Town of South Ottawa v. Perkins*, 4 Otto, 239.

§ 2684. *Bills for raising revenue.*—A bill establishing rates of postage is not a bill for raising revenue within the meaning of the constitutional provision, requiring bills for raising revenue to originate in the house of representatives. The clause in the act of March 3, 1875, increasing the rate of postage upon certain matter, is not, therefore, unconstitutional, because it originated in the senate, and was not an amendment to a bill for raising revenue originating in the house of representatives. *United States v. James*,* 13 Blatch., 207.

§ 2685. *Courts cannot inquire into majority by which act was passed.*—It seems that when an act appears to have the requisite congressional sanctions, the majority by which it passed cannot be inquired into by the courts. *Falconer v. Campbell*, 3 McL., 209.

§ 2686. *Journals may be consulted by courts.*—By the law of the state of Illinois, as often declared by the supreme court of that state, the provisions of the constitution of 1843, requiring each house of the legislature to keep and publish a journal of its proceedings, and, on the final passage of all bills, to take the vote by ayes and noes, and ordaining that no bill shall become a law without the concurrence of a majority of all the members elect of each house, are not merely directory; but if the journals, being produced or proved, fail to show that an act has been passed in the mode prescribed by the constitution, the presumption of its validity, arising from the signatures of the presiding officers and of the executive, is overthrown, and the act is void. *Post v. Supervisors*,* 15 Otto, 667.

§ 2687. *Whether a seeming act of the legislature is or is not a law is a judicial question to be determined by the court, and not a question of fact to be tried by a jury.* *Ibid.*

§ 2688. *It is not allowed to go behind the written law itself for the purpose of ascertaining what the law is.* An act of congress examined and compared by the proper officers, approved by the president, and enrolled in the department of state, cannot afterwards be impugned by evidence to alter or contradict it. It imports the absolute verity of a record, at least so far that no extrinsic proof can be received to erase one thing from it or to interpolate another into it. If there be an apparent conflict between the journals and the law as finally approved and enrolled, the journals have no claim to superior authenticity. Acts of congress must be taken as they are found, without addition or diminution. *Thompson's Case*,* 9 Op. Att'y Gen'l, 2. *Contra*, *Reed v. Clark*, 3 McL., 430.

§ 2689. *Under the laws of Illinois the journals of the legislature may be resorted to for the purpose of overthrowing the prima facie evidence of the constitutional enactment of a law, furnished by the signatures of the presiding officers of both houses.* *Walnut v. Wade*, 13 Otto, 699.

§ 2690. *Under the decisions of the supreme court of Illinois it is necessary to the validity of a statute of that state that it appear by the legislative journals that it was duly passed in the manner prescribed by the constitution.* The journal, being made up under the immedi-

ate direction of the house, is presumed to contain a full and complete history of its proceedings. If a certain act received the constitutional assent, it will so appear upon the face of the journal. When a contest arises whether an act was passed, the journal may be appealed to to settle it. *Town of South Ottawa v. Perkins*, 4 Otto, 263.

§ 2691. Whether territorial laws were properly passed.—The courts have power to go behind the printed volume of the laws of a territory, duly certified by the territorial secretary, to ascertain whether those laws were passed in accordance with the provisions of the act of congress organizing the territory. *Brown v. Nash*,* 1 Wyom. T'y, 85.

§ 2692. Clerical omissions.—Where a bill with a certain title, and known by a certain number, is passed by one house of the legislature, and a bill with the same number and a clerical omission in the title is passed by the other house, and there can exist no doubt as to the identity of the bills, the omission mentioned will not invalidate the law. *Walnut v. Wade*, 13 Otto, 689.

§ 2693. Vote of speaker.—In the passage of a law by a territorial legislature against the objections of the governor, eleven members were present, including the speaker. The speaker having been excused from voting, seven voted for and three against the passage of the law. The speaker retained his chair and announced the vote to be in the affirmative. It was held that the speaker must be counted in determining the necessary two-thirds, and that the necessary two-thirds was not cast in favor of the law. *Brown v. Nash*,* 1 Wyom. T'y, 85; *Union Pac. R. Co. v. Carr*,* 1 Wyom. T'y, 96.

3. Approval.

SUMMARY — *Date may be proved*, §§ 2694, 2695.

§ 2694. The president in approving a bill gave the date of his approval as January 24, without giving the year. *Held*, that extrinsic evidence was admissible to show the date of the approval. *Gardner v. The Collector*, §§ 2693-2703.

§ 2695. In approving a bill the president is required to do nothing more than to sign it. *Ibid*.

[NOTES.— See § 2704.]

GARDNER v. THE COLLECTOR.

(6 Wallace, 499-511. 1867.)

ERROR to U. S. Circuit Court, Southern District of New York.

STATEMENT OF FACTS.—An act was passed by congress raising the duty on tea from fifteen to twenty cents per pound. It was approved by the president thus: "Approved December 24. Abraham Lincoln." In point of fact the bill was approved December 24, 1861. The enrolled statute with the president's approval was filed in the office of the secretary of state December 26, 1861. In 1864 Gardner insisted that the proper duty on some tea which he had imported was fifteen cents a pound, but paid the twenty cents per pound duty under protest, and sued the collector. There was judgment against him.

Opinion by MR. JUSTICE MILLER.

The date of the president's approval of the bill is undoubtedly the date at which it became a law, if it ever did. In the volume of the statutes now before us, published in 1863, the approval is dated December 24th [1861], but the figures 1861 are in brackets, by which it is understood that no such figures are found in the original enrolled act on file in the department of state. And it is conceded that, on inspection, the roll shows on the face of the bill no other date for the approval of the president than the day of the month already stated. It is not denied that the president's signature to the bill is genuine, and that he did approve it. The volume of the United States Statutes at Large, which contains this act, was published by authority the year before the entry was made of his tea by the plaintiff. The record kept in the office of the secretary of state shows that this enrolled statute, with the president's approval

on it, was filed in that office December 26, 1861. The journal of the house of representatives in congress shows that a message was received from the president, January 6, 1862, stating that on the 24th day of the preceding month he had approved this bill. So that, if we can look to any of these sources of information, the court can have no doubt that the bill was in force as a statute at the time the duties on plaintiff's tea became chargeable.

The whole of the very able and ingenious argument of counsel for plaintiff rests on these two propositions, as stated in his own language: "That the president alone can make the record which is to show the date of his approval; and that if the president's record is defective in respect to the year when it was made, no resort can be had to extrinsic evidence to supply that defect." The first of these propositions assumes that no act of congress can become a valid statute, unless some official written statement is found in it of the precise date when the president approved it, and that it is a part of the duty of the president to make this statement; a duty so important that unless made by him, and by no one else, all the previous proceedings of the two houses of congress, and the approval of the president, and his signature attesting that approval, are all vain and nugatory. We should reasonably expect to find a duty so very important as this, the neglect of which is followed by such serious consequences, prescribed by some positive and express provision of the constitution, or, at least, by some act of congress.

§ 2696. *The duty of the president with reference to bills presented for his signature.*

The only duty required of the president by the constitution in regard to a bill which he approves is, that he shall sign it. Nothing more. The simple signing his name at the appropriate place is the one act which the constitution requires of him as the evidence of his approval, and upon his performance of this act the bill becomes a law. "Every bill which shall have passed the house of representatives and the senate shall, before it becomes a law, be presented to the president of the United States; if he approve, he shall sign it; but if not, he shall return it, with his objections, to that house in which it shall have originated." "If any bill shall not be returned by the president within ten days (Sunday excepted) after it shall have been presented to him, the same shall be a law in like manner as if he had signed it." Here are two courses of action by the president in reference to a bill presented to him, each of which results in the bill becoming a law. One of them is by signing the bill within ten days, and the other is by keeping it ten days, and refusing to sign it. Even in the event of his approving the bill, it is not required that he shall write on the bill the word approved, nor that he shall date it.

§ 2697. *It is not the duty of the president to date his approval of a bill.*

If a date by the president is essential to the validity of the statute, it must be as essential when he retains the bill and fails to sign it as when he signs it. It is his action in retaining the bill for ten days which makes it a law as much as it is in signing it. Yet, in the latter case, no evidence is required of the president, either by the constitution or in actual practice, to show that he had ever received or considered the bill. It is not possible, therefore, to hold that the constitution, either expressly or by just implication, imposes upon the president the duty of affixing a date to his signature to a bill. Nor does any act of congress require him to do this. The statutes of September 15, 1789, and of July 7, 1838, so far from requiring the president to affix a date to his act of signing bills, provide another means of ascertaining when a statute takes

effect, namely, by finding it on file in the office of the secretary of state, for by this statute all such bills, orders, resolutions or votes of congress as shall become laws, or shall take effect, are to be received from the president and filed in that office. The duty, then, of making such memorandums as shall show when they were received by this department, in which the rolls are to remain permanently, and where alone they can be inspected, is much clearer than any such duty on the part of the president. As the only valuable purpose of having a date is to determine when the statute takes effect, it is reasonable that this should be made by the officer who receives it from the president forthwith, and who is to be the future custodian of the statute — who alone can give certified copies of it, and from whose office the legally authorized publisher receives the copy from which it is printed.

§ 2698. — *analogy of the English practice.*

If neither the constitution nor the statutes impose this duty upon the president, we are equally unable to find anything in the practice of the English parliament to sustain this view. The custom there anciently was for the enrolled bill, on receiving the assent of the king, generally given by commission in parliament, to be delivered, with the statement of this fact indorsed on it, to the clerk of parliament. From thence transcripts were sent to the sheriffs of the counties, who were ordered to proclaim them in their county courts, where the transcripts were filed for reference. Since the art of printing, this latter custom has been abandoned. But an act of 33 George III., ch. 15, requires the clerk of parliament to indorse the date of the king's approval upon the roll of each statute, which is to be the date from which it shall take effect. Bacon's Abr. Stat., letter C. The enactment of such a statute shows that no rule had previously existed, that the date was affixed by the king or by the commissioners who, in his name, gave his assent to the bill.

§ 2699. *The courts take judicial notice of public statutes.*

The second proposition, that "if the president's record is defective in respect to the year when it was made, no resort can be had to extrinsic evidence to supply that defect," is still more at variance with both principle and authority than the one we have just considered. The statute under consideration is a public statute, as distinguished from a private statute. It is one of which the courts take judicial notice, without proof, and, therefore, the use of the words "extrinsic evidence" are inappropriate. Such statutes are not proved as issues of fact as private statutes are. But if we suppose the phrase to have been used to express the sources of information to which the court may resort, the proposition is still inadmissible.

§ 2700. *The dates of written contracts may be contradicted by parol proof.*

In point of moral force in producing conviction in the mind that a bill was signed on a given day, there may be often found stronger evidence than the date accompanying the signature. It is general experience that mistakes are often made in such dates. So well is this understood that the general rule of law, that parol evidence cannot be received to contradict a written contract, does not apply to the date, which, though forming a part of the written instrument, may be contradicted whenever it is material to the issue to do so. So also written contracts, or other instruments having no date on their face, may have the time of their execution proved by parol or other competent testimony. It is believed that this principle would be applicable to any instrument in writing offered to a jury on an issue of fact even if it were a private statute, always requiring, however, the best evidence of the date that exists. But the

argument we are considering imposes upon the judges who are to take judicial notice of a statute, a more limited range of search for information than that which is open to a jury, when the rule of judicial notice, as we shall show hereafter, was adopted for the purpose of enlarging it.

§ 2701. *The judicial notice of the courts extends not only to the existence of the statute, but to the time it takes effect and to its construction.*

The record of the secretary of state of the time of filing such a paper, the journals of the two houses of congress, the message of the president, and other circumstantial facts, may produce stronger conviction of the day and of the year in which the bill was signed than the date affixed by the president. There is no reason, then, on sound principle, why the court should confine itself to the date made by the president, or, if he has made none, should reject all other sources of knowledge. The judicial notice of the court must extend not only to the existence of the statute, but to the time at which it takes effect, and to its true construction. This view of the subject is well supported by authority.

§ 2702. *Authorities cited.*

In the learned work of Mr. Dwarrris on Statutes, p. 467, we are told that the principal reason of the rule that the courts should take judicial notice of public statutes, and should not permit them to be put in issue as private statutes are, was that many ancient statutes were no longer to be found, which yet were within the time of legal memory, and could not, therefore, be treated as common law. In order to prevent their existence being brought to the test of proof by record, the principle was adopted that the court should take notice of them, and that the judges are to inform themselves in the best way they can.

This is confirmed by Sir Matthew Hale in his History of the Common Law, pp. 14, 16. Alluding to these statutes, of which there are many that are no longer to be found among the rolls, he says: "An act of parliament, made within the time of memory, loses not its being so, because not extant of record, especially if it be a general act of parliament. For of general acts of parliament the courts of common law are to take notice without pleading them. And such acts shall never be put to be tried by the record upon an issue of *nul tiel record*, but it shall be tried by the court, who, if there be any difficulty or uncertainty touching it, or the right of pleading it, are to use, for their information, ancient copies, transcripts, books, pleadings and memorials, to inform themselves, but not to admit the same to be put in issue by a plea of *nul tiel record*. For, as shall be shown hereafter, there are many old statutes which are admitted, and obtain as such, though there be no record, at this day, extant thereof; nor yet any other written evidence of the same but which is in a manner only traditional, as, namely, ancient and modern books of pleading, and the common received opinion and reputation and approbation of the judges learned in the law." See 1 Kent's Com., 460; Sedgwick on Stat. and Const. L., 34.

Lord Coke (4 Institutes, 26), giving an account of the manner in which the statutes were formerly published in the county courts, in regard to which he had made diligent search, observes that, "although proclamation be not made in the county, every one is bound to take notice of that which is done in parliament, for, as soon as parliament hath concluded anything, the law intends that every person hath notice thereof, for the parliament represents the body of the whole realm, and, therefore, it is not requisite that any proclamation be made, seeing the statute took effect before." If this proposition be sound, of which

there seems to be no reason to doubt, how can it be held that the judges, upon whom is imposed the burden of deciding what the legislative body has done, when it is in dispute, are debarred from resorting to the written record which that body makes of its proceedings in regard to any particular statute.

The courts of last resort in several of the states have expressly decided that this may be done. *Purdy v. People*, 4 Hill, 384; *De Bow v. People*, 1 Denio, 9; *Spangler v. Jacoby*, 14 Ill., 297; *Young v. Thomson*, 14 id., 297; *Speer v. Plank Road*, 22 Penn. St., 376; *Matter of Welman*, 20 Vt., 656; *Supervisors v. Heenan*, 2 Minn., 330; *Fowler v. Pierce*, 2 Cal., 151. In the *Prince's Case*, 8 Rep., 28, the rule on this subject is laid down by the court in the following language: "As to the fourth point, it was resolved that, against a general act of parliament, or such whereof the judges *ex officio* ought to take notice, the other party cannot plead *nul tiel record*, for of such acts the judges ought to take notice. But if it be misrecited the party ought to demur in law upon it. And in that case the law is grounded upon great reason; for God forbid, if the record of such acts should be lost, or consumed by fire or other means, that it should be to the general prejudice of the commonwealth, but rather, although it be lost or consumed, the judges either by the printed copy, or by the record in which it was pleaded, or by other means, may inform themselves of it." In this case the lord chancellor was assisted by a judge from each of the common law courts, of whom Coke was one, and the decision as reported by him, and the reason on which it was founded, are entitled to the highest consideration.

§ 2703. *The rule by which courts take judicial notice of statutes.*

We are of opinion, therefore, on principle as well as authority, that whenever a question arises in a court of law of the existence of a statute, or of the time when a statute took effect, or of the precise terms of a statute, the judges who are called upon to decide it have a right to resort to any source of information which in its nature is capable of conveying to the judicial mind a clear and satisfactory answer to such question; always seeking first for that which in its nature is most appropriate, unless the positive law has enacted a different rule.

Judgment affirmed.

§ 2704. The constitution of Illinois provides as follows: "Every bill which shall have passed the senate and house of representatives shall, before it becomes a law, be presented to the governor; if he approve, he shall sign it; but if not, he shall return it, with his objections, to the house in which it shall have originated; and the said house shall enter the objections at large on their journal, and proceed to reconsider it. . . . If any bill shall not be returned by the governor within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the general assembly shall, by their adjournment, prevent its return; in which case the said bill shall be returned on the first day of the meeting of the general assembly after the expiration of said ten days, or be a law." *Held*, that a bill passed by both houses, and presented to the governor before the legislature adjourns, becomes a law when signed by the governor after the session of the legislature has been terminated by an adjournment, but within ten days from its presentation to him. *Seven Hickory v. Ellery*,* 13 Otto, 423.

4. *Time of Taking Effect.*

SUMMARY — *Take effect from time of approval*, §§ 2703-2707.

§ 2705. On the 3d day of March, 1875, an act of congress was passed increasing the tax on tobacco from twenty to twenty-four cents per pound. On the same day, but before the president approved the bill, parties owning tobacco paid the tax of twenty cents per pound. *Held*, that the act took effect from the time it was approved by the president, and the parties were not liable for the additional four cents per pound. *Burgess v. Salmon*, §§ 2703-2711.

§ 2706. An act of congress takes effect from the time of its approval by the president. *In re Richardson*, §§ 2712-2714; *Burgess v. Salmon*, §§ 2708-2711.

§ 2707. A petition in bankruptcy was filed on the 3d day of March, 1843, about noon. *Held*, that the court had jurisdiction of the proceedings, and that such jurisdiction was not divested or affected by the act of the same day repealing the bankrupt act, which was passed, and approved by the president, late in the evening of that day. *Ibid*.

[NOTES.—See §§ 2715-2736.]

BURGESS v. SALMON.

(7 Otto, 381-385. 1878.)

ERROR to U. S. Circuit Court, Eastern District of Virginia.

Opinion by MR. JUSTICE HUNT.

STATEMENT OF FACTS.—The facts of this case, as agreed upon, were these: That Burgess was collector of internal revenue for the third collection district of Virginia, and in that capacity exacted from and received of Salmon & Hancock, and paid into the treasury of the United States, the sum of \$377.80 as an additional tax of four cents a pound on a quantity of tobacco belonging to them. It was thus exacted on the 3d day of March, 1875, under the act of that date, which provides as follows: "That section 3368 of the Revised Statutes be amended by striking out the words 'twenty cents a pound,' and inserting in lieu thereof the words 'twenty-four cents a pound.'" . . . "Provided, that the increase of tax herein provided for shall not apply to tobacco on which the tax under existing laws shall have been paid when this act takes effect." 18 Stat., 339.

The act contains also the provision following, viz.: "Every person who removes from his manufactory tobacco without the proper stamp being affixed and canceled . . . shall for each offense be fined not less than \$1,000 and not more than \$5,000, and be imprisoned not less than one year and not more than two years."

The tobacco in question was stamped, sold and removed for consumption or use from the place of manufacture, and beyond the control of Salmon & Hancock, in the forenoon of March 3, 1875, and the above-named act of congress was approved in the afternoon of that day, after the stamping and removal of this tobacco, which, when removed, had been stamped at twenty cents a pound. Payment of the additional four cents a pound was made under protest, and an appeal to the commissioner of internal revenue regularly taken and overruled. The manufacturers brought suit to recover back the amount, and recovered judgment in the court below. The collector thereupon sued out this writ of error.

The case presents but a single point: Can a manufacturer be punished, criminally and civilly,—civilly here,—for the violation of a statute, when the statute was not in force at the time the act was done? In other words, can a person be thus punished when he did not contravene the provisions of the statute? In still other words, can one be punished for offending against the provisions of a statute from the effects of which he was expressly exempted?

§ 2708. *Time at which a statute becomes operative; whether a question of law or of fact.*

We are relieved by the agreed statement, to which reference is made, from examining a question of importance, and perhaps of difficulty, respecting the *punctum temporis* when a statute takes effect. Does it, as the collector contends, have operation in the present instance on the 3d day of March, 1875, and cover the whole of that day, commencing at midnight of March the 2d?

If the time may be inquired into, to ascertain at what hour or what fraction of an hour of the day the form of the law becomes complete, is it to be ascertained by the court as a question of law, or to be decided as an issue of fact? It is agreed by the parties to the record that in fact the duty of twenty per cent. had been paid on the tobacco in question, and it had been removed from the storehouse before the act of March 3, 1875, took effect; and we content ourselves by acting upon that agreement. We are of opinion that the government must fail, upon the facts agreed upon; to wit, that the duty of twenty per cent. had been paid and the tobacco had been removed before the act had been approved by the president. The seventh section of article 1 of the constitution of the United States provides that every bill which shall have passed the house of representatives and the senate shall, before it becomes a law, be presented to the president of the United States. If he approves, he shall sign it; but if not, he shall return it, with his objections, to that house in which it originated, . . . who shall proceed to reconsider it. . . . If any bill shall not be returned by the president within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the congress, by their adjournment, prevent its return, in which case it shall not be a law.

§ 2709. — *takes effect from time of approval.*

In the present case the president approved the bill; and the time of such approval points out the earliest possible moment at which it could become a law, or, in the words of the act of March 3, 1875, at which it could take effect.

§ 2710. *Authorities reviewed.*

In *Lapeyre v. United States*, 17 Wall., 191, it was said *obiter*: "The act became effectual upon the day of its date. In some cases it is operative from the first moment of that day. Fractions of the day are not recognized. An inquiry involving that subject is inadmissible." The question involved in that case was whether a proclamation issued by President Johnson, bearing date of June 24, 1865, removing certain restrictions upon commercial intercourse, took effect on that day, or whether it took effect on the day it was published and promulgated, which was on the 27th of the same month. It was held by a majority of this court that it took effect from its date. The question was upon the 24th or the 27th of June, and the point of the portion of a day was not involved. While the general proposition may be true, that, where no special circumstances exist, the entire day on which the act was passed may be included, there is nothing in that case to make it an authority on the point before us.

In the *Matter of Howes*, 21 Vt., 619, it appeared that the bankrupt act was repealed March 3, 1843. Howes presented his petition on that day, and it was held that he was too late; that on questions of that nature there can be no divisions of a day. In the *Matter of Welman*, 20 id., 653, the question was the same, and decided in the same way. While stating the general rule as above, the court say they agree with Lord Mansfield in *Coombs v. Pitt*, 4 Burr., 1423, that in particular cases the very hour may well be shown when it need and can be done. *Arnold v. United States*, 9 Cranch, 104, is in affirmance of the same general principle. The act of July 1, 1812, there discussed, provided "that an additional duty of one hundred per cent. upon the permanent duties now imposed by law . . . shall be levied and collected on all goods, wares and merchandises which shall, from and after the passage of this act, be imported into the United States from any foreign port or place." The goods were brought into the collection district of Providence on the 1st day

of July, 1812. The court say: "The statute was to take effect from its passage, and it is a general rule that where the computation is to be made from an act done, the day on which the act is done is to be included." See the Case of Richardson, 2 Story, 571 (§§ 2712-14, *infra*), decided by the same judge, sustaining the view just taken.

In the present case, the acts and admissions of the government establish the position that the duties exacted by law had been fully paid, and the goods had been surrendered and transported before the president had approved the act of congress imposing an increased duty upon them.

§ 2711. *Ex post facto laws.*

To impose upon the owner of the goods a criminal punishment or a penalty of \$377 for not paying an additional tax of four cents a pound would subject him to the operation of an *ex post facto* law. An *ex post facto* law is one which imposes a punishment for an act which was not punishable at the time it was committed, or a punishment in addition to that then prescribed. *Carpenter v. Commonwealth of Pennsylvania*, 17 How., 456 (§§ 600-602, *supra*). Had the proceeding against Salmon & Hancock been taken by indictment instead of suit for the excess of the tax, and the one was equally authorized with the other, the proceeding would certainly have fallen within the description of an *ex post facto* law. In *Fletcher v. Peck*, 6 Cranch, 87 (§§ 1805-12, *supra*), it was decided that an act of the legislature by which a man's estate shall be seized for a crime, which was not declared to be an offense by a previous law, was void. In *Cummings v. State of Missouri*, 4 Wall., 277 (§§ 608-618, *supra*), it was held that the passage of an act imposing a penalty on a priest for the performance of an act, innocent at the time it was committed, was void. To the same purport is *Pierce v. Carskadon*, 16 Wall., 234. The cases cited hold that the *ex post facto* effect of a law cannot be evaded by giving a civil form to that which is essentially criminal. *Cummings v. Missouri*, *supra*; *Potter's Dwarris*, 162, 163, note 9.

Judgment affirmed. (a)

IN RE RICHARDSON.

(Circuit Court for Massachusetts: 2 Story, 571-581. 1843.)

Opinion by STORY, J.

STATEMENT OF FACTS.—The present question embraces some novelty as to the interpretation of statutes, and the time of giving them effect. It appears, from the statement of facts, that the petition in this case for the benefit of the bankrupt act of 1841, chapter 9, was filed on the 3d day of March, 1843, about noon; and that the act of 3d of March, 1843, chapter 82, repealing the bankrupt act, passed congress, and was approved by the president, late in the evening of the same day. The language of this last act is, "That the act entitled 'An act to establish a uniform system of bankruptcy throughout the United States,' approved on the 19th day of August, 1841, be, and the same is hereby, repealed." There is a proviso, "That this act shall not affect any case or proceeding in bankruptcy commenced before the passage of this act." Now, upon this posture of the case, the question arises whether the repealing act took effect by relation, from the commencement of the 3d day of March, 1843, or whether it took effect only from the act of approval by the president,

(a) Affirming *Salmon v. Burgess*, * 1 Hughes, 356.

on the evening of the same day. If the former be the true legal interpretation, then the district court had no jurisdiction to entertain the petition; if the latter be the true intendment of law, then the district court had a clear jurisdiction in the premises, and the jurisdiction having once attached, the proviso saves all further proceedings under the petition.

§ 2712. *The doctrine that there is no fraction of a day is not allowed to operate against right and justice.*

I am aware that it is often laid down that in law there is no fraction of a day. But this doctrine is true only *sub modo*, and in a limited sense, where it will promote the right and justice of the case. It is a mere legal fiction, and, therefore, like all other legal fictions, is never allowed to operate against the right and justice of the case. On the contrary, the very truth and facts, in point of time, may always be averred and proved in furtherance of the right and justice of the case; and there may be even a priority in an instant of time; or, in other words, it may have a beginning and an end. See Digges' Case, 1 Coke, 383; Fitzwilliams' Case, 6 Coke, 33; Co. Litt., 135, a; Viner, Abridg., A. 3, pl. 7. The common case put to illustrate the doctrine that there is no fraction in a day is the case when a person arrives at majority. Thus, if a man should be born on the 1st day of February, at eleven o'clock at night, and should live to the 31st day of January, twenty-one years after, and should at one o'clock of the morning of that day make his will, and afterwards die by six o'clock in the evening of the same day, he will be held to be of age, and his will be adjudged good. Here the rule is applied in favor of the party to put a termination to the incapacity of infancy. The case of Fitzhugh v. Dennington, 2 Ld. Raym., 1094; S. C., 6 Mod., 260; 1 Salk., 44, fully supports this doctrine, and it stands recognized and confirmed in other cases. See Com. Dig., Infant, A; Roe v. Wrangham, 3 Wils., 274; Herbert v. Turball, 1 Keble, 589; Siderf. R., 163, pl. 18 (Anon., 1 Ld. Raym., 480). But many cases may easily be put where the real fact is allowed to prevail, and to be conclusive. Thus, for example, if a woman makes a deed of her land in the morning, and is afterwards married, or dies on the same day, the deed is good. So, if my ancestor die at five o'clock in the morning, and I enter into his lands at six o'clock, and make a lease at seven o'clock of the same day, the lease is good. So, if the ancestor, and his immediate heir, both die on the same day, and the inheritance would pass to different persons, according to the survivorship of the ancestor or the heir, then the actual fact, which survived the other, may be proved, so as to pass the inheritance to the proper party entitled thereto. Nay, the question of survivorship may often, in the absence of direct proof, be decided by mere presumption, from age, sex, constitution and other circumstances, where both perish by the same common calamity, as by the foundering of the ship at sea, in which they are both embarked.

§ 2713. *The doctrine of relation is not allowed to prevail, except for the promotion of justice.*

In short, the true doctrine upon this whole subject is laid down in Roe d. Wrangham v. Hersey, 3 Wils., 274, where the court said: "It is said that there is no fraction in a day; but this is a mere fiction in law; *fictio juris neminem lædere debet*; but avail much it may. And this is seen in all matters, where the law operates by relation, and by division of an instant, which are fictions in law." And, after putting various other illustrations, the court added: "By fiction of law, the whole time of the assizes, and the whole session of parliament, may be, and sometimes are, considered as one day; yet the matter of

fact shall overturn the fiction in order to do justice between the parties." See Com. Dig., Temps., ch. 8. In *Combe v. Pitt*, 3 Burr., 1423, 1434, Lord Mansfield approved a similar doctrine, and said: "But, though the law does not, in general, allow of the fraction of a day, yet it admits it in cases where it is necessary to distinguish. And I do not see why the very hour may not be so too, where it is necessary, and can be done; for it is not like a mathematical point which cannot be divided." So that we see that there is no ground of authority, and, certainly, there is no reason, to assert that any such general rule prevails, as that the law does not allow of fractions of a day. On the contrary, common sense and common justice equally sustain the propriety of allowing fractions of a day, whenever it will promote the purposes of substantial justice. Indeed, I know of no case where the doctrine of relation, which is a mere fiction of law, is allowed to prevail, unless it be in furtherance and protection of rights, *pro bono publico*.

§ 2714. *An act of congress takes effect from the time of its approval, and does not relate back to the beginning of the day on which it is approved.*

But it appears to me that the doctrine assumes a broader importance under the constitution and laws of the United States. By the constitution of the United States, "Every bill, which shall have passed the house of representatives and the senate, shall, before it become a law, be presented to the president of the United States; if he approve it, he shall sign it; but if not, he shall return it, with his objections, to the house in which it shall have originated," etc. Now, it seems to me clear, from this language, that in every case of a bill, which is approved by the president, it takes effect as a law only by such approval, and from the time of such approval. It is the act of approval which makes it a law; and, until that act is done, it is not a law. The approval cannot look backwards, and, by relation, make that a law, at any antecedent period of the same day, which was not so before the approval; for the general rule is, *Lex prospicit, non respicit*. Branch's Maxims, p. 99; Jenkins' Text, 284. The law prescribes a rule for the future, not for the past; or as it is sometimes expressed, *Lex dat formam futuris, non preteritis negotiis*. And this, in a republican government, is a doctrine of vital importance to the security and protection of the citizen. It is fully recognized in the constitution itself, which declares that no *ex post facto* law shall be passed. Put the case that a statute, passed on the 3d of March last, which created and punished as public offenses certain acts which were not so before the passage of the statute; and the statute was approved at eleven o'clock at night; and an act was done in the preceding part of the day which was innocent at the time when it was done; could it be contended that the party would be punishable therefor by relation? Or that it was not within the prohibition of the constitution, as an *ex post facto* law, so far as it operated upon his case? If it should be said that the law does not recognize any fractions of a day, why may we not deem the law in force only from the last instant of the day instead of carrying it back, by relation, to the first instant of the day? If there be any choice, as to the principle of interpretation, one should think that that ought to be adopted, in cases of this sort, which is most favorable to private rights and public justice. Surely the constitution is not to be set aside, or varied in its intendment, by mere legal fictions. On the contrary, it appears to me that in all cases of public laws, the very time of the approval constitutes, and should constitute, the guide, as to the time when the law is to have its effect, and then to have its effect prospectively, and not retrospectively. It

may not, indeed, be easy, in all cases, to ascertain the very *punctum temporis*; but that ought not to deprive the citizens of any rights created by antecedent laws and vesting rights in them. In cases of doubt, the time should be construed favorably for the citizens. The legislature have it in their power to prescribe the very moment, *in futuro*, after the approval when a law shall have effect; and if it does not choose to do so, I can perceive no ground why a court of justice should be called upon to supply the defect. But when the time can be accurately and fully ascertained (as in the present case), when a bill was approved, I confess that I am not bold enough to say that it became, by relation, a law, at any antecedent period of the same day. I cannot but view such an interpretation as at war with the true character and objects of the constitution.

Upon the whole, my opinion is that the question adjourned into this court by the district court ought, upon the statement of facts, to be answered in the affirmative; and that the district court had jurisdiction of the present petition at the time when it was filed and acted upon; and that it has full jurisdiction to entertain all proceedings thereon to the close thereof, according to the provisions of the bankrupt act of 1841, ch. 9.

§ 2715. **Take effect from time of approval.**—Where the constitution of a state requires the approval of the governor before a bill becomes a law, it becomes operative only upon his approval of it, and such act does not begin its operation by relation on the day of its passage. *Memphis v. United States*, 7 Otto, 293 (§§ 1888-94).

§ 2716. Under the constitution of Tennessee of 1870, an act of the legislature takes effect from the day it was signed by the governor, and not from the time it was passed by the legislature. *Ibid*.

§ 2717. **On day of enactment.**—The rule of construction in this country is that a statute takes effect, if not otherwise provided, on the day of its passage, including that day. *In re Ankrim*, 3 McL., 286.

§ 2718. But it seems that, except in remedial statutes, that rule cannot be a sound one, and that it is as objectionable on principle as the rule of the common law that statutes took effect from, and were supposed to have been passed on, the first day of the session. *In re Ankrim*, 3 McL., 286; *Matthews v. Zane*, 7 Wheat., 184; *Arnold v. United States*, 9 Cr., 119.

§ 2719. Where an act of congress is to take effect from the day of its passage, it must embrace the whole day, and the time at which it received the signature of the president cannot be inquired into. *United States v. Williams*, 1 Paine, 263.

§ 2720. **Law to take effect on a certain day.**—Where a law by its terms is to go into operation on a certain day, it must be considered as having been enacted on that day, and to have been of no force or effect between the date of enactment and the day that it is to take effect. *In re Horton*,* 5 Law Rep., 462.

§ 2721. **At common law, all acts of parliament, unless another period was fixed, took effect, by relation, on the first day of the session, so that if an act had been brought in at the close of the session and passed on the last day, which made an innocent act criminal, or even a capital offense, and if no day was fixed for the commencement of its operation, it had the same efficacy as if it had been passed on the first day of the session; and all who, during the long session, had been doing an act which at the time was legal and inoffensive, were liable to suffer the punishment prescribed by the statute.** *The Brig Ann*, 1 Gall., 65.

§ 2722. **Precise time when act became a law, material, when.**—Where the question is as to the validity of an act performed on the same day on which an act affecting the validity of such transaction was passed, the precise time at which the act became a law may be properly inquired into. *In re Wynne*, Chase's Dec., 251; *In re Howes*,* 2 N. Y. Leg. Obs., 271; *Burgess v. Salmon*, 7 Otto, 381 (§§ 2708-11).

§ 2723. **Revised Statutes of United States.**—The Revised Statutes of the United States of 1874 are to be considered as having been passed December 1, 1873, although in fact passed June 22, 1874, and a law passed on the latter date must be considered a subsequent law so far as the Revised Statutes are concerned, and as repealing by implication any clauses of the Revised Statutes with which it was in conflict. *In re Oregon Bulletin Printing, etc., Co.*,* 14 N. B. R., 407.

§ 2724. **Laws passed at same session — Reviving repealed act.**—An act of the legislature of Virginia, passed in November, 1792, repealed a certain act of 1748. During the same ses-

sion, and in December of the same year, an act was passed which suspended the repeal until October, 1793. At this time the law of 1789 was in force which provided that the repeal of a repealing act should not revive the act repealed. *Held*, that the act of 1748 was in force on the 11th day of February, 1793, for the reason that, according to the law of Virginia, the British rule prevailed that where acts were passed at the same session of the legislature, they had their commencement at the same time, *i. e.*, from the first day of the session, and that therefore the repealing and suspending acts must have gone into effect at the same time; and also that the law of 1789, that the repeal of a repealing act does not revive the act repealed, being in derogation of the common law, must be strictly construed, and the suspending act, not being a repeal, cannot be held to be within its provisions. *Brown v. Barry*, 3 Dal., 367.

§ 2725. Penal laws.—Laws regarding trade, which do not provide when they shall go into effect, and which render acts penal which were before proper, and which were done with the sanction of the officers of the government, should begin to operate in the different districts only from the time they are respectively received from the proper department by the collector of customs, unless notice of them be brought home in some other way to the person charged with their violation. *The Ship Cotton Planter*, 1 Paine, 27.

§ 2726. Courts cannot restrain operation.—Limitation laws affect the remedy, and the legislative power has the same right to regulate and restrict remedies upon causes of action in existence as upon causes of action to be created. When a law is made operative *in present*, courts cannot legislate away the effect and declare that it shall operate only *in futuro*. *McLaughlin v. Hoover*,* 1 Or., 34.

§ 2727. Forfeiture under penal laws.—Where a statute in terms denounces a forfeiture of property as a penalty for a violation of the law, without alternative of value, or other qualifications or provisions, or language showing a different intent, the forfeiture takes place absolutely and instantaneously on the commission of the offense, and the title vests in the government from that moment; and it is not within the power of the offender or former owner to defeat the forfeiture by a subsequent transfer, even to a *bona fide* purchaser. *United States v. One Hundred Barrels of Spirits*, 2 Abb., 313; S. C., 1 Dill., 57.

§ 2728. Prospective operation.—No statute ought to have a retrospective effect. It is a general rule that a statute takes effect from its date, when no time is fixed; and it cannot, upon sound principles, be admitted that a statute shall, by any fiction or relation, have any effect before it was actually passed. A retrospective statute partakes, in its character, of the mischiefs of an *ex post facto* law, and, when applied to contracts or property, would be equally unjust and unsound in principle as *ex post facto* laws when applied to crimes and penalties. *Warren Manuf'g Co. v. Etna Fire Ins. Co.*, 2 Paine, 517; *United States v. Starr*, Hemp., 471; *Tinker v. Van Dyke*, 1 Flip., 523; *Harvey v. Tyler*, 2 Wall., 328; *Blanchard v. Sprague*, 2 Story, 164; *United States v. Alexander*, 12 Wall., 177; *Bassett v. United States*,* 2 Ct. Cl., 450; *Costin v. Corporation of Washington*, 2 Cr. C. C., 257; *Hamlin v. Pettibone*, 6 Biss., 171; *Prince v. United States*, 2 Gall., 209; *Accounts of Public Printers*,* 9 Op. Att'y Gen'l., 439; *Peay v. Schenck*, 1 Woolw., 175; *McEwen v. Den*, 24 How., 242; *The Hiawatha*, Bl. Pr. Cas., 5; *Johnston v. Vandyke*, 6 McL., 428; *In re Billings*, 3 Ben., 214; *Murray v. Gibson*, 15 How., 423; *Reynolds v. McArthur*, 2 Pet., 434; *Twenty per Cent. Cases*, 20 Wall., 179. See §§ 20, 638, 1694, 2019; also sub-title IV, *supra*.

§ 2729. The object of the whole law concerning wills is to enable the owners of property reasonably to control its disposition at their decease. To cause their real intentions and wishes to be so expressed, and their expression to be so preserved and manifested that they can be ascertained and carried into effect, are the chief purposes of legislation on the subject, and these purposes should be borne in mind in the interpretation of laws relating to wills. To induce a court to believe the legislature intended to make a law relating to wills retroactive upon a will then in existence, and cause it to pass after-acquired property without any evidence that the testator desired or believed that it should do so, and to fix a particular day after which it should so operate, the intention of the legislature should be expressed with irresistible clearness. *Carroll v. Carroll*, 16 How., 281.

§ 2730. While it is true that in private cases a court will and should struggle hard against a construction of a statute which will, by a retrospective operation, affect the rights of parties, yet in great national concerns, where individual rights acquired by war are sacrificed for national purposes, the statute making the sacrifice ought always to receive a construction conforming to its manifest import; and if the nation has given up vested rights of its citizens, the question of compensation is not for the courts. The court must decide according to existing laws; and if a judgment valid in law when rendered cannot be sustained but in violation of law, it must be set aside. *United States v. Schooner Peggy*, 1 Cr., 110.

§ 2731. A city charter giving the city the power "to prescribe the terms, etc., upon which free negroes and mulattoes may reside in the city," is prospective in its action. The word

"prescribe" is prospective, and the law applies only to persons coming into the city after the granting of the charter. *Costin v. Corporation of Washington*, 2 Cr. C. C., 257.

§ 2732. — as to pending actions.— A retrospective act is one which impairs vested rights or imposes new duties or disabilities in respect to transactions already passed. A law modifying the conditions on which a discharge shall be granted to a bankrupt is not retroactive, but applies to cases pending at the time of its enactment. *In re Griffiths*, 2 Low., 341.

§ 2733. The law of congress of February 28, 1839, which adopts a state law abolishing imprisonment for debt, takes immediate effect, and applies as well to pending as to future cases. It is a law relating to the remedy, and the legislature may alter such laws in their discretion, and, unless expressly provided, they operate on pending cases as well as those which may be commenced subsequently. *Gray v. Munroe*, 1 McL., 529.

§ 2734. A statute will not be so construed as to permit a plaintiff in ejectment to recover on the strength of a title acquired after a suit instituted, in contravention of the common law and the statute of the state, if it is possible otherwise to construe the statute. *McCool v. Smith*, 1 Black, 470.

§ 2735. A judgment is rendered in the territory of Wyoming on the 12th day of February, 1877, at which time there is a law in force that "no proceeding for reversing, vacating or modifying judgments or final orders shall be commenced unless within three years from the rendition of the order or making of the order." An act passed on December 15, 1877, limits the time of appeals to one year. It is decided that this latter act does not limit an appeal on the above judgment to one year from its rendition, and that it does not affect any judgments rendered prior to its passage. *Lee v. Cook*, * 1 Wyom. T'y, 413.

§ 2736. — statutes of limitation.— Though no court will give effect to a statute of limitations so as to bar claims by time elapsed before its passage, yet where a reasonable time must elapse after the enactment before the bar is complete, effect must be given to the statute. *Lewis v. Broadwell*, 3 McL., 569.

5. Construction of Statutes.

§ 2737. Positive provisions not to be restrained by implication.— In searching for the literal construction of an act, it would seem to be generally true that positive and explicit provisions, comprehending in terms a whole class of cases, are not to be restrained by applying to those cases an implication drawn from subsequent words, unless that implication be very clear, necessary and irresistible. *Faw v. Marsteller*, 2 Cr., 23.

§ 2738. Forced construction.— Courts should not, by a forced construction of existing statutes, attempt to remedy possible evils by anticipation. If evil consequences should be found to exist under existing laws, it is for the legislature to remedy them by its action. *O'Reilly v. Morse*, 15 How., 128.

§ 2739. To be confined to one act.— It is a dangerous and unnecessary proceeding on the part of courts to decide on a number of acts said to be *in pari materia*, when the question to be determined is upon the construction of only one. *United States v. Penelope*, 2 Pet. Adm., 438.

§ 2740. Latitude not allowed.— It is not for courts of justice to indulge in any latitude of construction where the words of a statute do not naturally justify it, and there is no express legislative intention to guide them. *Gardner v. Collins*, 2 Pet., 91.

§ 2741. Whether law is appropriate.— A law which accomplishes or tends to accomplish a purpose required by the constitution to be effected cannot be said, by a judicial tribunal, to be inappropriate. (Per BOND, C. J.) *United States v. Petersburg Judges of Election*, 1 Hughes, 501.

§ 2742. As to policy of laws.— A court cannot sit in judgment upon the wisdom or policy of a law. *United States v. Union Pac. R'y Co.*, 1 Otto, 91; *Jones v. Van Zandt*, 5 How., 231.

§ 2743. Immoral tendency of law.— The question of the immoral tendency of a law is a question for the legislature which passed it, and is not to be considered by a court before which it comes for construction and enforcement. *Brewer v. Blougher*, 14 Pet., 198; *Jones v. Van Zandt*, 5 How., 231.

§ 2744. Ignorance not imputed to legislature.— Neither want of knowledge, foresight nor absurdity ought to be imputed to the legislature in the construction of a statute, unless the language employed in the provision in question is such that the conclusion cannot be avoided without distorting the plain meaning. *Butler v. Russell*, 3 Cliff., 258.

§ 2745. How far consequences are to be considered.— Though it is true that consequences are to be considered in expounding laws where the intent is doubtful, yet this rule must be applied with caution. Where rights are infringed, where fundamental principles are overthrown, where the general system of the laws is departed from, the legislative intention must

be expressed with irresistible clearness to induce a court of justice to suppose a design to effect such objects. But where only a political regulation is made which is inconvenient, the intention of the legislature will be presumed to be such as the words, if they are reasonably intelligible, naturally import. *United States v. Fisher*, 2 Cr., 390.

§ 2746. **Question of hardship.**—In the construction of statutes courts are not at liberty to reject any words which are sensible in the place where they occur, merely because they may be thought, in some cases, to import a hardship, or tie up a beneficial right within very close limits. *Pennock v. Dialogue*, 2 Pet., 21.

§ 2747. Arguments founded upon the hardship resulting from a particular application of a statute are entitled to great weight if the statute in question is obscure and open to construction. But considerations of this nature can never sanction a construction at variance with the manifest meaning of the legislature expressed in clear and unambiguous language. *Evans v. Jordan*, 9 Cr., 203.

§ 2748. **Whether object of law has been accomplished.**—Though a particular object may have been in the contemplation of the legislature, a court is not bound to conclude that they have done what was intended, unless fit words be used for that purpose. *The Schooner Enterprise*, 1 Paine, 85.

§ 2749. **Courts can only declare what law is.**—In the construction of a statute a court can only declare what a statute is, and not what it ought to be. *Beatty v. United States*,* Dev., 158.

§ 2750. **Parts to be harmonized—Repugnant provisions.**—Courts should construe all statutes so as to give full effect to all the words in their ordinary sense, if this can be properly done, and thus preserve the harmony of all provisions. A construction which would create a positive repugnancy between two sections of a statute is improper if any other reasonable construction can be found. *Bend v. Hoyt*, 13 Pet., 270; *Ogden v. Strong*, 2 Paine, 584; *Allen v. Louisiana*, 13 Otto, 84.

§ 2751. It is proper to give effect to all the material words of a section of a statute, if they can be reconciled with or have an obvious reference to the words or enactment of another section; and whenever this can be consistently done, the courts will not presume that congress intended to qualify or restrain the only meaning which the words employed naturally and grammatically import. *United States v. Randolph*,* 1 Pittsb. R., 24; *Wheaton v. Peters*, 8 Pet., 661; *Strode v. The Stafford Justices*, 1 Marsh., 165; *Rice v. Minnesota & N. W. R. Co.*, 1 Black, 378; *Butler v. Russell*, 3 Cliff., 255; *Brown v. Barry*, 3 Dal., 367; *In re Oregon Bulletin Publishing, etc., Co.*,* 13 N. B. R., 205; *Perrine v. Chesapeake & Delaware Canal Co.*, 9 How., 187; *Beals v. Hale*, 4 How., 37; *McKay v. Campbell*, 2 Abb., 127.

§ 2752. A statute must be so construed, if possible, that, without doing violence to the language, force, meaning and effect may be given to every part of it. It seems that where two clauses are repugnant to each other, the latter clause should control, as being the later expression of the will of the law-makers. *In re Davis*, 3 Ben., 485; *Powers v. Barney*, 5 Blatch., 203.

§ 2753. Where a law requires two repugnant and incompatible things, it is incapable of receiving a literal construction, and must sustain some change of language to render it intelligible. This change, however, ought to be as small as possible, and with a view to the intention of the legislature as manifested by themselves. *Huidekoper v. Douglass*, 3 Cr., 66.

§ 2754. **Words taken in an opposite sense.**—The words of a statute may be taken in a sense at first seemingly contrary to their meaning, if that sense is the one really within the reason and spirit of the act, and is the only one which is consistent with the statute taken as a whole. *Heydenfeldt v. Daney Gold & Silver Mining Co.*, 3 Otto, 639; *United States v. Steamboat James Morrison, Newb.*, 243; *United States v. Freeman*, 3 How., 565; *United States v. Fisher*, 1 Wash., 4; *Ryan v. Carter*, 3 Otto, 84; *Butler v. Russell*, 3 Cliff., 255; *Brown v. Barry*, 3 Dal., 367.

§ 2755. — **unless the language is plain.**—Where the language of a law is explicit and involved in no obscurity, there is no room for construction, and hence no occasion to look beyond the letter of the law itself for its meaning and purpose. *Lands of Kansas Indians*,* 13 Op. Att'y Gen'l, 533; *Love v. Hinckley*, 1 Abb. Adm., 442; *Doe v. Considine*, 6 Wall., 458; *Beatty v. United States*,* Dev., 157; *United States v. Warner*, 4 McL., 468; *Binns v. Lawrence*, 12 How., 17; *Green v. Biddle*, 8 Wheat., 1 (§§ 1183-1201); *Denn v. Reid*, 10 Pet., 527; *Huidekoper v. Douglass*, 3 Cr., 70.

§ 2756. **All parts construed together.**—In construing a statute, all its provisions and all the objects and the entire intent of the statute must be considered. All the statutes on the same subject-matter are to be interpreted together. If, then, a clause is found in one section, which, in its general language and import, is equally as applicable to other sections and provisions of the same act as it is to the very section in which it is found; if the main objects of those sections, and the true intent and policy of the act, will be best promoted by reading

it as applicable to all those sections; and if public mischiefs equally within the scope of the statute would be thereby prevented, and upon a different construction those mischiefs would be left without redress, the clause ought to be so construed as to suppress the mischiefs and not promote them. *The Schooner Harriet*, 1 Story, 251; *Davis v. Leslie*, 1 Abb. Adm., 137.

§ 2757. It is the duty of a court in construing a written law, in doubtful cases, to compare all its parts in order to discover the intention of the legislature; and however broad some of its provisions may be, yet if, on such examination, it shall clearly appear that they are and were intended to be limited by other provisions of the same, or other acts on the same subject, it cannot be improper to restrain them accordingly. *The Sloop Elizabeth*, 1 Paine, 11; *Pennington v. Cox*, 2 Cr., 52.

§ 2758. Rules of common law to be applied.—In both civil and criminal cases the construction of statutes by the federal courts is to be governed by the rules of the common law. *Rice v. Minnesota & Northwestern R'y Co.*, 1 Black, 374.

§ 2759. Same provision must not be made to operate differently.—All laws must be equal in their operation, and any construction is improper which would make the same provisions operate differently. *McLean v. Lafayette Bank*, 3 McL., 612.

§ 2760. Single purpose.—If the several sections of an act can be reconciled with each other and with the single purpose of legislation, as indicated in the title, it will not be presumed that congress intended to embrace more than that purpose, although it may contain words susceptible of a different construction. *United States v. Randolph*,* 1 Pittsb. R., 24.

§ 2761. Implied meaning.—It seems that what is implied in a statute, and what was intended by the legislature, is as much within the statute as if it was plainly expressed. *United States v. Babbit*, 1 Black, 61; *United States v. Hodson*, 10 Wall., 395.

§ 2762. A condition will not be inserted in a legislative grant by implication, which is rendered nugatory and absurd by existing circumstances. *Green v. Litter*, 8 Cr., 248.

§ 2763. Statutes passed under constitution.—Statutes passed under the constitution are to be construed with it. *Durousseau v. United States*, 6 Cr., 318.

§ 2764. Must harmonize with treaties.—And all laws should be so construed as to harmonize with treaties of the United States. *The Chinese Merchant*, 7 Saw., 546.

§ 2765. Beyond the power of congress.—Though it is true that when one part of a statute is valid and constitutional, and another is unconstitutional and void, the court may enforce the valid part where they are distinctly separable so that each can stand alone, it is not within the judicial province to give to the words used by congress a narrower meaning than they are manifestly intended to bear, in order that crimes may be punished which are not described in language which brings them within the constitutional power of that body. So a law punishing the counterfeiting of trade-marks of any kind will not be held valid as to any class of trade-marks, though a law applying exclusively to such trade-marks as are within the commercial power of congress might be valid. *Trade-Mark Cases*, 10 Otto, 98.

§ 2766. Mistakes and omissions.—The fact that, in the passage of a law, the legislature were mistaken as to the existence of a particular right under then existing laws will not have the effect to create such a right unless the words of the statute clearly imply it. *Peck's Case*,* 10 Op. Att'y Gen'l, 54. Omissions in an act of congress cannot be supplied by the courts, because they cannot be supposed to exist. *United States v. Union Pac. R'y Co.*, 1 Otto, 85.

§ 2767. General words.—In the construction of statutes and of contracts, where general words of description follow particular ones, the general words are controlled and limited by the particular ones, so as to apply to subjects *ejusdem generis*. *United States v. Buffalo Park*, 16 Blatch., 190; *United States v. Weise*, 2 Wall. Jr., 72; *Seeley v. Koox*, 2 Woods, 368.

§ 2768. The rule that, in the construction of statutes, general words are to be restricted by particular words, is not arbitrary, but is one of many resorted to ascertaining the intention of the legislature, and is not to be applied in cases in which such intention would be defeated thereby. *United States v. Lawrence*, 13 Blatch., 212.

§ 2769. In order that the general words of a statute be controlled by subsequent restraining ones, the restraining words or clause must have evident relation to the whole subject-matter; otherwise they are to be understood as supplementary or exceptive to the main provisions. *United States v. Jackson*,* 10 N. Y. Leg. Obs., 451.

§ 2770. All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression or an absurd consequence. It will be presumed in such cases that the legislature intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over its language. And so it was held that the arrest of a mail-carrier for felony, on a bench warrant, was not an obstruction of the mails within the meaning of an act making it criminal to obstruct the mails. *United States v. Kirby*, 7 Wall., 483.

§ 2771. Where the words of an act are general, courts are not at liberty to insert limitations

not called for by the sense, the objects or the mischiefs of the enactment. *United States v. Coombs*, 12 Pet., 80.

§ 2772. **Meaning of words and phrases.**—In the construction of statutes, courts are to give the words their ordinary meaning; to presume that they were used by the legislature in their ordinary sense; neither to enlarge nor restrict unduly their signification, and if possible to give every word its full meaning, and when that is impossible, to give such construction as best to carry out the intention of the legislature as gathered from the whole act. *United States v. Milwaukee & St. Paul R'y Co.*, 5 Biss., 423; *The Fashion v. Ward*, 6 McL., 170; *Levy v. McCartee*, 6 Pet., 110; *United States v. Collier*, 3 Blatch., 332; *White v. How*, 3 McL., 114; *United States v. Souders*, 2 Abb., 460; *Maillard v. Lawrence*, 16 How., 261; *United States v. Clayton*, 2 Dill., 224; *United States v. Reese*, 5 Dill., 412; *Wigg v. United States*,* Dev., 157.

§ 2773. In the interpretation of statutes creating crimes, the courts must regard and even cling to the language which the legislature has used to express its purpose. Where the words are not technical, it is presumed that they were used in their ordinary, popular or general signification. It is to be taken that the legislature did not use the words, in which its commands are expressed, in any unusual sense. And hence an act of congress, providing for the punishment of any "officer of election" who shall "fraudulently make a false certificate of the result of any election in regard to a representative" in congress, does not include the governor of a state. *United States v. Clayton*,* 10 Am. L. Reg. (N. S.), 787.

§ 2774. Words in a statute, other than technical words, should be used in their ordinary sense. The words "white person," used in the naturalization laws of the United States, do not include a member of the Mongolian race, as none but members of the Caucasian race are white persons in ordinary speech. *In re Ah Yup*, 5 Saw., 155.

§ 2775. Mercantile terms used in a law are to be interpreted in the sense in which they were intended, rather than in the sense in which they are commonly used in mercantile transactions; and this intention may be made out from other portions of the same law, and from laws *in pari materia*. *United States v. Twenty-four Coils of Cordage*, Bald., 505; *Bacon v. Bancroft*, 1 Story, 341; *Arthur v. Morrison*, 6 Otto, 111; *Roosevelt v. Maxwell*, 3 Blatch., 898; *United States v. Eighty-five Hogsheads of Sugar*, 2 Paine, 59; *United States v. The Steamboat Forrester*, Newb., 94; *Elliott v. Swartwout*, 10 Pet., 151.

§ 2776. In laws relating to duties the testimony of dealers should be taken as to the meaning of commercial terms, rather than that of mechanics. *United States v. Sarchet*, Gilp., 284.

§ 2777. It will be presumed, where a special meaning is attached to certain words in a prior act, that congress intended they should have the same signification where used in a subsequent act relating to the same subject-matter. And hence where a statute exempted from duty "animals, living, of all kinds; birds, singing and other, and land and water fowls," and a subsequent act laid a duty on "all horses, mules, cattle, sheep, hogs and other live animals," the latter act was held not to include birds. *Reiche v. Smythe*, 13 Wall., 162.

§ 2778. Where the words of an act of congress are explicit, they must be held to comprehend every case not expressly excluded. *Young v. Bank of Alexandria*, 4 Cr., 397.

§ 2779. Words of the same import should be construed to mean the same, whether found in a bank charter, or in the general law. *M'Lean v. Lafayette Bank*, 3 McL., 611.

§ 2780. The meaning of a single word in a statute, when it is susceptible of different interpretations, must be determined from the context, the subject-matter of which the law-makers are speaking, and the provisions and language with which it is associated. *Perrine v. Chesapeake & Delaware Canal Co.*, 9 How., 190.

§ 2781. Terms and phrases employed in statutes must be understood in the sense intended by the law-makers, where that can be ascertained with reasonable certainty. *United States v. Irwin*, 5 McL., 183.

§ 2782. Where the words of a statute have acquired, through judicial interpretation, a well understood legislative meaning, it must be presumed that when they are used in a subsequent statute, they are used in the same sense, unless the contrary is in some way made to appear. The "*Abbotsford*," 8 Otto, 444.

§ 2783. The meaning of technical nautical phrases, used in statutes, is presumed to be known to courts sitting in admiralty, and no experts need be called in to interpret the law. "Going off large" is a nautical expression, and means having the wind free on either tack. *The Fashion v. Ward*, 6 McL., 170; *Ward v. Brig Fashion*, Newb., 23.

§ 2784. — "such."—As an ordinary rule "such" refers to the last antecedent. This rule of grammatical construction is, however, by no means, conclusive. Hardly any rule of grammatical construction is more frequently violated. A court must look to the context, consider the relation of the clause under construction to other parts of the section and to other sections connected with the subject, and consider also, if possible, the design and object of the clause, the conveniences or benefits it was intended to secure or confer, and the

evils, if any, which it was intended to prevent; and if, in view of all these considerations, it appears that the subject of "such" was not the antecedent immediately preceding, but a prior one, the court should so construe the law. *In re Lacey*, 12 Blatch., 336.

§ 2785. — "shall" and "may."—As against the government, the word "shall," when used in statutes, is to be construed as "may," unless a contrary intention is manifest. *Railroad Co. v. Hecht*, 5 Otto, 168 (§§ 1905, 1906).

§ 2786. It is not true that in all cases "may" must be construed as "shall." The principle adduced from the modern cases is, that that exposition ought to be adopted in this case as in other cases, which carries into effect the true intent and object of the legislature in the enactment; the ordinary meaning of the language must be presumed to be intended unless it would manifestly defeat the object of the provisions. *Apperson v. City of Memphis*, 2 Flip., 372; *Thompson v. Roe*, 22 How., 434.

§ 2787. The words "shall" and "will" as used in statutes have no fixed meaning, but the question is one of intendment. *Construction of Statutes*,* 8 Op. Att'y Gen'l, 114.

§ 2788. — "and" means "or," when.—Where a statute provides a punishment for any one who shall violate sections 1 and 2 of an act, it must be held that "and" means "or," for the intent of the legislature would not otherwise be carried out. *People v. Sweetser*,* 1 Dak. T'y, 313.

§ 2789. The disjunctive particle "or," in a penal statute between two enumerated causes for forfeiture, cannot be construed to mean *and*. *United States v. Ten Cases of Shawls*, 2 Paine, 166.

§ 2790. — "at" and "from."—The words "at" and "from," as used in a charter fixing the route of a canal, will not be construed to be exclusive of the places named, but will be held to mean and to apply to a point within the locality mentioned. *Chesapeake & Ohio Canal Co. v. Key*, 3 Cr. C. C., 603.

§ 2791. — "month."—Where a statute provided that an act shall be done in six months, it will be presumed that calendar months were intended. *Brudenell v. Vaux*, 2 Dal., 302; *Union Bank of Georgetown v. Forrest*, 3 Cr. C. C., 224.

§ 2792. — "year."—The word "year," as used in a statute providing that an officer should receive a certain percentage not exceeding a certain sum "for any one year," means an official year, and not a calendar year. *United States v. Dickson*, 15 Pet., 162.

§ 2793. — adding words.—A statute should be read so as to render its language effective, and if the insertion of the conjunction "and" in a criminal statute is necessary for that purpose, it should be considered as inserted. *United States v. Pelletreau*, 14 Blatch., 128.

§ 2794. — "persons."—Corporations are included in the term "persons" used in a statute, where the circumstances in which they are placed are identical with those of natural persons expressly included in such statutes. *Beaston v. Farmers' Bank of Delaware*, 12 Pet., 134.

§ 2795. — "blood."—The word "blood," as used in a statute of descent, when used without a qualifying word, includes "half blood" as well as "whole blood." *Gardner v. Collins*, 2 Pet., 87.

§ 2796. — "annually."—The word "annually" means every year. So where the charter of a corporation required its officers to make a certain report "annually" between the 1st and 20th days of January, it was held that a corporation organized in May would be obliged to make the required report in January following, even though they had not at that time been organized a year. *Union Iron Co. v. Pierce*, 4 Biss., 329.

§ 2797. — "wilfully."—The word "wilfully," as used in a penal statute, means with a wrong and criminal intent. *United States v. Three Railroad Cars*,* 7 Int. Rev. Rec., 189.

§ 2798. The word "wilfully," means not merely voluntarily, but with a bad purpose. *Felton v. United States*, 6 Otto, 702.

§ 2799. Where a statute provides a penalty for an act done "knowingly and wilfully," the penalty is not recoverable unless the act be done not only with knowledge, but with bad intent. *Ibid*.

§ 2800. — inhabitants.—An act relating to the granting of aid to a railway company by certain municipalities, provided that such aid should not be granted until a proposition had been submitted by the company to the inhabitants of the municipality and approved by them, and further provided for the submission of the question, on the application of ten voters, to an election, etc. *Held*, that the words "inhabitants" means voters, as used in the act. *Walnut v. Wade*, 13 Otto, 693.

§ 2801. — "came by descent, gift," etc.—In a statute of descent, the words "came by descent, gift or devise from the parent or other kindred of the intestate," etc., mean descent, gift or devise immediately from such parent or kindred and not mediately through others. *Gardner v. Collins*, 2 Pet., 89.

§ 2802. — transport.—The word "transport," as used in the act of July 6, 1812, which forbids any citizen of the United States to "transport or attempt to transport, over land or

otherwise, in any wagon, cart, sleigh, boat or otherwise, . . . any articles of provision from the United States into Canada," is held not to include the driving of fat oxen on foot into Canada, although such may be considered articles of provision. *United States v. Sheldon*, 2 Wheat., 119.

§ 2803. Words in a grant descriptive of the intention or use of the land are not to be construed as a condition precedent in the absence of anything showing an intention that they should be considered as such. *Ward v. New England Screw Co.*, 1 Cliff., 576.

§ 2804. Strict construction.—The supreme court of the United States will give a strict construction to legislative acts empowering counties to borrow money to aid corporations, but it will at the same time protect the holders of county obligations against unwarranted attempts to impeach their validity. *Moran v. Commissioners of Miami County*, 2 Black, 723.

§ 2805. Every statute derogatory to the rights of property, or that takes away the estate of a citizen, ought to be strictly construed. *Vanhorne v. Dorrance*, 2 Dal., 316; *United States v. Harris*, 1 Sumn., 21.

§ 2806. Where the language of an act readily admits of a construction in harmony with its purposes, the intention to give it another and different meaning, and one which is opposed to both the common and admiralty law, must be clearly made out, or it cannot be entertained by the courts. *Sherlock v. Alling*, 3 Otto, 108; *Shaw v. Railroad Co.*, 11 Otto, 565; *McCool v. Smith*, 1 Black, 470; *Ross v. Jones*, 22 Wall., 576; *Wick v. The Schooner Samuel Strong*, 6 McL., 592; *Brown v. Barry*, 3 Dal., 367.

§ 2807. A court cannot give an act a construction which would change the rules of evidence, without a clear expression of legislative intention. *The Schooner Abigail*, 3 Mason, 333.

§ 2808. The authority to take testimony by deposition, being in derogation of the rules of the common law, must be construed strictly, and it is necessary to establish that all the requisites of the law have been complied with, before such testimony is admissible. *Bell v. Morrison*, 1 Pet., 355.

§ 2809. A statute conferring limited jurisdiction upon a court is to be construed strictly as to the jurisdiction, and liberally as to proceedings under it. *Russell v. Wheeler*, Hemp., 5.

§ 2810. Where an act expressly provides that its provisions shall take effect on the 1st day of July next before the day of its approval, it will not be construed to retroact to any greater extent, there being nothing else in the act manifesting an intention that the act shall be retrospective. *Twenty Per Cent. Cases*, 20 Wall., 179.

§ 2811. Statutes restrictive of the rights of public officers to all the fees and emoluments of their office, generally allowed by law, limiting and cutting down their compensation to a fixed maximum, are to be interpreted so as to give effect to the restriction only so far as the legislature has positively spoken. *United States v. Bassett*, 2 Story, 389.

§ 2812. Statutes levying duties or taxes upon subjects or citizens are not to be extended by implication beyond the clear import of the language used, nor enlarged in their operation so as to embrace matters not specifically pointed out, although standing upon a close analogy. In every case of doubt such statutes are to be construed most strongly against the government and in favor of the citizen. *United States v. Wigglesworth*, 2 Story, 369.

§ 2813. In the construction of legislative grants, the rule is, that, if the meaning of the words be doubtful, they shall be taken most strongly against the grantee, and for the government, and therefore should not be extended, by implication, beyond their natural and obvious meaning; and if such construction does not support the right claimed, it must fall. In such a grant, nothing passes but what is granted in clear and express terms. *Minturn v. Larue*, McAl., 375; *Griffing v. Gibb*, McAl., 218; *Rice v. Minnesota, etc., R'y Co.*, 1 Black, 380; *Perrine v. Chesapeake & Delaware Canal Co.*, 9 How., 192; *Claim of Maryland*,* 9 Op. Att'y Gen'l, 59; *Peck's Case*, 10 id., 54; *Moran v. Commissioners of Miami Co.*, 2 Black, 723; *Mills v. St. Clair Co.*, 8 How., 583; *Ohio Life Ins. and Trust Co. v. Debolt*, 16 How., 416 (§§ 2254-65); *Newton v. Commissioners*, 10 Otto, 548 (§§ 1799-1804); *Holyoke Co. v. Lyman*, 15 Wall., 500 (§§ 2170-76); *Charles River Bridge v. Warren Bridge*, 11 Pet., 420 (§§ 2058-82); *Railway Co. v. Philadelphia*, 11 Otto, 528 (§§ 2266-72); *Wright v. Nagle*,* 11 Otto, 797; *Richmond R. Co. v. Louisa R. Co.*,* 13 How., 71; *Wilmington Railroad v. Reid*, 13 Wall., 264 (§§ 2303, 2304).

§ 2814. Private acts of congress are always to be strictly construed against the person for whose benefit they are enacted, and never forced beyond their plain import. Most especially are they to be so construed as to prevent the entrapping of the government by fixing upon it liability where the intention of congress was only to authorize an investigation and determination of the question of liability. *Roberts v. United States*,* 6 Ct. Cl., 89.

§ 2815. In order that the grant of a ferry privilege by legislative act be exclusive, the intention to make it so must be clearly expressed or necessarily inferred. *Fanning v. Gregoire*, 16 How., 533; *Charles River Bridge v. Warren Bridge*, 11 Pet., 420 (§§ 2059-82).

§ 2816. It is not to be presumed that congress intends to grant money, unless the grant is

so clearly expressed as to exclude, by force of the words, any other construction. *Peck's Case*,* 10 Op. Att'y Gen'l, 55.

§ 2817. State laws which give liens upon vessels for material and labor are *stricti juris*, and are to be strictly construed. *Calkin v. United States*,* 3 Ct. Cl., 303.

§ 2818. The word "laws," as used in the thirty-fourth section of the judiciary act, which provides that "the laws of the several states," etc., shall form the rules of decision in the trial of common law cases in the federal courts, is strictly limited to local statutes, and local usages of fixed and permanent operation, and does not embrace the decisions of local courts on points of commercial law. *Swift v. Tyson*, 16 Pet., 18.

§ 2819. An act permitting gaming should be strictly construed. Every reasonable doubt should be resolved so as to limit the powers and rights claimed under its authority. Implications and intendments should have no place except as they are inevitable from the language or the context. *Aicardi v. The State*,* 19 Wall., 685.

§ 2820. Liberal construction.—In construing a severe statute declaring heavy forfeitures, those who are called upon to conduct their business in view of all its provisions ought to be fairly apprised of its requirements and of its penalties. They are bound to know the law, but law-makers owe a duty to them of making it intelligible; and those whose business it is to construe or expound a law which is of doubtful or double meaning should not incline to the harshest possible meaning, when it is obvious that those to whom it is to be applied may have been led to trust in another, which is less severe, but equally satisfying in its terms. This is not saying that laws of the kind in question are to be strictly construed in favor of the citizen against the state, but only that they should be construed with reasonable fairness to the citizen. *United States v. 1412 Gallons of Distilled Spirits*, 10 Blatch., 433.

§ 2821. A law authorizing the redemption of lands sold for taxes ought to receive a liberal and benign construction in favor of those whose estates will otherwise be divested, especially where the time allowed is short, and ample indemnity is given to the purchaser, and a penalty is imposed on the owner. *Dubois v. Hepburn*, 10 Pet., 22.

§ 2822. Statutes authorizing redemption from tax sales are to be construed liberally in favor of the owners, especially when they provide full indemnity to the purchaser and impose a penalty upon the delinquent. *Corbett v. Nutt*, 10 Wall., 464.

§ 2823. The patent laws of the United States ought to be construed in the spirit in which they were made. *Grant v. Raymond*, 6 Pet., 342; *Blanchard v. Sprague*, 2 Story, 164; *Whitney v. Emmett*, Bald., 322.

§ 2824. Pension laws are beneficial in their nature, and are therefore to be construed beneficially in matters of inevitable doubt. *Aicardi v. United States*,* Dev., 159.

§ 2825. A remedial and beneficial statute will not be defeated by a construction which is strictly technical. The construction should be liberal in order to give effect to the remedy. *Davis v. Leslie*, 1 Abb. Adm., 189; *United States v. Rhodes*, 1 Abb., 86; *Parks v. Turner*, 12 How., 46.

§ 2826. Bankruptcy acts enacted by congress pursuant to the constitution are properly denominated remedial, and should therefore receive a generous and liberal interpretation; and this extends to the provisions conferring upon the courts jurisdiction to execute it as well as to other parts. *Goodall v. Tuttle*, 3 Biss., 241.

§ 2827. Laws creating laborers' liens are to be construed liberally in favor of the laborer. And so an act reading: "All persons performing labor for carrying on any mill shall have a lien on such mill for such work or labor done," is held to establish such a lien in favor of one hauling quartz for a quartz mill. *In re Hope Mining Co.*, 1 Saw., 710.

§ 2828. A statute having reference to public good should be liberally construed. *Beaston v. Farmers' Bank of Delaware*, 12 Pet., 184.

§ 2829. A statute giving priority to the United States in the case of an assignment by an insolvent debtor ought to receive a fair and reasonable interpretation, according to the just import of its terms; and the term "debts due" is to be construed as meaning "debts owing." *United States v. State Bank of North Carolina*, 6 Pet., 35.

§ 2830. Benevolent statutes of the government, made for the benefit of its own citizens, inviting and encouraging them to settle on its public lands, and passed for the purpose of rewarding, in a liberal manner, a meritorious class of persons who had taken possession of that country and held it for the government under circumstances of great danger, should be liberally construed in defining the class of persons, among those residing in the territory in those early days and partaking of the hardships which the acts were intended to reward, who are entitled to take lands under those acts. *Silver v. Ladd*, 7 Wall., 219.

§ 2831. Statutes enacted for the benefit of married women should be liberally construed. *Warford v. Noble*, 9 Biss., 324.

§ 2832. If a statute intended to confer a bounty contains ambiguous words, it is the duty

of the court to adopt that construction which will best effect the liberal intentions of the legislature. *Ross v. Bariland*, 1 Pet., 667.

§ 2833. A statute requiring a certain act to be done to entitle a person to an allowance of public money from the United States, being directory and not penal, does not require a strict interpretation, rigidly confined to what is so clearly expressed, as to admit of no doubt. It calls for such an interpretation as will guard the public treasury from fraud, so far as the language used, when fairly construed, is capable of accomplishing such purpose. *United States v. Nickerson*, 17 How., 209.

§ 2834. Statutes of frauds should be liberally construed for the suppression of frauds. *Bank of United States v. Lee*, 13 Pet., 118.

§ 2835. Intention of legislature.—All statutes must be construed so as to give them validity, force and effect, and to carry out the will of the legislature. *People v. Sweetser*,* 1 Dak. Ty., 811; *Ogden v. Strong*, 2 Paine, 584; *Binney v. Chesapeake & Ohio Canal Co.*, 8 Pet., 212; *United States v. Petersburg Judges of Election*, 1 Hughes, 504; *United States v. Souders*, 2 Abb., 460; *Wilkinson v. Leland*, 2 Pet., 661; *Brown v. Duchesne*, 19 How., 194; *United States v. Collier*, 3 Blatch., 382; *Bassett v. United States*,* 2 Ct. Cl., 449; *United States v. Athens Armory*, 2 Abb., 185.

§ 2836. Rules and maxims of interpretation are ordained as a means of discovering the true intent and meaning of the law-giver; but the primary rule is, that whenever the meaning which the makers of the statute entertained can be discovered by fit signs, it ought to be followed in its construction in a course consonant to reason and discretion. *Butler v. Russel*, 3 Cliff., 255.

§ 2837. The rules for construing statutes are the same in courts of equity as in courts of law. *Talbot v. Simpson*, Pet. C. C., 188.

§ 2838. Where the legislative intention can be derived only from the words used in the statute, courts cannot speculate beyond the reasonable import of these words. The spirit of the act must be extracted from the words of the act, and not from conjectures *altunde*. *Gardner v. Collins*, 2 Pet., 98.

§ 2839. The meaning of the legislature is to be ascertained from the language of the statute, and it is not to be supposed that they have used words without intending to convey any idea. *Wigg v. United States*,* Dev., 157; *Platt v. Union Pac. R. Co.*, 9 Otto, 58; *In re Dibble*, 3 Ben., 293.

§ 2840. Where an act is full, complete and evidently expresses the obvious intent of the legislature if certain words are omitted, and is senseless if the words are permitted to remain, such words must be treated as surplusage, and the act construed as if they were omitted. To suppose that the legislature, while intending to remedy an evil, should by express words render their act wholly ineffective, is to suppose the legislature to be guilty of folly, if not of fraud. *United States v. Stern*, 5 Blatch., 518.

§ 2841. In construing a statute it is the duty of the court to ascertain the meaning of the legislature from the words used in the statute, and the subject-matter to which it relates, and to restrain its operation within narrower limits than its words import, if the court are satisfied that the literal meaning of its language would extend to cases which the legislature never designed to embrace in it. *Brewer v. Blougher*, 14 Pet., 196.

§ 2842. It seems that where an act of congress is designed to introduce an important change amounting to a revolution in the law of evidence, it is not for courts to counteract the legislative will by distinctions at variance with the general scope of the new principles intended to be established. *Rison v. Cribbs*, 1 Dill., 185; *Wigg v. United States*,* Dev., 157.

§ 2843. In the construction of all statutes it is a general rule that courts are bound to expound them according to the intention of the framers. This intention is to be gathered, not from the examination of a single section merely, but from comparing together different sections of the same statute. When it is once ascertained that the legislature has created an offense, the extent to which it reaches is to be sought in the exposition of the mischiefs which it sought to remedy, and cases within the same mischief and the same intent have been frequently construed within the prohibitions, although not exactly within the letter. From the operation of this rule penal statutes do not seem always to be excepted. Though they are to be construed strictly, yet they are to be so construed as to meet the mischief which the legislature show a clear intention to suppress. *The Schooner Harmony*, 1 Gall., 137.

§ 2844. In arriving at the intention of the legislature in passing an act, we must place ourselves as far as possible in the light which the legislature enjoyed, look at things as they appeared to it, and discover its purpose from the language used in connection with the attending circumstances. *Platt v. Union Pac. R. Co.*, 9 Otto, 68.

§ 2845. The construction of charters conferring power to condemn land for public use

should be such as will best carry into effect the intent of the legislature. *Chesapeake & Ohio Canal Co. v. Key*, 3 Cr. C. C., 605.

§ 2846. A court is not at liberty to presume the intention of the legislature, and has nothing to do with the policy of the law. *Beatty v. United States*,* Dev., 157.

§ 2847. It seems that the intention of the legislature in enacting a law may be inferred from subsequent legislation of a similar character. *United States v. Mynderse*, 7 Blatch., 499.

§ 2848. **Constructions to be avoided — Act must be upheld.**— If a section of a law admits of two interpretations, one of which brings it within, and the other presses it beyond, the constitutional authority of congress, it will be the duty of the courts to adopt the former construction, because a presumption never ought to be indulged that congress meant to exercise or usurp any unconstitutional authority, unless that conclusion is forced upon the court by language altogether unambiguous. *United States v. Coombs*, 12 Pet., 76.

§ 2849. — **must not violate law of nations.**— An act of congress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country. *Murray v. Schooner Charming Betsey*, 2 Cr., 118.

§ 2850. — **forfeitures.**— Congress may denounce a forfeiture for the non-payment of taxes that will take effect *ipso jure*, but such forfeitures are not favored in law, and the courts will not give a statute such a construction unless the intention that it should have such effect is made clearly to appear. *Schenck v. Peay*, 1 Dill., 268.

§ 2851. — **security of property.**— Legislative acts ought never to be so construed as to subvert the rights of property, unless the intention so to do is expressed in such terms as to admit of no doubt, and to show a clear design to effect the object. General permission given by the legislature to enter lands within a given tract of country, must, of necessity, be limited to lands not previously occupied. No general terms intended for property, to which they may be fairly applicable, and not particularly applied by the legislature; no silent, implied and constructive repeals, ought ever to be so understood as to divest a vested right. *Rutherford v. Greene*, 2 Wheat., 196.

§ 2852. — **construction causing mischief.**— A construction which must necessarily occasion great public and private mischief must never be preferred to a construction which will occasion neither, or neither in so great degree, unless the terms of the instrument absolutely require such preference. *Griffin's Case*, Chase's Dec., 364 (§§ 1552-67).

§ 2853. — **causing inconvenience.**— That any given interpretation of the constitution will produce great injury and inconvenience is a reason for rejecting it, where any other reasonable construction can be given. *Latham v. United States*,* 1 Ct. Cl., 152.

§ 2854. — **prejudicial to public good.**— In interpreting a statute a court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute (or statutes on the same subject), and the objects and policy of the law, as indicated by its various provisions, and give it such a construction as will carry into execution the will of the legislature as thus ascertained, according to its true intent and meaning. Neither will the court, in expounding a statute, give to it a construction which would in any degree disarm the government of a power which has been confided to it to be used for the general good,— or which would enable individuals to embarrass it in the discharge of the high duties it owes to the community,— unless plain and express words indicate that such was the intention of the legislature; and this rule applies particularly to patent and copyright laws. *Brown v. Duchesne*, 19 How., 194.

§ 2855. — **leading to injustice.**— A construction will not be given to an act which would lead to manifest injustice, as the granting of a lot to one man because it had been improved by another, and which would also oppose the general legislation of congress on the subject. *Pollard v. Kibbe*, 14 Pet., 353; *Hepburn v. Griswold*, 8 Wall., 603; *United States v. Heth*, 3 Cr., 409.

§ 2856. — **opposed to public safety.**— An act of congress, prohibiting the stopping of the mails, ought not to be so construed as to shield a carrier from arrest for driving through a populous city at a rate of speed dangerous to the inhabitants. *United States v. Hart*, Pet. C. C., 390.

§ 2857. — **contrary to object of law.**— When a distinction is sought to be set up as to the application of the words of a statute which is not founded upon the considerations leading to the adoption of the statute, the language must be very clear before the distinction will be adopted by the court. *United States v. State Bank of North Carolina*, 6 Pet., 38.

§ 2858. — **where the law will bear two constructions.**— Where the words of a law will bear either of two constructions, that construction will be preferred which is most reasonable and consistent with the intention of the legislature, so far as it can be collected from the whole system. *United States v. Hall*, 2 Wash., 366.

§ 2859. — **In case of doubt.**—In doubtful cases it is a sound rule of construction that the words of a statute are to be expounded in favor of the citizen and against the legislature. *The Sloop Falmouth*, 1 Gall., 133.

§ 2860. Doubts as to the construction of a law permitting the contracting of municipal indebtedness, which has been acted on, should be resolved in favor of good faith. *Henderson v. Jackson County*, 2 McC., 621.

§ 2861. — **equitable.**—A statute shall never have an equitable construction in order to overthrow and divest an estate. *Vanhorne v. Dorrance*, 2 Dal., 316.

§ 2862. — **requiring introduction of new words.**—The court should give effect to all the words of a statute, if by a reasonable interpretation that can be done, and it involves no repugnancy to other provisions, and is not inconsistent with the apparent objects of the statute. But such an interpretation will not be adopted to give effect to particular words, which will require, on the part of the court, the introduction of new provisions and auxiliary clauses, which the statute neither points out nor hints at. *United States v. Bassett*, 2 Story, 389.

§ 2863. — **unjust or absurd conclusions.**—All laws should be so construed, if possible, as to avoid an unjust or an absurd conclusion; and hence an act of congress, prohibiting the master of any vessel from bringing into the United States from any foreign port any Chinese laborer, does not prohibit him from returning to the United States Chinese who shipped on board his vessel at San Francisco as part of the crew. *The Chinese Laborers*, 7 Saw., 542; *The Chinese Merchant*, 7 Saw., 546.

§ 2864. — **giving double penalty.**—A law is open to construction when its words, used in their broad and general sense, would give double penalties for the same offense, it being improbable that such was the intention of the legislature. *United States v. Hunter*, Pet. C. C., 10.

§ 2865. — **giving extraterritorial force.**—All statutes ought to receive a reasonable construction; and it cannot be presumed that the legislature authorizes any act to be done in a foreign territory when that act is beyond the reach of its proper jurisdiction or sovereignty. Hence, unless there is a plain clause authorizing the construction of a dam or a canal in another state, such authority cannot be implied from general language. *Farnum v. Blackstone Canal Corporation*, 1 Sumn., 46; *Bond v. Jay*, 7 Cr., 853.

§ 2866. — **acting on contracts with foreigners.**—Though every state has within its own sovereignty an authority to bind its citizens everywhere, so long as they continue their allegiance, and may, unless restrained by constitutional prohibitions, act upon contracts made between its own citizens in every country, and discharge them by general laws, such is not the operation of its jurisdiction upon contracts made by a citizen with a foreigner in a foreign country. If, in such case, the legislature by positive laws nullifies such a contract, it is certain that it cannot be enforced by the tribunals of the state, but elsewhere it retains all the validity originally possessed by it under the *lex loci contractus*. But if a statute be general, without direct application to foreign contracts, the rule is that its construction shall not be extended to foreign contracts. So an action on a contract, made in a foreign country, between a foreigner and a citizen of Rhode Island, is not barred by the bankrupt act of Rhode Island. *Van Reimsdyk v. Kane*, 1 Gall., 377; *Suydam v. Broadnax*, 14 Pet., 74.

§ 2867. **Policy of law, and mischief to be remedied.**—Where the language of an act is broad enough to include a given case, it is not to be excepted from the operation of the law, if it is within the policy of the act and the mischief to be remedied. *United States v. Bailey*, 9 Pet., 256.

§ 2868. It is fair to presume that a private act for the benefit of the city of Mobile, and certain individuals, was passed with reference to the particular claims of such individuals, and the situation of the land embraced within the law at the time it was passed. *Pollard v. Kibbe*, 14 Pet., 361.

§ 2869. If a section of a law admits of two interpretations, each of which is within the constitutional authority of congress, that ought to be adopted which best conforms to the terms and objects manifested in the enactment, and the mischiefs it was intended to remedy. *United States v. Coombs*, 12 Pet., 75.

§ 2870. Where a construction will not express the meaning of congress consistently with the received rules of interpretation, the court must ascertain the mischief, if any, which the act was designed to remedy, and endeavor to perceive its meaning by the light which that consideration will throw upon it. *Chase v. United States*,* Dev., 158; *D'Arcy v. Ketchum*, 11 How., 175.

§ 2871. The spirit and purpose of an act are not to be lost sight of in a strict adherence to its letter. *Felton v. United States*, 6 Otto, 702; *United States v. Souders*, 2 Abb., 460.

§ 2872. The spirit as well as the letter of a statute must be respected; and where the whole context of the law demonstrates a particular intent in the legislature to effect a certain object, some degree of implication may be called in to aid that intent. So where an act affirmatively

declares the appellate jurisdiction of a court in express terms, it must be implied that it was the intention of the act to except such cases as are embraced in the negative words. *Durousseau v. United States*, 6 Cr., 814.

§ 2873. A resort may be had to the general and settled policy of the government, as manifested by its legislation from time to time with reference to any particular subject, to explain an ambiguous or doubtful enactment on that subject. *United States v. Whidden*, 3 Ware, 272.

§ 2874. The supposed policy of the government to encourage manufactures, and therefore being against the imposing of duties upon raw material, is of very little weight in construing acts increasing duties on imports for the purpose of increasing the revenues of the country. What is termed the policy of the government with reference to any particular legislation is generally uncertain, and is a ground too unstable upon which to rest the judgment of the court in the interpretation of statutes. *Hadden v. The Collector*, 5 Wall., 107.

§ 2875. In construing legislative enactments the uniform policy of the legislature is to be kept in view when the question arises whether, in the absence of express words and obvious natural language, it is to be presumed to have departed from such policy. *Minturn v. Larue*, McAl., 881; *United States v. One Hundred Barrels*, 1 Dill., 49.

§ 2876. Purpose determined from effect.—In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect. *Henderson v. Mayor of New York*, 2 Otto, 259 (§§ 1336-42).

§ 2877. Reference to subject-matter.—The applicability of an act of congress is determined by the subject-matter of the act, and not by any assumed test of convenience. *Indians in Oregon*,* 7 Op. Att'y Gen'l, 294.

§ 2878. Long acquiescence.—The fact that a particular construction of an act has been acquiesced in for a long term of years without question is no unsatisfactory evidence that it is correct. *Miller v. McQuerry*, 5 McL., 432.

§ 2879. Construction by parties.—A practical construction of a law by parties acting under it will be followed by the courts if such construction appears safe and reasonable. *United States v. State Bank of North Carolina*, 6 Pet., 89.

§ 2880. Contemporaneous construction.—A construction placed on a statute at the time a contract relating to land is entered into determines the rights of the parties, though such construction may be subsequently doubted, and the land in question becomes part of another state. *Caldwell v. Carrington*, 9 Pet., 103.

§ 2881. In the construction of a doubtful and ambiguous law, the contemporaneous construction placed upon the law by those who were called upon to act under it, and were appointed to carry its provisions into effect, is entitled to great respect. *Edwards v. Darby*, 12 Wheat., 206.

§ 2882. The contemporaneous construction of a statute, corroborated by an undeviating course for thirty years, must govern the meaning of the statute; and it seems that this is true even though it was clearly unauthorized by the terms of the law. *United States v. The Ship Recorder*, 1 Blatch., 223; *Huidekoper v. Burrus*, 1 Wash., 109.

§ 2883. Reference to condition of things.—Statutory provisions, when doubtful, may be construed with reference to the condition of things upon which the act was intended to operate at the time of its passage, and in connection with the provisions of other statutes *in pari materia*. *Le Roy v. Chabolla*, 1 Saw., 456.

§ 2884. Inoperative law may show condition of things previously existing.—Though an act of congress regulating salvage in the case of a capture of a neutral vessel can have no effect as to a capture previously made, still it seems that it may be considered as showing the system in relation to such matters already adopted by congress. *Talbot v. Seeman*, 1 Cr., 34.

§ 2885. Circumstances considered in fixing pay of consuls.—The fact that Algeria belonged to a Mohammedan power until 1830, and at that date became one of the provinces of France; that our consuls in Mohammedan countries, as to their powers and duties, are very different from those in Christian countries; and that the acts of congress regulating the salaries of consuls in the Mohammedan countries, passed after Algeria became a province of France, did not mention Algiers, may be taken into consideration in construing the statutes fixing the pay of our consul at that place. *Mahoney v. United States*, 10 Wall., 62.

§ 2886. Reference to history of country.—In construing the act of November, 1777, of North Carolina, establishing offices for receiving entries of claims for lands in the several counties of the state, the court recurs to the history and situation of the country, and the prior legislation of that state respecting the manner of appropriating its vacant lands, and finding a uniform intention manifested to prohibit entries from being made on land included within the Indian boundaries, holds that this act did not authorize entries within those boundaries. *Preston v. Browder*, 1 Wheat., 115.

§ 2887. An act of congress expresses its will, and this is to be ascertained from the lan-

guage used; but courts, in construing a statute, may, with propriety, recur to the history of the times when it was passed; and this is frequently necessary in order to ascertain the reason as well as the meaning of particular provisions in it. The views of individual members as expressed in debate, and the motives which led them to vote for the bill, cannot, however, be inquired into. *United States v. Union Pacific R'y Co.*, 1 Otto, 79.

§ 2888. *Inquiry of members of legislature as to meaning.*—The meaning of a statute is to be ascertained from the language used, and not by inquiring of the individual members of the legislature what they intended by enacting the law. If the natural import of the law is different from the effect intended to be given to it by those who voted for it, the only safe rule is to take the act as it stands as conveying the intention of the legislature. *Nicholson v. United States*, * Dev., 158; *Claim of State of Maryland*, * 9 Op. Att'y Gen'l, 58; *Aldridge v. Williams*, 8 How., 24.

§ 2889. The legislative department speaks only through the statute book, and must be interpreted *ex visceribus suis*. It is true that the opinion of senators and representatives is entitled to respect as some authority for the meaning of words actually used in the enactment. In making the law the legislature is supreme, but in giving it a construction the opinions of its members are entitled only to that deference which we pay to other persons whose learning and ability give them an equal claim on our confidence, and the words of the law itself must be looked to as furnishing the real elements of a judgment upon it. *Accounts of Public Printers*, * 9 Op. Att'y Gen'l, 438.

§ 2890. Though the opinion of individual legislators cannot be received to alter the text or control the interpretation of an act of congress, yet where a bill has been carefully considered and revised by a conference committee of congress, it seems that their opinions, carefully and deliberately expressed, when they accord with the plain text of the act, may show very conclusively that congress was not mistaken as to the legal effect of the language of the act, and did not intend that it should receive an interpretation different from the one plainly expressed. *Harrison v. Hadley*, 2 Dill., 240.

§ 2891. *Reference to what was said and done.*—Where the words used in a statute do not clearly disclose the intention of the law-maker, it is proper to consider what was done and said by the law-making power while the subject was under discussion, in order to arrive at their meaning. *United States v. Souders*, 2 Abb., 456.

§ 2892. The statements of supervisors in debate on the passage of an ordinance cannot be resorted to for the purpose of explaining the meaning of the terms used; but they may be resorted to for the purpose of ascertaining the general object of the legislation proposed, and the mischiefs sought to be remedied. *Ah Kow v. Nunan*, * 5 Saw., 552.

§ 2893. What passes in congress upon the discussion of a bill cannot become a matter of strict judicial inquiry in construing the statute. And little reliance ought to be placed in such sources of interpretation. *Mitchell v. Great Works Milling and Manuf'g Co.*, 2 Story, 648.

§ 2894. *Extraneous, to explain charter.*—Whether, in a given case, the court may resort to extraneous evidence of the meaning of a charter will depend upon the question whether, after applying the proper rule of construction to the words of the charter itself, they shall remain obscure or ambiguous in relation to the point in dispute. *Chesapeake & Ohio Canal Co. v. Key*, 3 Cr. C. C., 604.

§ 2895. *Proviso.*—A proviso, although repealed, may be resorted to in interpreting a section of the act still in force. The effect of the repeal of a proviso is to leave the body of the act in full force and operation without any such qualification as was imposed by the proviso. *Bank for Savings v. The Collector*, 8 Wall., 495.

§ 2896. Where a revenue statute provided that there should be levied and collected a tax of five per centum on all dividends thereafter declared due, whenever the same should be payable to stockholders or parties whatsoever, as part of the gains, earnings or income of any bank, trust company, savings institution, etc., and on all *undistributed sum or sums made and added during the year to their surplus or contingent funds*; with the proviso, among other things, that the annual or semi-annual interest allowed or paid to depositors in savings institutions should not be considered as dividends, it was held that the proviso did not exempt from taxation the *undistributed sums or surplus funds* of savings institutions. If such had been the intention of congress, savings institutions might have been left out of the act altogether. The fact that the proviso mentioned one class of sums and not the other is evidence of the intention of congress not to except the sums not mentioned in the proviso. *Savings Bank v. United States*, 19 Wall., 227.

§ 2897. *Preamble.*—It is a rule in the construction of a statute that recourse may be had to the preamble, though it is in strictness no part of it, as one element for opening and expounding the meaning and intent of the legislature, though it cannot control the enacting part of the law, when the words are clear and explicit and are manifestly more com-

prehensive than the preamble. But when the words of the enacting part are ambiguous, or may fairly admit a larger or a more restricted meaning, then reference may be made to the preamble to determine what sense was intended by the legislature. The reason is that the preamble states the grounds and objects of the law. And when the reasons and grounds of the law are made known in any other manner equally certain and authentic, they are entitled to have the same influence in the construction of a statute as the preamble, if the meaning of the words is doubtful, because every law ought to be carried into effect according to the intention of the law-maker, when the intention can be certainly known. *United States v. Webster*, Dav., 45; *Copeland v. Memphis & Charleston R. Co.*, 3 Woods, 651; *United States v. Robeson*, 9 Pet., 819.

§ 2898. An act of a state legislature provided that aliens "who shall have actually resided" in the state for two years may hold lands the same as citizens. *Held*, that the act applied to a future as well as a past residence, and that in view of the policy of the act as recited in the preamble, viz., to enable aliens to acquire and hold lands, such construction was proper. *Beard v. Rowan*, 1 McL., 141.

§ 2899. Journals.—Where a statute is badly worded, and is apparently contradictory in its terms, a reference may be had to the journals of congress, showing the various amendments made to the bill as originally proposed, in order to ascertain the intention of congress in passing the act. *Blake v. National Banks*, 23 Wall., 307.

§ 2900. Public opinion.—While it is true that in modern civilization the public opinion of the world is not to be despised, it is no more the law of nations than is popular opinion at home the municipal law. Public opinion, ever shifting, cannot be substituted by courts for constitutions and statute books. *United States v. One Hundred Barrels of Cement*,* 3 Am. L. Reg. (N. S.), 748.

§ 2901. It is only when a statute is ambiguous in its language, or may have reference to facts or conclusions dependent upon usage, that the influence of opinion, or the proof of established usage, may be properly resorted to as fixing the just interpretation of the law. *Binns v. Lawrence*, 12 How., 18.

§ 2902. Reference to usage.—A general statute may be expounded, when its words are doubtful, by reference to any general usage with reference to which the law may be supposed to have been enacted. Though it seems that a general law cannot be explained by reference to the usage of some particular place, yet an act which has reference only to some particular business or locality may be explained by the usage of that particular business or locality. *Love v. Hinckley*, 1 Abb. Adm., 440.

§ 2903. A custom in respect to renewal of a license of a vessel cannot change a plain enactment of congress on the subject. *United States v. The Steamboat Forrester*, Newb., 94.

§ 2904. Usage under a statute cannot alter the law, but is evidence of the construction given to it, and must be considered as binding as to past transactions. *United States v. Macdaniel*, 7 Pet., 15.

§ 2905. Legislative action is to be presumed to have been taken in view of known and established usage. *United States v. Bailey*, 9 Pet., 256.

§ 2906. Reference to title of act.—The title of an act, though a part of it, is only a formal part. It cannot be used to restrain or to extend the positive provisions in the body of the act. And it is of little weight in explaining doubts as to the meaning of the several provisions. *Hadden v. The Collector*, 5 Wall., 107.

§ 2907. It is seldom that the title to an act of congress can be resorted to as an aid to construction, for it is often the case that incongruous provisions are embodied in a single act, which have no relation to its title. *United States v. Distillery No. 28*, 6 Biss., 486.

§ 2908. The title of a statute is more worthy of consideration, when the legislature passes on the whole statute title, preamble, if any, and the body of the statute. *Copeland v. Memphis & Charleston R. Co.*, 3 Woods, 651.

§ 2909. The title of an act, taken in connection with the other parts, may assist in removing ambiguities, but it cannot affect the construction of provisions to whose subject-matter it does not refer. *United States v. McArdle*, 2 Saw., 367; *Ogden v. Strong*, 2 Paine, 584; *United States v. Randolph*,* 1 Pittsb. R., 24.

§ 2910. Punctuation, how far to be considered.—Though the punctuation of a statute, as printed, affords no very decisive means of ascertaining its construction, yet, so far as it affects the question, such punctuation may be taken as an indication of the application of words cut off by punctuation marks. *United States v. Three Railroad Cars*, 1 Abb., 210.

§ 2911. Punctuation is a most fallible standard by which to interpret a writing. It may be resorted to when all other means fail, but the court will first take the instrument by its four corners in order to ascertain its true meaning, and if that is apparent on judicially inspecting the whole, the punctuation will not be suffered to change it. *Ewing v. Burnet*, 11 Pet., 54.

§ 2912. In construing a statute, not much stress should be laid upon punctuation. *Black v. Scott*, 2 Marsh., 331.

§ 2913. In a criminal statute, where much is to be allowed in favor of liberty, it is unsafe to rely on a mere matter of punctuation. *United States v. Voorhees*, * 9 Fed. R., 144.

§ 2914. The laws of a state relating to the powers of judges in vacation provided that a judge should have power "to hear and determine motions, to dissolve injunctions, to stay or quash executions," etc. *Held*, that the statute should be construed as if the comma was omitted after the word "motions." *Hammock v. Loan and Trust Co.*, 15 Otto, 83.

§ 2915. By departments.—The construction given to an act of congress by the navy department, and the long and uninterrupted practice of that department conforming to that construction, must be considered and respected by the court. Yet this cannot be allowed to alter the law, nor control its construction in a court of justice. *Goldsborough v. United States*, Taney, 80.

§ 2916. Though the orders, as well as the opinions, of the head of the treasury department, expressed in letters and circulars, as to the proper construction of revenue laws, are entitled to much respect, and will always be duly weighed by the courts, yet it is the laws themselves, rather than his opinion of them, which are to govern; and importers, in case of doubt, are entitled to have their rights settled by the judicial exposition of those laws, rather than by the views of the department. *Greely v. Thompson*, 10 How., 234; *United States v. Dickson*, 15 Pet., 161; *Peabody v. Stark*, 16 Wall., 240.

§ 2917. Where a statute granting pensions has received a settled construction by the commissioner of pensions, and several subsequent acts of congress manifest the intention of that body to adopt the departmental construction, the courts will not interpret the statute differently. *United States v. Alexander*, 12 Wall., 177.

§ 2918. Whenever an act of congress has, by actual decision, or by continued usage and practice, received a construction by the proper department, and that construction has been acted upon for a succession of years, it must be a strong and palpable case of error and injustice that would justify a change in the interpretation to be given to it. *Rations of Navy Commissioners*, * 2 Op. Att'y Gen'l, 558; *Peck's Case*, * 10 Op. Att'y Gen'l, 55.

§ 2919. No erroneous construction of an act by the disbursing officers of the government, no matter of how long standing, will justify the allowance of a claim against the government, which it contests by suit. *United States v. Freeman*, 3 How., 564.

§ 2920. The construction placed by the officers of the treasury department upon a series of statutes regulating the pay of officers and soldiers in the army, when continued for many years, is worthy of consideration by the courts in construing such statutes. But where congress has declared the departmental construction unauthorized, and that the act last passed increasing the pay of the soldiers shall not receive such construction, a future act making further increase in the pay of soldiers, and silent as to the construction by the treasury department, will be construed according to the intention of congress as expressed in the former act. *United States v. Gilmore*, 8 Wall., 330.

§ 2921. Penal laws are strictly construed. Nothing can be taken by implication. *United States v. Reese*, 2 Otto, 214 (§§ 1568-86).

§ 2922. The rule that a penal act must be construed strictly means nothing more than that it shall not, by what may be thought its spirit or equity, be extended to offenses other than those which are specially and clearly described and provided for. It should be a principle of every criminal code that no person be adjudged guilty of an offense unless it be created and promulgated in terms which leave no reasonable doubt of their meaning. When the sense of a penal statute is obvious, consequences are to be disregarded, but if doubtful they are to have their weight in its interpretation. *The Schooner Enterprise*, 1 Paine, 33.

§ 2923. Words which would declare a forfeiture cannot be inserted in a penal statute by the courts, though it may appear probable that words declaring such forfeiture were omitted by mistake. *United States v. Ten Cases of Shawls*, 2 Paine, 165.

§ 2924. In construing penal statutes, cases within the like mischief are not to be drawn within a clause imposing a prohibition or a forfeiture, unless the words clearly comprehend the case. *The Schooner Harriet*, 1 Story, 251; *Stimpson v. Pond*, 2 Curt., 504; *United States v. Reese*, 5 Dill., 412; *United States v. Souders*, 2 Abb., 460; *The Propeller Sun*, 1 Biss., 376; *The Rovena*, 1 Ware, 313; *United States v. Buchanan*, 4 Hughes, 488; *Seely v. Koox*, 2 Woods, 368; *Ferrett v. Atwill*, 1 Blatch., 156; *United States v. Beaty*, Hemp., 496; *French v. Foley*, 11 Fed. R., 804; *Andrews v. United States*, 2 Story, 202; *United States v. Morris*, 14 Pet., 475; *United States v. Morris*, 2 Bond, 28.

§ 2925. By no just construction can the penalties of a law be incurred, where no prohibited act has been done, and no enjoined act omitted. The penal provisions of a law cannot be made broader than the directory or prohibitory one. *United States v. Twenty-four Coils of Cordage*, Bald., 508.

§ 2926. The maxim that penal laws are to be construed strictly is subject to the modification that the intention of the legislature must govern in the construction of penal statutes. The maxim is not to be so applied as to narrow the words of the statute, to the exclusion of cases which those words, in their ordinary acceptation, or in that sense in which the legislature has obviously used them, would comprehend. Where there is no ambiguity in words, there is no room for construction. *United States v. Wiltberger*, 5 Wheat. 76; *The People v. Sweetser*,* 1 Dak. T'y, 314; *American Fur Co. v. United States*, 2 Pet., 367; *United States v. Buchanan*, 4 Hughes, 483; S. C., 9 Fed. R., 689; *United States v. Wilson, Bald.*, 101; *The Schooner Industry*, 1 Gall., 117; *United States v. Hartwell*, 6 Wall., 385.

§ 2927. In the construction of penal statutes, if the case of the accused is clearly within the letter of a statute in his favor, the court will not, as a rule, take his case out of it upon the ground that it is not within the spirit and intent of the act. In order for the court to make such a construction the case must be free from all doubt, for where there is no ambiguity there is no room for construction. *United States v. Ragsdale, Hemp.*, 501.

§ 2928. It is not a principle in the construction of penal laws, that a case which is within the reason or mischief of a statute is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated. *United States v. Wiltberger*, 5 Wheat., 76.

§ 2929. A statute which renders certain officers of a corporation personally liable for debts of the corporation, in case they shall fail to make certain returns as to the condition of the affairs of the corporation, is a penal statute, and should be strictly construed. *Steam Engine Company v. Hubbard*, 11 Otto, 191.

§ 2930. A statute which provides that stockholders in a corporation shall be liable to the creditors of the corporation to the amount of their stock subscription till it is all paid in is not a penal statute in the sense that it cannot be enforced except in the courts of the state which enacts it. *Cuykendall v. Miles*, 10 Fed. R., 344.

§ 2931. The Civil Rights Act of March 1, 1875 (18 Statutes at Large, pt. 3, 336), is a penal statute, exercising a control over the business of the country which is *quasi* public, and must be construed strictly. *United States v. Taylor*, 9 Biss., 474. *Contra*, *United States v. Rhodes*, 1 Abb., 252.

§ 2932. Although penal statutes are not to be enlarged by implication, or extended to cases not obviously within their meaning and purport, yet where a word is used in such a statute which has various known significations, there is no rule requiring the court to adopt the most restricted sense, if the objects of the statute equally apply to the largest and broadest sense of the word. And so where a statute made it criminal for any master or other officer to maliciously wound, beat or imprison any one or more of the "crew" of the vessel, the word "crew" was held to include the officers as well as the common seamen, and the master was liable for imprisonment of the first mate. *United States v. Winn*, 3 Sumn., 269.

§ 2933. In the construction and execution of penal laws courts will supply those exceptions or qualifications which are presumed to be within the contemplation of the legislature as always accompanying such enactments. *The Waterloo, Bl. & How.*, 118.

§ 2934. Where two separate sections of an act prescribe different penalties for the same offense they must be considered to be cumulative, unless such effect can be avoided by express or constructive exceptions. *The Schooner Industry*, 1 Gall., 116.

§ 2935. An act imposing a penalty of not less than \$100 does not authorize the imposition of a penalty of more than that sum. If it could be held to do so, it would probably be unconstitutional. *Stimpson v. Pond*, 2 Curt., 504.

§ 2936. Revenue laws.—Penalties annexed to violations of general revenue laws do not make such laws penal in the sense that they are to be construed strictly. Nor, on the other hand, are they to be construed with excess of liberality. *United States v. One Hundred Barrels*, 1 Dill., 49; *United States v. Hodson*, 10 Wall., 395; *United States v. 129 Packages*, 11 Am. L. Reg., 419; *United States v. Olney*, 1 Abb., 283; S. C., *Deady*, 487; *Twenty-eight Cases*, 2 Ben., 66; S. C., 7 Int. Rev. Rec., 4; *United States v. Mynderse*, 7 Blatch., 499; *United States v. Twenty-five Cases of Cloths*, *Crabbe*, 376; *United States v. 36 Barrels of High-wines*, 7 Blatch., 459; *United States v. Willets*, 5 Ben., 227; *United States v. 3 Tons of Coal*, 6 Biss., 393; *United States v. 28 Casks of Wine*, 7 Int. Rev. Rec., 14; *Taylor v. United States*, 3 How., 210; *Rankin v. Hoyt*, 4 How., 332; *Cliquot's Champagne*, 3 Wall., 114.

§ 2937. Revenue and duty acts are to be construed according to the true import and meaning of their terms, not strictly as penal statutes, nor liberally as remedial statutes, and those in furtherance of private rights and liberty. The names of articles used in a revenue or duty act are to be interpreted, not according to the abstract propriety of language, but according to the known usage of trade and business at home and abroad. If an article has one appellation abroad and another at home with the community at large, who are buyers and sellers, our laws are to be interpreted according to the domestic sense. But where the foreign name

is well known here, and no different appellation exists in domestic use, we must presume that, in a commercial law, the legislature used the word in the foreign sense. *United States v. Breed*, 1 Sumn., 159.

§ 2938. Penalties annexed to violations of general revenue laws do not make such laws penal in the sense which requires them to be construed strictly. Nor, on the other hand, are they to be construed with an excess of liberality; but it is the duty of the court to study the whole statute, its policy, its spirit, its purpose, its language, and giving to the words used their obvious and natural import, to read the act, with these aids, in such a way as will best effectuate the intention of the legislature. Legislative intention is the true guide to true judicial interpretation. *United States v. One Hundred Barrels of Spirits*, 2 Abb., 814; S. C., 1 Dill., 757.

§ 2939. The internal revenue act should be construed reasonably and fairly. It should not be made a trap to deceive or catch the innocent and well-intentioned who endeavor to render full obedience to the law. Neither is it to be construed strictly in such sense that, by any possible construction, it may furnish a chance of escape and a means of evasion to a guilty party, who is engaged in endeavoring to defraud with the intent and design which constitutes the ground of forfeiture. Such statutes should be construed so as most effectually to accomplish the intent of the legislature in passing them. *United States v. Thirty-six Barrels of Highwines*,* 13 Int. Rev. Rec., 40.

§ 2940. Where, in a revenue law, the provisions in relation to the compensation of the collector are obscure, the interpretation most favorable to him should be adopted. *United States v. Collier*, 3 Blatch., 838.

§ 2941. Laws imposing duties are never construed beyond the natural import of their language; and duties are never imposed upon citizens upon doubtful interpretations. *Adams v. Bancroft*, 3 Sumn., 384; *United States v. Ullman*, 4 Ben., 553; *Powers v. Barney*, 5 Blatch., 203.

§ 2942. It is a settled rule in construing statutes imposing duties, that articles grouped together are deemed to be of a kindred nature, and of kindred materials, unless there is something in the context to repel the inference. *Adams v. Bancroft*, 3 Sumn., 384.

§ 2943. *In pari materia*.—Acts *in pari materia* are to be construed together as forming one act. If, in a subsequent clause of the same act, provisions are introduced which show the sense in which the legislature employed doubtful phrases previously used, that sense is to be adopted in construing those phrases. So if a legislative act on the same subject affords complete demonstration of the legislative sense of its own language, the above rule, that the subsequent should be incorporated into the foregoing act, is a direction to courts in expounding the law. *Alexander v. Mayor*, etc., of Alexandria, 5 Cr., 7; *Dubois v. McLean*, 4 McL., 488; *United States v. Babbitt*, 1 Black, 60; *Butler v. Russell*, 3 Cliff., 255; *Brown v. Barry*, 8 Dal., 367; *Le Roy v. Chabolla*, 2 Abb., 452; *Forman v. Peaslee*,* 21 Law Rep., 279; *McLaughlin v. Hoover*,* 1 Or., 33; *Winter v. Norton*,* 1 Or., 44; *Johnston v. Van Dyke*, 6 McL., 424; *United States v. Walker*, 22 How., 312; *United States v. Hewes*, Crabbe, 318; *Pargaud v. United States*,* 4 Ct. Cl., 348; *Pollard v. Kibbe*, 14 Pet., 366; *United States v. Freeman*, 3 How., 564; *Milne v. Huber*,* 3 McL., 212; *Gordon v. South Fork Canal Co.*, McAL., 518 (§§ 1644-49).

§ 2944. It seems that all the revenue acts of the United States may be considered *in pari materia*, as forming one connected system, and consequently to be compared together, when any one is construed. *Pennington v. Cox*, 2 Cr., 58.

§ 2945. Laws upon the subject of the public lands are *in pari materia* and are all to be construed together; an authority to an individual to make an entry of any of those lands is not to be considered as an isolated act, to be strictly expounded upon its own letter, but as having relation to the general system, and to be expounded according to the meaning of congress, which is to be collected from the language of the particular law as compared with the whole system, and from the reason and nature of the case. Act for Relief, etc.,* 2 Op. Att'y Gen'l, 46.

§ 2946. Criminal statutes.—Criminal statutes are not to be extended by construction to cases not fairly embraced within their terms. The intent of the legislature is to be found, if possible, in the act itself. The courts cannot create offenses; but if, by a latitudinarian construction, they construe cases not provided for to be within the statute, the safety and liberty of the citizen are put in peril, and the legislative domain is invaded. An enactment is not to be frittered away in metaphysical niceties or by forced constructions; but before a man can be punished, his case must be plainly and unmistakably shown to be within the statute; and if there is any fair doubt whether the statute embraces it, that doubt is to be resolved in favor of the accused. *United States v. Clayton*, 2 Dill., 225; *United States v. Reese*, 5 Dill., 418.

§ 2947. Government contracts.—In interpreting contracts between a state and the United States contained in statutes, the relation of the contracting parties and the objects they had in view must be considered, and the strict and technical rules which would prevail among private individuals should be disregarded. *Searight v. Stokes*, 8 How., 167.

§ 2949. Where a contract is created by statute between the government and an individual, it is to be construed according to the rules for the construction of statutes and not of contracts. In such cases it is the intent of the law-makers only, which is to be sought and considered by the courts. And this rule cannot be affected by the considerations leading to the contract on the part of the government. *Union Pac. R'y v. United States*,* 7 Ct. Cl., 577.

§ 2949. A contract contained in a statute, though a state is a party, is to be construed according to the general rules for the construction of contracts. *Huidekoper v. Douglass*, 3 Cr., 70.

§ 2950. If a claim be alleged to be founded upon any law of congress, the court will construe such law and ascertain its meaning by applying to it those rules which a wise and long continued experience has determined to be best adapted to that purpose. *Todd v. United States*,* Dev., 44.

§ 2951. Revised Statutes.—While, in the construction of the Revised Statutes of the United States, the presumption is against an intention to change the law, yet where the language used in the revision cannot possibly bear the same construction as the revised and repealed act, full effect must be given to the new enactment. *The Bark Brothers*, 10 Ben., 402.

§ 2952. In a case of doubt as to the meaning of any clause of the Revised Statutes, resort may be had to the law which was the subject of revision to resolve such doubt. When the meaning is plain, the courts cannot look to the statutes which have been revised to see if the legislature erred in that revision, but may do so when necessary to construe doubtful language used in expressing the meaning of the legislature. *United States v. Bowen*, 10 Otto, 513; *Roosevelt v. Maxwell*, 3 Blatch., 395.

§ 2953. The Revised Statutes of the United States of 1874 purporting to amend and supplement the act of 1867, a statute passed subsequent to the enactment of the revision, which refers to certain sections of the act of 1867, must be construed as referring to the corresponding sections in the Revised Statutes, and as supplementing them. *In re Oregon Bulletin Printing, etc., Co.*,* 14 N. B. R., 419.

§ 2954. Statutes re-enacted.—Where a statute has been re-enacted it must be presumed that it was re-enacted with the known and settled construction given to it while formerly in force. Such construction, if clear and well settled, is absolutely binding on the courts when called upon to construe the re-enacted statute. Such construction has not only the weight of the authority of the court which pronounced it to sustain it, but, in addition thereto, it is presumed that such construction was approved and sanctioned by the legislature. *Goodall v. Tuttle*, 8 Biss., 229; *United States v. Tilden*, 10 Ben., 173; *Johnson v. Tompkins*, Bald., 582.

§ 2955. Although it is a general rule that where a judicial construction has been placed upon a statute, the re-enactment of the statute is held to be in effect a legislative adoption of that construction, the construction placed upon a revenue law by the commissioners of internal revenue is not to be considered as adopted by congress in re-enacting that law in substantially the same language as it originally contained. *Savings Bank v. United States*, 19 Wall., 227.

§ 2956. Foreign laws — Adoption.—The settled construction of British statutes at the time of their adoption in this country may be considered as accompanying the statutes and forming an integral part of them. Subsequent decisions of British courts upon such statutes, though entitled to considerable weight, are not to be taken as absolute authority, and American courts will not follow the fluctuations of such decisions. *Cathcart v. Robinson*, 5 Pet., 280.

§ 2957. Where a foreign statute is adopted, it is reasonable to suppose that the settled construction which such statute has received is likewise adopted. *Kirkpatrick v. Gibson*, 2 Marsh., 391.

§ 2958. An English statute was re-enacted in Maryland simply by reference to its title. The act of re-enactment provided every clause and thing should be in force. The act in terms forbade certain acts in England and Wales. It was contended that the statute as re-enacted applied only to England and Wales, but the court held that the intention of the legislature, that the act should apply to Maryland to the same extent as it did in England and Wales, should be carried out and effectuated. *United States v. Jennege*, 4 Cr. C. C., 120.

§ 2959. Limitations.—Statutes of limitation for the recovery of real property will be so construed by the courts as to effectuate the beneficent objects which they are intended to accomplish, namely, the security of titles and the quieting of possessions. *Willison v. Watkins*, 3 Pet., 53.

§ 2960. A special state statute, designed to bar actions against commissioners for their acts in laying out streets, does not bar an action by the owner of the soil on a discontinuance of the street. *Harris v. Elliott*, 10 Pet., 55.

§ 2961. The statute of limitations is entitled to the same effect as other statutes, and ought not to be explained away. *Clementson v. Williams*, 8 Cr., 74.

§ 2962. In statutes of limitation, where the will of the legislature is clearly expressed, it ought to be followed without regard to consequences; and a construction derived from a consideration of its reason and spirit should never be resorted to, except where the expressions are so ambiguous as to render such mode of interpretation unavoidable. *Denn v. Harnden*, 1 Paine, 61.

§ 2963. If a legislature fails to make any exception in a statute of limitations in favor of distant creditors, such an exception cannot be interpolated therein by the courts. *Bacon v. Howard*, 20 How., 25; *Maxwell v. Moore*, 23 How., 191; *Bank of Alabama v. Dalton*, 9 How., 539.

§ 2964. Ancient statutes.—In the construction of ancient statutes, courts, in search for the intent, often went far beyond the words. But in modern times this practice has been a good deal restrained. Courts still construe words liberally to reach that intention which the words themselves import, but seldom insert a description of persons omitted by the statute, because there is, in the opinion of the court, the same reason for comprehending those persons within its provisions as for comprehending those actually enumerated. *Kirkpatrick v. Gibson*, 2 Marsh., 390.

§ 2965. Standing provision as to appropriations.—It will not be presumed that a provision intended to have a general and permanent application to all future appropriations was intended to be engrafted upon an act making a temporary and special appropriation, unless the intention is expressed in the most clear and positive terms, and the language admits of no other reasonable interpretation. A proviso is generally intended either to except something from the enacting clause, or to qualify or restrain its generality, or to exclude some possible ground of misinterpretation of it as extending to cases not intended by the legislature to be brought within its purview. A general rule, applicable to all future cases, would be expected to find its place in some distinct and independent enactment. *Minis v. United States*, 15 Pet., 445.

§ 2966. Special and general laws to stand together.—The provisions of a special charter or special authority derived from the legislature are not affected by general legislation on the subject. The two are to be deemed to stand together; the one as the general law of the land, the other as the law of the particular case. *State v. Stoll*, 17 Wall., 425.

§ 2967. Directing a thing to be done in a particular way.—When a statute limits a thing to be done in a particular mode, it includes a negative of any other mode. A provision in a charter of a railroad company allowing the individual shares of the stockholders to be taxed, after the expiration of a certain period, whenever their annual profits exceed eight per cent., implies that the shares are not to be taxed until the profits reach that amount. *Raleigh & Gaston R. Co. v. Reid*,* 13 Wall., 269.

§ 2968. Applicable to particular actions.—A statute applicable in its terms to particular actions cannot be applied by construction to other actions standing on the same reason, but it may be applied to an action which it expressly comprehends. *Jacob v. United States*, 1 Marsh., 523.

§ 2969. Power to establish ferries and bridges.—A statute vesting in an inferior court the power to establish ferries and bridges, and to authorize their establishment, does not confer upon them the power to grant an exclusive franchise to any to maintain bridges and ferries. *Wright v. Nagle*,* 11 Otto, 791.

§ 2970. Amendments.—Of two constructions, each of which is warranted by the words of an amendment of a public act, that is to be preferred which best harmonizes the amendment with the general terms and spirit of the act amended. *Griffin's Case*, Chase's Dec., 364 (§§ 1552-67).

§ 2971. In construing an amendatory act, the old law, the mischief arising under it, and the remedy which the new law may be supposed to provide, should be considered. *People v. Sweetser*,* 1 Dak. Ty, 311.

§ 2972. An amendment becomes a part of the original act, whether it be a change of a word, figure or line, or the striking out of an entire section, or striking out and inserting, or in any other way modifying or altering its provisions. *Ibid.*

§ 2973. Where an amendatory act sets forth the entire sections as they are amended, they are to be considered as inserted in the old statute, and the old and the new must be read together as one act, as though it had been originally enacted in its amended form. *Ibid.*

§ 2974. Where an act of congress is passed for the purpose of carrying into effect an amendment to the constitution, the act must be construed to have effect only within the limit of the power over the subject conferred by the amendment on congress. *McKay v. Campbell*, 2 Abb., 127.

§ 2975. Release construed as a grant.—A release by the legislature to a third party, of its title to land, though its words are insufficient to convey title, are to be construed as a grant, if it was the legislative intention that the release should so operate. *Stokes v. Dawes*, 4 *Mason*, 272.

§ 2976. Acts in fraud of law.—Whatever is done in fraud of a law is done in violation of it. *Lee v. Lee*, 8 *Pet.*, 50; *Bank of United States v. Owens*, 2 *Pet.*, 536.

§ 2977. Appropriation bills.—Where an appropriation bill contains matters of general legislation, each separate clause and provision must be scanned and its meaning determined according to its particular tenor, wholly regardless of the place or the nature of the act in which it is found. *Term of Judicial Service*, * 7 *Op. Att'y Gen'l*, 306.

§ 2978. Where private bills are inserted as amendments by one house of congress in general acts of appropriation, such bills are to be construed most in favor of the rights of the executive and of the branch of congress which acquiesce in such irregular legislation. *Construction of Statutes*, * 8 *Op. Att'y Gen'l*, 117.

§ 2979. Acts passed at same session.—Where two acts have been passed at the same session of the legislature, relating to the same subject-matter, they should be construed together as if they formed one and the same act. *Black v. Scott*, 2 *Marsh.*, 328.

§ 2980. Charters.—In construing a charter a court must take it as it stands, and is not to consider whether larger powers would not have been given if the legislature had anticipated events which have since happened. *Perrine v. Chesapeake & Delaware Canal Co.*, 9 *How.*, 187.

6. Repeal of Statutes.

§ 2981. Repeals by implication — Repugnant provisions.—Courts do not favor repeals by implication. *Furman v. Nichol*, 8 *Wall.*, 44 (§§ 1813-20).

§ 2982. Where such repeal would operate to reopen accounts at the treasury department, long since settled and closed, the supposed repugnancy ought to be clear and controlling before it can be held to have that effect. *United States v. Walker*, 23 *How.*, 311; *Zabriskie v. Cleveland, etc.*, R. Co., 23 *How.*, 397.

§ 2983. The principle that repeals by implication are not favored applies with particular force to revenue statutes, the provisions of which, to prevent fraud, are complicated, and enacted frequently at different times to meet special exigencies or defects in previous enactments. *United States v. One Hundred Barrels*, 1 *Dill.*, 49; *United States v. Sixty-seven Packages of Dry Goods*, 17 *How.*, 98; *Wood v. United States*, 16 *Pet.*, 363.

§ 2984. Repeals by implication are not favored by the courts. It must be presumed that a given law was enacted by the legislature with accurate knowledge on its part of the language and scope of the previous legislation upon the same subject. If there was an intention to repeal or modify the prior statute, it must be presumed that direct terms for that purpose would have been employed. In the absence of express words of repeal, it is the duty of the court to give effect to the prior statute if it is possible to do so. Unless the repugnancy between the subsequent and prior statutes is so absolute and palpable as to be recognized at once, without the aid of ingenious argument, it must be assumed that the legislature intended both statutes to stand. *United States v. Cook County Nat'l Bank*, 9 *Biss.*, 60; *Red Rock v. Henry*, 16 *Otto*, 601; *McLaughlin v. Hoover*, * 1 *Or.*, 81; *United States v. 10,000 Cigars*, 1 *Woolw.*, 123; *In re Manufacturers' National Bank*, 5 *Biss.*, 502; *Harford v. United States*, 8 *Cr.*, 109; *Third Nat. Bank v. Harrison*, 3 *McC.*, 163; *Harden v. Gordon*, 2 *Mason*, 551; *Beals v. Hale*, 4 *How.*, 53; *Seavey v. Seymour*, 3 *Cliff.*, 453; *Cooke v. Ford*, 2 *Flip.*, 32; *Davies v. Fairbairn*, 3 *How.*, 644; *Leadbetter v. Kendall*, *Hemp.*, 303; *Johnson v. Byrd*, *id.*, 436; *City of Galena v. Amy*, 5 *Wall.*, 705; *Henderson's Tobacco*, 11 *Wall.*, 632; *Cote v. United States*, * 3 *Ct. Cl.*, 69; *United States v. Twenty-five Cases of Cloths*, *Crabbe*, 370; *West v. Pine*, 4 *Wash.*, 691; *Aspden's Estate*, 2 *Wall. Jr.*, 368; *Reynolds v. McArthur*, 2 *Pet.*, 432; *People v. Sponster*, * 1 *Dak. T'y.*, 294; *Morlot v. Lawrence*, 1 *Blatch.*, 612; *Wood v. United States*, 16 *Pet.*, 362; *Arthur v. Horner*, 6 *Otto*, 140; *United States v. Smith*, 2 *Blatch.*, 180; *United States v. One Hundred Barrels of Spirits*, 2 *Abb.*, 318; *S. C.*, 1 *Dill.*, 61; *The John Martin*, 2 *Abb.*, 177.

§ 2985. Repeals by implication are not favored, particularly the repeal of a general law by a private statute. The latter is to be strictly construed when it is opposed to the former, and the purpose of the legislature to embody in a private act a repeal, suspension or change of a public law must clearly appear. A private law, therefore, giving either party interested an appeal to the court of claims within ninety days, will not be held to change the general laws relating to the proceedings on appeal. *Hubbell v. United States*, * 6 *Ct. Cl.*, 56.

§ 2986. Though repeals by implication are not favored, such effect and operation are indispensable in some cases, as when a subsequent statute is inconsistent with a former, and

the two cannot be reconciled. So where a later is on the same subject as a former one, and introduces some new qualifications or modifications, the former must necessarily be repealed; the two cannot stand together. In most cases the question resolves itself into the inquiry, What was the intention of the legislature? Did it mean to repeal or take away the former law, or was the new statute intended to be merely cumulative? Affirmatives in statutes that introduce new laws imply a negative of all that is not in the purview, so that a law directing anything to be done in a certain manner implies that it shall not be done in any other manner. *United States v. One Case of Hair Pencils*, 1 Paine, 405; *State v. Stoll*, 17 Wall., 425.

§ 2987. Whether a new law, by implication, supersedes an old one on the same subject, cannot well be determined in most cases by any merely *a priori* rules of argument or construction, but must depend very much upon the peculiar circumstances of each case—the old and the new law—the mischief and the remedy. *Campbell v. Case*,* 1 Dak. Ty, 23.

§ 2988. A repeal by implication is held to occur only where different statutes cover the same ground, and there is a clear and irreconcilable conflict between the earlier and the later. Where an act incorporating a railroad company authorized any county through which it should pass, or any town in any such county, to issue its bonds in aid of its construction, and a subsequent act authorized a certain county to issue bonds in aid of any railroad that should be constructed between certain points, and a subsequent act still, amending the first act, provided that it should not be construed so as to repeal the first act, the first act was held not to be repealed by the second. *Supervisors v. Lackawana Iron, etc., Co.*,* 3 Otto, 619.

§ 2989. Where there are two acts on the same subject, the rule is to give effect to both if possible. But if the two acts are repugnant in any of their provisions, the latter act, without any repealing clause, operates, to the extent of the repugnancy, as a repeal of the first; and even where the two acts are not in express terms repugnant, yet if the latter act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act. So where the act of 1813, providing punishments for violation of the naturalization laws, made the punishment for the offenses designated therein imprisonment or fine, and the act of 1870, covering the same subject, allowed both punishments, in the discretion of the court; and the former provided that the imprisonment should not be less than three nor more than five years, and the latter allowed the imprisonment to be for any period between one and five years; and the former fixed the lowest limit of the fine at \$500, and the latter allowed the fine to be as low as \$300, it was held that the latter repealed the former. *United States v. Tynen*,* 11 Wall., 88.

§ 2990. Where the subject of a former statute is embraced in the provisions of a later one, and the later statute appears to be intended to prescribe the only rules which should govern that subject, the particulars of the old law, in which they differ, will be regarded as repealed by implication; but the old law is repealed by implication only to the extent of the repugnancy. *Woods v. Jackson Iron Manuf'g Co.*,* 1 Holmes, 379.

§ 2991. When there are repugnant statutes of different dates, the latter repeals the former to the extent of the repugnancy. *Union Iron Co. v. Pierce*, 4 Biss., 331; *United States v. Gates*,* 8 Law Rep., 469; *Woods v. Jackson Manuf'g Co.*,* 1 Holmes, 379; *Bas v. Tingy*, 4 Dal., 40; *Schenck v. Peay*, 1 Dill., 268; *The Propeller Sun*, 1 Biss., 375; *In re Oregon Bulletin Printing, etc., Co.*,* 14 N. B. R., 418; *Smith v. United States*, 5 Pet., 299; *United States v. Tynen*,* 11 Wall., 88.

§ 2992. Repeals by implication of revenue and collection laws are not favored, and the general rule is, that in order to work a repeal by implication there must be a positive repugnancy between the provisions of the new law and the old. But well-founded exceptions exist to that general rule, as where the provisions of the old statute are revised in the later enactments, and where it appears that the later statute was intended to prescribe the only rules upon the subject. In such cases the subsequent statute is held to repeal the former one, although the provisions of the subsequent statute are not in all respects repugnant to those contained in the act of antecedent date. *Butler v. Russel*, 3 Cliff., 255; *Campbell v. Case*,* 1 Dak. Ty, 22; *Stewart v. Kahn*, 11 Wall., 493; *United States v. Bennett*, 12 Blatch., 348; *United States v. Barr*, 4 Saw., 254; *United States v. Cheeseman*, 3 Saw., 424; *Patterson v. Tatum*, 3 Saw., 169.

§ 2993. Where a new statute covers the whole subject-matter of an old one, adds new offenses, and prescribes different penalties or punishments from those enumerated in the old law, the old statute is repealed by implication, as the provisions of both cannot stand together. To ascertain whether two statutes are repugnant their provisions must be compared. *Norris v. Crocker*, 18 How., 433; *United States v. One Hundred Barrels of Spirits*, 2 Abb., 318; *S. C.*, 1 Dill., 57; *People v. Sponster*,* 1 Dak. Ty, 294.

§ 2994. It is a rule in the construction of statutory law, that when new conditions or re-

quirements are imposed in respect to existing offenses, so that those acts constitute the offense which would not have constituted it before, the statute necessarily becomes the exclusive rule and abrogates or supplants the preceding one. The thing prohibited is no longer an offense except as it is brought within the terms of the act. *The Martha, Bl. & How.*, 153; *United States v. Clafin*, 7 Otto, 551.

§ 2995. **Repeal of law repeals amendments.**—Section 103 of the act of 1864 imposed a tax of two and one-half per cent. of the gross receipts from passengers, freights and transportation of mails earned by certain steamboats. The fourth section of the act of 1865 declared that the receipts of vessels paying tonnage duty should not be subject to the tax provided in section 103 of the act of 1864, nor by any act amendatory thereof. The ninth section of the act of 1866 declared that the one hundred and third section of the act of 1864 should "be amended by striking out all after the enacting clause and inserting in lieu thereof the following." It then proceeded to tax the receipts from passengers, etc. This latter act, in so amending the act of 1864, is held to have also repealed the fourth section of the act of 1865. *Steamboat Co. v. The Collector*, 18 Wall., 478.

§ 2996. **Effect on past acts and contracts.**—A declaration in a law, that a prior law did not repeal another by implication, is inoperative as to acts done between the passage of the repealing act and the declaratory act. To declare what the law is or has been is a judicial power; to declare what the law shall be is legislative; and by the fundamental principles of our government these two powers are separated. *Ogden v. Blackledge*, 2 Cr., 276.

§ 2997. Where one statute is repealed by another statute, acts done in the mean time, while it was in force, shall endure and stand, and shall be good and effectual. *Patents for California Land Claims*, * 12 Op. Att'y Gen'l, 255.

§ 2998. The repeal of a law under which a contract was entered into cannot affect the validity and operation of the contract. Under an act of congress which permitted it, the owners of certain highwines in a bonded warehouse in Illinois, upon which the taxes had not been paid, wishing to remove them to New York, gave a bond to secure the payment of the taxes due thereon. *Held*, that the bond created a contract obligation, and was not a penalty, and that consequently the repeal of the statute did not affect the validity of the bond. *United States v. Dutcher*, 2 Biss., 52.

§ 2999. When a right has arisen upon a contract, or upon a transaction in the nature of a contract, authorized by statute, as the right given to licensed pilots to one-half the pilotage fees on tender and refusal of their services to any vessel to pilot it out of port, and such right has been so far perfected that nothing remains to be done by the party asserting it, the repeal of the statute does not affect it. (*MILLER, CLIFFORD and SWAYNE, JJ.*, dissent.) *Steamship Co. v. Joliffe*, 2 Wall., 450.

§ 3000. The repeal of the law prohibiting certain transactions does not impart validity to such transactions. *Milne v. Huber*, * 3 McL., 212.

§ 3001. Usury taken against law may be recovered back after the repeal of the usury law. After the passage of the repealing law there was no usury, but prior to that there was, and the repealing law did not, and could not, annihilate that state of things, or the rights that grew out of it. *Whitaker v. Pope*, 2 Woods, 463.

§ 3002. Proceedings for the issuing of bonds by a town in aid of a railroad company, which were valid when begun, are not made invalid or void by a subsequent statute varying the procedure. *Munson v. Town of Lyons*, 12 Blatch., 546.

§ 3003. Where a school district has obtained a vested right to school moneys, due from the county, a subsequent act by the legislature changing the boundaries of counties, and embracing the school district in another county, will not destroy its right to the moneys due from the original county. *Brown v. Nash*, * 1 Wyom. T'y, 85.

§ 3004. A lien on a vessel which becomes vested under a territorial law does not become divested by a repeal of the law. *Steamer Gazelle v. Lake*, * 1 Or., 121; *In re Hope Mining Co.*, 1 Saw., 710.

§ 3005. **Effect of repeal of charter of corporation.**—When a charter is repealed it no longer exists. Its life is at an end. Whatever force the law may give to transactions into which the corporation entered, and which were authorized by the charter while in force, it can originate no new transactions dependent upon the power conferred by the charter. Whatever power is dependent solely on the grant of the charter, and which could not be exercised by unincorporated private persons under the general laws of the state, is abrogated by the repeal of the law which granted these special rights. All property, real or personal, acquired by the corporation, not dependent upon the general powers conferred by the charter, and all the rights and interest of stockholders in such property, remain notwithstanding the repeal. *Greenwood v. Freight Co.*, 15 Otto, 18.

§ 3006. **General phrases in a repealing act must be limited in their application to the subject-matter of the original act.** *Reynolds v. McArthur*, 2 Pet., 426.

§ 3007. Repeal by a general clause inserted in the repealing section of the act are not favored, and are never to be extended beyond their necessary operation. Repealing clauses of this kind are limited in terms to such provisions as are inconsistent with the amendatory act, and are never construed to include or alter provisions not embraced in the amendments. *Hamlin v. Pettibone*, 6 Biss., 170.

§ 3008. Where a limited repeal is intended, the practice of inserting a clause to that effect in a statute is so common, that, if nothing of that kind is found in a repealing clause, the presumption is strong against the intention to continue the old law in force for any purpose. *Railroad Co. v. Grant*, 8 Otto, 402.

§ 3009. In every act professing to repeal or interfere with the provisions of a former law, it is a question of construction whether it operates as a total, or partial or temporary repeal. The word "repeal" is not to be taken in an absolute, if it appears upon the whole act that it was used in a limited, sense. *Patents for California Land Claims*,* 12 Op. Att'y Gen'l, 237.

§ 3010. It is a general rule for the construction of revenue statutes, that specific provisions for duties on a particular article are not repealed or affected by the general words of a subsequent statute, although the language is sufficiently broad to cover the article first mentioned. *Movius v. Arthur*, 5 Otto, 146.

§ 3011. A general statute on the subject of the jurisdiction of the circuit courts does not repeal prior statutes conferring jurisdiction on those courts in special cases or over particular controversies, unless it is clear from the language employed that such was the intent of congress. *Third Nat'l Bank of St. Louis v. Harrison*, 8 Fed. R., 722.

§ 3012. Judicial question.—Whether a statute was repealed by a later one is a judicial and not a legislative question; and a legislative recital that such a law has been repealed, though entitled to great respect, ought not to be considered as more than an expression of opinion, or a recital of belief, and therefore not conclusive. *United States v. Claflin*, 7 Otto, 548.

§ 3013. Statute abrogates prior laws and usages.—A statutory enactment controls all prior usages and laws, and establishes the rule which governs the subject-matter. *United States v. Collier*, 3 Blatch., 332.

§ 3014. No punishment after repeal.—After the expiration of a law, no penalty can be enforced nor punishment inflicted for violations of the law committed while it was in force. But a general statute may prevent this by providing the contrary. *United States v. Barr*, 4 Saw., 254; *The Schooner Rachel v. United States*, 6 Cr., 329.

§ 3015. An offense against a temporary act cannot be punished after the expiration of the act, unless a particular provision be made by law for the purpose. An act on the same subject, passed during the continuance of the temporary act, and repealing the same, with a proviso that the power to prosecute, punish and convict offenders against the repealed act shall remain as if the act had not been repealed, will not continue the power of prosecution beyond the period limited. *The Irresistible*,* 7 Wheat., 551.

§ 3016. Upon the repeal of an act of congress, all criminal proceedings pending thereunder fall. *United States v. Tynen*,* 11 Wall., 88.

§ 3017. The repeal of a penal statute defeats all actions for penalties under such statute pending at the time of the repeal, unless the repealing act in terms saves the right to prosecute pending suits. The effect of the repealing act in such a case is to obliterate the statute repealed as completely as if it had never passed. It must be considered as a law that never existed, except for the purposes of those actions which were commenced, prosecuted and concluded while it was an existing law. *Union Iron Co. v. Pierce*, 4 Biss., 332; *Anonymous*, 1 Wash., 84; *Norris v. Crocker*, 18 How., 440; *In re Callicot*, 8 Blatch., 98; *United States v. Finlay*, 1 Abb., 367; *United States v. Tynen*,* 11 Wall., 88; *Yeaton v. United States*, 5 Cr., 283; *United States v. Ship Helen*, 6 Cr., 203.

§ 3018. An action to enforce a forfeiture may be maintained notwithstanding the repeal of the law under which it arose, if it was commenced before the repeal took effect, and the repealing act contained a saving clause authorizing the institution and prosecution of proceedings under the old law. But it seems that where an action for the recovery of a penalty or a proceeding to enforce a forfeiture prescribed in a legislative act is pending at the time of the repeal of the act, or is instituted after the repeal, such repeal is a bar to the action or proceeding in the absence of a saving clause in the repealing act. *United States v. Six Fermenting Tubs*, 1 Abb., 274.

§ 3019. Effect on pending actions.—A law repealing the bankrupt law is a bar to any prosecution for perjury by the bankrupt before the commissioners. *United States v. Passmore*, 4 Dal., 374.

§ 3020. Where jurisdiction, conferred by statute, is prohibited by a subsequent statute, the prohibition is so far a repeal of the statute conferring jurisdiction, and destroys all pending

actions. *Insurance Co. v. Ritchie*, 5 Wall., 541; *The Assessors v. Osbornes*, 9 Wall., 567; *South Carolina v. Gaillard*, 11 Otto, 488.

§ 3021. But where a court had jurisdiction at the time the suit was brought, a repeal of the law giving jurisdiction, before the verdict was rendered, was held not to take away the plaintiff's right to costs. *Walker v. Smith*, 1 Wash., 202.

§ 3022. **Repeal and re-enactment at same time.**—Where a statute is repealed, and one or more of its provisions are re-enacted in the repealing statute, so that there is no moment in which the repeal is in force without being replaced by the corresponding provisions of the new statute, in practical operation and legal effect this is to be considered rather as a continuance and modification of old laws than as an abrogation of the old and a re-enactment of new ones. *Treat v. Staples*, 1 Holmes Rep., 5; *Steamship Co. v. Joliffe*, 2 Wall., 450.

§ 3023. **Repeal reviving former law.**—An act declaring that whenever a law shall be repealed, which repealed a former law, the former law shall not thereby be revived unless specially provided for, applies as well to repeals by repugnancy as to express repeals. *Milne v. Huber*,* 8 McL., 212.

§ 3024. As a general rule the repeal of a repealing statute revives the original statute, even though the original statute was repealed by implication; but this rule is not without exception. Much depends in all such cases upon the intention of the legislature; and it is well settled that the rule that a statute may be revived by implication or construction cannot operate upon any part of an act which has been subsequently altered by express legislation. *Butler v. Russel*, 3 Cliff., 258; *People v. Wintermute*,* 1 Dak. T'y, 65; *Janes v. Buzzard*, Hemp., 260.

§ 3025. When a statute contains an absolute affirmative repeal of an antecedent statute, or a part of it, then the expiration of the subsequent statute by its own limitation will not revive the repealed act; but where there is no such express repeal, but the first statute is taken to be repealed by implication that is supplied by the subsequent law, then it would seem that we might well consider that the second law was rather a suspension than a repeal of the first, and that if the legislature, after the experiment, allowed the second act to expire, it was their intention to go back to the provisions of the first. *United States v. Twenty-five Cases of Cloths*, Crabbe, 393.

7. State Laws and Decisions.

[See PRACTICE.]

§ 3026. **State laws — Effect of Revolution.**—The American Revolution did not totally abrogate all laws then existing in the various colonies, but only such as became inconsistent with the new form of government assumed and the new constitution established. *United States v. Mundell*, 1 Hughes, 432.

§ 3027. — **effect of articles of confederation and constitution.**—After the declaration of independence, and the subsequent adoption of the articles of confederation and the constitution, no existing law of any of the colonies was altered, except where plainly inconsistent with the powers, in the particular cases, transferred to the general government. *Ibid.*

§ 3028. **Rules for construing state laws.**—Federal courts, in the absence of decisions of state courts, construe state statutes according to the rules of the common law. *Loring v. Marsh*, 2 Cliff., 390.

§ 3029. The federal courts are bound to deal with a statute of a state as in their judgment it would be dealt with by the courts of the state. *Union Horse Shoe Works v. Lewis*, 1 Abb., 521.

§ 3030. **State laws cannot control federal government.**—State laws cannot control the exercise of the powers of the national government, or in any manner limit or affect the process or proceedings in the United States courts, unless adopted by congress. Congress may adopt such laws directly, or confide the authority to adopt them to the United States courts. *Oelrichs v. Pittsburgh*,* 2 Pittsb. R., 93.

§ 3031. **Federal courts must give full effect to state laws.**—The federal courts cannot inquire into the policy, justice or expediency of a state law. Though the federal court may believe a law to be unjust and improper, yet, if it is within the limits prescribed by the constitution, the court cannot interfere with it. *Bennett v. Boggs*, Bald., 74; *Fuentes v. Gaines*, 1 Woods, 112.

§ 3032. **State laws judicially noticed.**—The supreme court of the United States, and the judges thereof, recognize without proof the laws of the several states and territories of the United States. *Miller v. McQuerry*, 5 McL., 478; *Lincoln v. Tower*, 2 McL., 476; *Pennington v. Gibson*, 16 How., 81; *Starr v. Moore*, 3 McL., 354.

§ 3033. **State limitation acts binding upon federal courts.**—The courts of the United States, in the absence of legislation upon the subject by congress, recognize the statute of lim-

itations of the several states, and give them the same construction and effect which are given by the local tribunals. They furnish the rule of decision under the thirty-fourth section of the judiciary act of 1789. The construction given to a statute of a state by the highest judicial tribunal of such state is regarded as a part of the statute, and is as binding upon the courts of the United States as the text. And in case of a new ruling by the highest court of a state, reversing a former decision, the last decision will be followed. *Leffingwell v. Warren*, 2 Black, 603; *Bank of Alabama v. Dalton*, 9 How., 527.

§ 3034. — also law of redemption.— When substantial rights, resting upon a state statute which is clearly within the legislative power, come in conflict with mere forms and modes of procedure, in the federal courts, the latter must give way and adapt themselves to the forms necessary to give effect to such rights. So a state law, giving the right of redemption in case of the sale of land on the foreclosure of a mortgage, is obligatory on the federal courts, and their rules of practice must be modified to conform to the provisions of such law. *Brine v. Insurance Co.*, 6 Otto, 634.

§ 3035. — also laws regulating titles and remedies.— The laws of a state regulating titles and remedies to real estate must, in the absence of contrary regulations by congress, govern the federal courts sitting in the state in which the land is situated. *Society for Propagation of Gospel v. Wheeler*, 2 Gall., 138.

§ 3036. A state law abolishing imprisonment for debt is a law affecting the remedy, and does not impair the obligation of contracts. Being a mode of procedure, it binds federal courts which have adopted the procedure of the courts of the state. *Beers v. Haughton*, 1 McL., 232; *Gray v. Munroe*, id., 529.

§ 3037. Chancery system not governed by state laws.— In exercising chancery jurisdiction, the courts of the United States are not limited by the chancery system adopted by any state, and they may exercise their functions in a state where no court of chancery has been established. The usages of the high court of chancery in England, whenever the jurisdiction is exercised, governs the proceedings. This may be said to be the common law of chancery, and since the foundation of our government it has been observed. *State of Pennsylvania v. Wheeling, etc.*, *Bridge Co.*, 13 How., 563; *Burt v. Keyes*, 1 Flip., 69.

§ 3038. — nor proceedings in admiralty.— State statutes and decisions will not supply a rule of decision in courts of admiralty unless they have been adopted by rule of the federal courts. *The Steamboat Delaware, etc.*, 242.

§ 3039. Laws on practice.— A state law in reference to legal procedure can have no effect on the courts of the United States unless adopted by congress or under its authority. *Beers v. Haughton*, 1 McL., 231; *Keary v. Farmers' and Merchants' Bank of Memphis*, 16 Pet., 94; *Young v. Bank of Alexandria*, 4 Cr., 397; *Campbell v. Claudius*, Pet. C. C., 485.

§ 3040. Under the thirty-fourth section of the judiciary act a settled construction of a state statute by the courts of a state is binding on the federal courts, unless the subject-matter is one within the constitutional jurisdiction of congress. Laws which relate to practice, process or modes of proceeding before or after judgment are exceptions to the thirty-fourth section, as congress has legislated on the subject. State laws which furnish the court a rule for forming a judgment are binding on the federal courts, but not laws for carrying that judgment into execution, as this matter is governed by act of congress and rules of practice adopted pursuant thereto. *Thompson v. Phillips, Bald.*, 274.

§ 3041. Under the act of congress, delegating to the courts of the United States the power to regulate their process and proceedings by reference to state laws, those courts may adopt any part or all of the remedies provided by the states, at their discretion. *Dobbins v. Allegheny*,* 2 Pittsb. R., 120.

§ 3042. Where congress has legislated with reference to a matter of criminal procedure in the federal courts, state statutes relating to the same matter are superseded. *United States v. Mundell*, 1 Hughes, 418.

§ 3043. Under the act of congress allowing courts to adopt the rules of practice, etc., prescribed by state laws, no court of the United States can adopt, by rule, any provision of state laws which are repugnant to, or incompatible with, the positive enactments of congress upon the subject of the jurisdiction, or practice, or proceedings of such court. *Keary v. Farmers' and Merchants' Bank of Memphis*, 16 Pet., 94.

§ 3044. Law allowing set-offs.— A state statute allowing set-offs can have no effect in a suit between the United States and one of its officers. The matter is wholly regulated by act of congress, and the rule on the subject must be uniform throughout the United States. *United States v. Prentice*, 6 McL., 67.

§ 3045. Forbidding suit against receiver.— A state law, that no action shall be commenced against a bank after the appointment of a receiver therefor, is a rule of procedure which is not adopted by the federal courts under the judiciary act of 1789, and is not a law binding upon the courts of the United States. *Demeritt v. Exchange Bank*,* 20 Law Rep., 607.

§ 3046. On maritime liens.—The provision in a state statute, creating liens on domestic ships in cases of contracts maritime in their nature, that the suit to enforce the lien shall not be filed until the debt has remained unpaid sixty days, is not applicable to proceedings in admiralty in the United States courts, and will not be adopted. *The Richard Busteed*, 1 Spr., 441.

§ 3047. Appointment of commissioners.—Though the laws of a state which constitute a rule of property must be respected by all courts, still the legislature cannot radically change the mode of proceeding prescribed for the courts of the United States, or direct those courts, in a trial at common law, to appoint commissioners for the decision of questions which a court of common law must submit to a jury. *Bank of Hamilton v. Dudley*, 2 Pet., 525.

§ 3048. References.—The statute of a state cannot control the rights of parties in the courts of the United States and take away privileges secured by the constitution and laws of the United States. So a state law which compels a reference in cases of long accounts does not bind the federal courts, as it impairs the right of trial by jury secured by the constitution of the United States. *United States v. Rathbone*, 2 Paine, 580.

§ 3049. Requiring judges to give reasons for decisions.—The provision in the constitution of Louisiana, requiring the judges of the different courts to adduce the reasons upon which their judgment is founded, can have no authority in the courts of the United States, that clause never having been adopted by congress for their government. *Parks v. Turner*, 12 How., 46.

§ 3050. Penalty against officer in addition to damages.—Though a state statute providing for summary proceedings against a sheriff has been adopted by act of congress, still, the penalty prescribed by the state law, in addition to the damage sustained, cannot be enforced in the federal courts against the marshal, nor, under the law of April 10, 1806, can the sureties of the marshal be proceeded against, other than by regular action. *Gwin v. Barton*, 6 How., 10.

§ 3051. Cannot affect jurisdiction.—While it is true that the laws of the several states are binding upon its tribunals and upon persons and property within its jurisdiction, yet those laws cannot affect, either by enlargement or diminution, the jurisdiction of the federal courts as vested and prescribed by the constitution and laws of the United States, nor destroy or control the rights of parties litigant, to whom the right of resort to those courts has been secured by the laws and constitution. So a state law providing that suit shall not be brought upon negotiable paper after protest for non-acceptance until its maturity is not binding on a suitor in a federal court against a citizen of the state in which such law is in force and in which he is sued. *Watson v. Tarpley*, 18 How., 519.

§ 3052. State laws cannot control the exercise of the powers of the national government, or in any manner limit or affect the operation of the process or proceedings in the national courts. The whole efficacy of such laws in the courts of the United States depends on the enactments of congress, and they are obligatory only as they are thus adopted. *Beers v. Haughton*, 9 Pet., 359.

§ 3053. Laws requiring judgment to be docketed.—Where rights once attach under laws of congress adopting laws of the respective states, such rights are not divested by a non-compliance with conditions, restrictions or limitations contained in those very state laws, where a compliance with the latter would depend upon a resort in any way to state officials, or to the machinery of the state judiciary. So the lien of a judgment obtained in a federal court in Virginia is not lost by failure to docket it in accordance with the state law in a state court. *United States v. Humphreys*, 3 Hughes, 204.

§ 3054. Rules of decision.—The phrase, "in all trials at common law," as used in that clause of the constitution providing that the laws of the state shall be regarded as rules of decision except in cases otherwise provided for by the constitution, laws or treaties of the United States, means "in trials in a court of common law jurisdiction when exercising that authority," as contrasted with courts of admiralty and maritime or equity jurisdiction. *United States v. Mundell*, 1 Hughes, 428.

§ 3055. Where an act of congress refers to a state law as a rule of decision, an existing state statute applicable to the case must be considered as if adopted and re-enacted by congress. But such state statute must be completely applicable to the case; for if there is a part which qualifies and modifies the rest, of which a party cannot have full benefit in the courts of the United States, this is not a case in which congress has given authority to adopt such a part; for to adopt it when not applicable to the federal courts would be to make it virtually a new law. *Ibid.*

§ 3056. The words "common law," as used in the act of July 6, 1862, which enacts that "the laws of the state in which the court shall be held shall be the rules of decision as to the competency of witnesses in the courts of the United States in trials at common law, in equity and admiralty," do not include criminal trials. *United States v. Brown*, 1 Saw., 531.

§ 8057. **Law of Confederate States.**—A statute of the Confederate States must be regarded by the federal courts as having had no efficiency except as effect was given to it by one of the states of such confederation. Such an organization being forbidden by the constitution, its existence cannot be recognized by the federal courts. *Williams v. Bruffy*, 6 Otto, 182.

§ 8058. **State decisions followed, when.**—The federal courts, in cases depending on the laws of a particular state, adopt the construction which the courts of that state have given to those laws. *Elmendorf v. Taylor*, 10 Wheat., 152; *Walker v. State Harbor Commissioners*, 17 Wall., 648; *Garrison v. City of New York*, 21 Wall., 196; *Thatcher v. Powell*, 6 Wheat., 119; *Erie R. Co. v. Pennsylvania*, 21 Wall., 492; *Nessmith v. Sheldon*, 4 McL., 376; *County of Leavenworth v. Barnes*, 4 Otto, 71; *Town of South Ottawa v. Perkins*, 4 Otto, 267; *Lewis v. Baird*, 3 McL., 81; *County of Cass v. Johnston*, 5 Otto, 369; *Smith v. Kernochen*, 7 How., 219; *Leitensdorfer v. Webb*, 20 How., 188; *Commercial Nat. Bank v. City of Iola*, 2 Dill., 358; *Ross v. McLung*, 6 Pet., 286; *Taylor v. Thomson*, 5 Pet., 368; *Pereles v. City of Watertown*, 6 Biss., 82; *Southern Pac. R. Co. v. Orton*, 6 Saw., 157; *Griffing v. Gibb*, McAL., 222; *Woolsey v. Dodge*, 6 McL., 150; *Kirkpatrick v. Gibson*, 2 Marsh., 389; *Carroll v. Safford*, 3 How., 460; *Christy v. Pidgeon*, 4 Wall., 196; *Randolph v. King*, 2 Bond, 105; *McKeen v. Delancy*, 5 Cr., 32; *Nichols v. Levy*, 5 Wall., 444; *Green v. Neal*, 6 Pet., 291; *Polk v. Wendal*, 9 Cr., 98; *State of New Hampshire v. Grand Trunk R'y Co.*, 3 Fed. R., 888; *Webster v. Cooper*, 14 How., 504; *Williamson v. Suydam*, 6 Wall., 723; *Marlatt v. Silk*, 11 Pet., 22; *Loring v. Marsh*, 2 Cliff., 311, 469; *Railroad Co. v. Georgia*, 8 Otto, 359 (§§ 2317-20); *Ohio Life Ins. and Trust Co. v. Debolt*, 16 How., 416 (§§ 2254-65); *Peik v. Chicago, etc., R'y Co.*, 4 Otto, 164 (§§ 2133-37); *Jefferson Branch Bank v. Skelly*, * 1 Black, 436; *Phalen v. Virginia*, 8 How., 163 (§§ 1852, 1858); *Gilman v. City of Sheboygan*, 2 Black, 510; *Machine Co. v. Gage*, 10 Otto, 676 (§§ 1384-86); *Aicardi v. The State*, * 19 Wall., 635; *Conway v. Taylor*, 1 Black, 629; *Sumner v. Hicks*, 2 Black, 534.

§ 8059. The supreme court, in an early decision, followed what it supposed to be a settled construction by the supreme court of a state of a state law affecting a rule of property. Some years afterwards a decision of the state court gave the law in question a different construction, which was acquiesced in and followed by the courts of the state. The circuit court of the United States having followed the decision of the supreme court of the United States, it was held by such supreme court, on a writ of error to the circuit court, that it was bound by the settled construction of the statute in question by the state courts, and that it would follow it, rather than its former decision. *Green v. Neal*, 6 Pet., 292.

§ 8060. — **rule of common law as to land titles.**—The federal courts follow the decisions of the state courts arising out of the common law of the state; especially when applied to the title to lands. *Beauregard v. City of New Orleans*, 18 How., 502; *Yates v. Milwaukee*, 10 Wall., 497.

§ 8061. — **affecting citizens of other states.**—The federal courts are not bound to follow the laws of a state in which they are located as to controversies affecting citizens of other states, and in no degree arising from local regulations, as, in this instance, a foreign commercial contract. *Van Reimsdyk v. Kane*, 1 Gall., 381.

§ 8062. — **gratuitous decision.**—The federal courts are not bound by any part of an opinion in a state court as to the construction of a state law which was not needful to the ascertainment of the right or title in question between the parties. So if the construction put by a state court upon a state statute is not a matter of judgment, if it might have been decided either way without affecting any right brought into question, then, according to the principles of the common law, an opinion on such a question is not a decision, and cannot govern the federal courts. To make it binding there must have been an application of the judicial mind to the precise question necessary to be determined to fix the rights of the parties, and to decide to whom the property in controversy belonged. *Carroll v. Carroll*, 16 How., 286.

§ 8063. — **decisions of inferior courts.**—It seems that a judgment of an inferior state court cannot be regarded as binding upon the supreme court of the United States in the construction of state statutes. *Beals v. Hale*, 4 How., 54.

§ 8064. — **private acts.**—The rule of the supreme court of the United States, that the decisions of the highest state courts upon statutes relative to real property will be recognized as a part of the local law, does not comprehend private statutes or statutes giving special jurisdiction to a state court for the alienation of private estates. It has never been extended to private acts, relating to particular persons, for the reason that whatever a court in a state may do in such a case, its decision is no part of the local law. It concerns only those for whose benefit such a law was passed, and because the decision under it is no rule for any future case. It may from analogy be cited for the interpretation of another private law of a like kind, but in such case the utmost extension of it would be that there would be two judgments, in two private cases, which only show the more plainly that no local law has been made for both. *Williamson v. Berry*, 8 How., 548.

§ 3065. — **Impairing vested rights.**— Although, as a general rule, the federal courts will adopt and follow the rulings of the state courts in their interpretation of the constitution and statutes of their respective states, yet where property has been acquired and investments made under statutory contracts, generally recognized and believed to be constitutional and valid in the absence of adjudications declaring them invalid, the federal courts are not concluded by the construction which the state courts may, subsequent to the acquisition of such property, give such statutes. But the federal court will, in all such cases, where the construction given by the state courts is not satisfactory to it, construe such statutes for itself. *Louisville & Nashville R'y Co. v. Gaines*, 2 Flip., 630; *Morgan v. Curtenius*, 20 How., 3; *Township of Pine Grove v. Talcott*, 19 Wall., 666; *Butz v. City of Muscatine*, 8 Wall., 575; *Gelpcke v. City of Dubuque*, 1 Wall., 175.

§ 3066. As a general rule the United States courts will, in the construction of state statutes or constitutions, follow the decisions of the highest courts of the state. But where the decision of the state court claimed as controlling is not based upon any principle peculiar to the state constitution, but upon reasons equally affecting every state government, and those principles are asserted as a ground for invalidating contracts, they are adopted or disregarded by the federal courts as they deem them sound or otherwise. *Talcott v. Township of Pine Grove*,* 1 Flip., 120.

§ 3067. There being no provision in the state constitution of Michigan expressly prohibiting legislation to authorize the issue of municipal bonds in aid of the construction of railroads, at the time such bonds were issued under such an authority, and there being nothing in the organic law of the state which could be construed as prohibitory of such legislation, it was held that the federal courts were not bound to follow a decision of the state courts, made since the issue of the bonds, declaring that the legislature had no power to grant such authority because of the restraining effect of certain constitutional provisions. *Ibid.*

§ 3068. — **on the effect of judgments.**— Judicial decisions of state courts founded upon state statutes will be respected by the supreme court of the United States. But when the effect of a state decision is only to regulate the practice of courts and to determine what shall be a judgment, and the legal effect of that or any other judgment, the supreme court will not consider itself bound by such decisions, upon the ground that the laws upon which they were made are local in their character. It is the duty of the supreme court, by their decision, to preserve the supremacy of the laws of the United States, which it cannot do without disregarding all state laws and state decisions which conflict with the laws of the United States. *Amis v. Smith*, 16 Pet., 813.

§ 3069. — **rules of the common law.**— Although the supreme court of the United States will follow the decisions of the state courts in relation to rules of property in the state where they are fully settled, yet in the case of private rights, which are to be determined by the rules of the common law alone, the supreme court will not be bound by the decisions of the state courts. *City of Chicago v. Robbins*, 2 Black, 418; *Swift v. Tyson*, 16 Pet., 1 (BILLS AND NOTES, §§ 382-386); *Jewett v. Hone*, 1 Woods, 580; *Meade v. Beale*, Taney, 339.

§ 3070. — **supreme court decides for itself, when.**— The supreme court, in all cases brought before it under the twenty-fifth section of the judiciary act, determines for itself the construction of state statutes, without regard to the previous decisions of the highest court of the state upon the subject. *Butz v. City of Muscatine*, 8 Wall., 575.

§ 3071. — **decisions of state from which act is copied.**— Where a statute in one state has been copied word for word from that of another state, and the constitutions of the two states on the subject are different, the federal courts will not adopt the construction placed upon the statute by the courts of the state from which it was taken before its enactment by the other state, when the language is so plain and unambiguous as to need no construction. *In re Swearingen*, 5 Saw., 58.

§ 3072. — **decision must be upon construction of some statute.**— A decision of a state court is not binding upon a federal court as to the effect of a deed given by a state, where such construction turns upon the meaning of words used at the common law, and does not depend upon a local statute. *Foxcroft v. Mallett*, 4 How., 379.

§ 3073. — **where the federal courts have first decided.**— Decisions of state courts construing state laws, though they govern the construction to be given to such laws by the federal courts, cannot be allowed to act retrospectively upon the federal courts; and neither the supreme court nor the circuit courts of the United States will reverse their judgments in consequence of a change of construction by the state courts. *Loring v. Marsh*, 2 Cliff., 319.

§ 3074. — **federal questions involved.**— In cases arising within a state, the supreme court is bound to apply the rules of construction settled by the tribunals of the state, except in cases where the question arises as to whether the law in question contravenes the constitution of the United States. The function of the supreme court, in such a case, is not to construe,

but to test the validity of the law in question. *Murray v. Gibson*, 15 How., 425; *Butz v. City of Muscatine*, 8 Wall., 582; *Lavin v. Emigrant Industrial Bank*, 18 Blatch., 12; *State Bank of Ohio v. Knoop*, 16 How., 569 (§§ 2246-53).

§ 8075. — **construction of a grant.**—The federal courts will not disturb the construction of a crown grant of lands, which has been settled in the state in which the lands are situated for a long time, especially when such construction is the only one which will give full effect to the grant. *Town of Pawlet v. Clark*, 9 Cr., 324.

§ 8076. **Constitutionality of state laws—State decisions.**—If the question whether an act of a state legislature is unconstitutional is merely doubtful, it seems that the courts of the United States will follow the decision of the supreme court of the state pronouncing it valid. *Bank of United States v. Longworth*, 1 McL., 37; *Township of Elmwood v. Marcy*, 2 Otto, 291; *Chemung Canal Bank v. Lowery*, 3 Otto, 76; *State Railroad Tax Cases*, 2 Otto, 618; *Smith v. City of Fond du Lac*, 8 Fed. R., 295; *Kimball v. Mobile*, 3 Woods, 555; *Nesmith v. Sheldon*, 7 How., 812; *Dubois v. McLean*, 4 McL., 488; *Ohio Life Ins. and Trust Co. v. Debolt*, 16 How., 431 (§§ 2254-65); *Randall v. Brigham*, 7 Wall., 523; *Luther v. Borden*, 7 How., 1; *County of Livingston v. Darlington*,* 11 Otto, 407; *Post v. Supervisors*,* 15 Otto, 667; *Barker v. Jackson*,* 1 Paine, 559; *King v. Wilson*,* 1 Dill., 555; *Boyd v. Alabama*,* 4 Otto, 645.

§ 8077. The federal courts always follow the decisions of the state courts in the construction of their own constitution and laws, but where those decisions are in conflict the federal courts must determine between them. *Ohio Life Ins. and Trust Co. v. Debolt*, 16 How., 431 (§§ 2254-65).

§ 8078. The federal courts cannot pronounce a state statute unconstitutional unless it is in conflict with some clause of the constitution of the United States, or some act of congress passed in pursuance thereof. *Griffing v. Gibb*, McAL., 220.

§ 8079. It belongs to the highest judicial tribunal of a state to interpret its constitution, and declare how far, and in what respects, any act of the legislature is in conflict therewith, and therefore inoperative. *Greene v. James*,* 2 Curt., 187.

§ 8080. The decisions of the supreme court of a state upon the validity of its statutes with reference to its own constitution are binding on the federal courts when they do not trench upon any rights protected by the constitution of the United States. *Reclamation District v. Hagar*,* 6 Saw., 567; *Boyd v. Alabama*,* 4 Otto, 645.

§ 8081. — **taxes for corporate purposes.**—It being the settled construction by the supreme court of Illinois of the state constitution, that the general assembly cannot invest the corporate authorities of counties or other municipal organizations with power to assess and collect taxes for any except corporate purpose, it is, according to the settled doctrines of that court, a "corporate purpose" for a municipality to make, under express legislative authority, a donation to secure the location within its limits of a state reform school for the discipline, education, employment or reformation of juvenile offenders and vagrants. *County of Livingston v. Darlington*,* 11 Otto, 407.

§ 8082. — **settling title to land.**—Where a state statute, settling the disputed title to certain lands, has been in force for nearly thirty years, and has been uniformly held by the state courts to be constitutional with reference to the state constitution, the United States courts will follow such construction. *Barker v. Jackson*,* 1 Paine, 559.

§ 8083. — **aiding railroads.**—Where the supreme court of Iowa had uniformly held that there was no power in the legislature to authorize a municipal corporation to tax its inhabitants to pay for a debt incurred to aid in building railroads, where stock was received in return, or where the tax was given as a gratuity, but the latest decision of the court had held it to be within the power of the legislature to authorize the tax when given as a gratuity, yet at the same time declaring their adherence to the cases holding the first part of the proposition, the circuit court of the United States, sitting in that state, decided that they were bound to follow the latest decision of the state court. *King v. Wilson*,* 1 Dill., 555.

§ 8084. A decision by a state court, that building a railroad, owned by a corporation, though built by authority of the state, is not a matter in which the public has any interest of such a nature as to warrant taxation in its aid, and that therefore a state statute authorizing a county to impose taxes to aid in the construction of the road is unconstitutional, is not a question of construction of the constitution and laws of the state, or a local question, but a question of general law, and the United States supreme court is not bound to follow the decision. *Olcott v. The Supervisors*,* 16 Wall., 678.

XIV. COMMON LAW.

§ 3085. **How ascertained.**—The common law of each state is to be ascertained by its general policy, the usages sanctioned by its courts, and its statutes. *Wheeler v. Smith*, 9 How., 55.

§ 3086. The common law has been adopted by the different states only so far as its principles were suited to the condition of each, so that what is common law in one state may not be in another. The judicial decisions, the usages and customs of the respective states, must determine how far the common law has been introduced into and sanctioned by each. *Wheaton v. Peters*, 8 Pet., 659.

§ 3087. **Brought over by colonists.**—The colonists who established the English colonies in this country brought with them the common and statute laws of England as they stood at the time of their emigration, as far as they were applicable to the situation and local circumstances of the colony. *United States v. Reid*, 12 How., 368.

§ 3088. **Before the Revolution** the law of a then existing colony was the common and statute laws of England so far as applicable to the circumstances and situation of the colony, except as modified and supplemented by acts of the colonial legislature. *United States v. Mundell*, 1 Hughes, 429.

§ 3089. **Not adopted as a system.**—The common law has not been adopted as a system by the United States generally. *Kendall v. United States*, 12 Pet., 621.

§ 3090. There is no common law of the United States, and consequently the rules of decision to be adopted by the federal courts must be found in the local law, written or unwritten. No foreign principle attaches to the federal courts when exercising their powers within a state. They give effect to the local law under which the contract was made, or by virtue of which the right is asserted, and this independent of any statute adopting the modes of proceedings at common law of the state courts. *Lorman v. Clarke*, 2 McL., 572; *Wheaton v. Peters*, 8 Pet., 658; *United States v. Railroad Bridge Co.*, 6 McL., 528.

§ 3091. **English cases decided since the Revolution** are not authority in this country. When, however, they are reasonable, are conformable to general principles, and do not change a rule previously established, such decisions cannot be entirely disregarded. *Murdock v. Hunter*, 1 Marsh., 143. They are entitled to that respect which is due the opinions of wise men who have studied the subject. *Livingston v. Jefferson*, id., 210.

§ 3092. **Law of the Church of England.**—The religious establishment of the Church of England was at an early date transplanted to the colony of Virginia, and therewith the common law relating thereto so far as was consistent with the changed circumstances, but by the Revolution it ceased to retain its character as an exclusive religious establishment. *Terrett v. Taylor*, 9 Cr., 46.

§ 3093. **In criminal cases.**—It seems that the constitution of the United States did not adopt the penal code of the common law, and that consequently there are no common law crimes against the United States. *United States v. Wynn*, 3 McC., 269.

§ 3094. The common law governs in criminal cases in the federal courts, and so the question whether the accused can be held to answer to a criminal information must be solved by determining, first, what is the common law on the subject; and second, what modifications have been effected through the laws of the United States or the constitution. The English system of jurisprudence brought by our ancestors as the common law, and those statutes of parliament, applicable to the state of the colonies, which extended to them or were adopted by usage or acts of assembly, form the common law of this country. *United States v. Shepard*, 1 Abb., 436.

§ 3095. **In force in Georgia.**—The common law is the law of Georgia, and the rules of evidence belonging to it are in force there, except so far as they have been modified by statute, or controlled by a settled course of judicial decisions and usage. *Patterson v. Winn*, 5 Pet., 241.

§ 3096. **In force in Utah.**—The common law is in force in the territory of Utah, having been extended over that territory by the act of congress providing for its territorial government, approved September 9, 1850. *People v. Green*,* 1 Utah Ty, 11.

§ 3097. No specific body of the common law was transplanted to the territory of Utah by the fact of immigration. The whole body of the people having tacitly agreed upon the maxims and principles of the common law, and these having been recognized by the courts, are as much the laws of the territory as if they had been expressly adopted by the law-making power. *First National Bank v. Kinner*,* 1 Utah Ty, 100.

§ 3098. **In force in District of Columbia.**—The common law as it was in force in Maryland when the District of Columbia was ceded to the United States remained in force in the

District, and regulates the object and purpose of writs of *mandamus* issued to officers therein, varying the form to suit the different character of our government. *Kendall v. United States*, 12 Pet., 614.

§ 8099. **Adopted in Virginia.**—The common law of England and all the statutes of parliament made in aid of the common law, prior to the reign of James I., which are general in their nature and not local to the kingdom, were expressly adopted in Virginia by the statute of 1776. *Scott v. Lunt*, 7 Pet., 605.

§ 8100. **Rules of practice of English courts.**—Though the rules and practice of the English courts as they existed at the time of the Revolution were adopted by the courts of the United States, yet changes of jurisdiction introduced afterwards into the English courts are not followed here. *Baker v. Biddle*, *Bald.*, 410.

§ 8101. **Regulating navigation.**—There is no common law in regard to regulations of navigation in force in the United States. The regulations of congress furnish the only rules known, and until there has been some legislation on the subject by congress, the federal courts can take no action regarding alleged obstructions to navigation at the suit of the United States in its private capacity. *United States v. Railroad Bridge Co.*, 6 McL., 522.

§ 8102. **Adopts law of nations.**—The common law has adopted the law of nations to its fullest extent and made it a part of the law of the land. *Territorial Rights*,* 1 Op. Att'y Gen'l, 69; *Enlistment of Aliens*,* 3 id., 671.

§ 8103. **Same as a statute.**—When a statute and the common law concur, the common law is not abolished, but is still in force and is preferred to the statute. *Jameson v. The Ship Regulus*, 1 Pet. Adm., 212.

§ 8104. **How far parties may contract in disregard thereof.**—Principles of law differ in their importance as well as in their origin; and while some of them represent great rules of policy and are beyond the reach of convention, others may be changed by parties who choose to contract upon a different footing; and some of them may be varied by usage, which, if general and well established, is equivalent to a contract. What principles of law cannot be interfered with is a matter which it is difficult to ascertain. *Swift v. Gifford*, 2 Low., 110.

§ 8105. **Trial by jury — Re-examination.**—According to the rules of the common law, facts once tried by a jury are never re-examined unless a new trial is granted in the discretion of the court before which the suit is depending for good cause shown; or unless the judgment of such court is reversed by a superior tribunal on a writ of error, and a *venire facias de novo* is awarded. *United States v. Wonson*, 1 Gall., 20; *Parsons v. Bedford*, 8 Pet., 448.

§ 8106. **Statute providing no remedy or punishment.**—Where a statute gives a right, but without providing a specific remedy, a remedy may be drawn from the abundant stores of the common law. *Kneass v. The Schuylkill Bank*, 4 Wash., 106.

§ 8107. **Where power to punish a crime is given by the constitution, but no law has been enacted, the crime is still punishable by indictment at common law.** *Territorial Rights*,* 1 Op. Att'y Gen'l, 69.

§ 8108. **Pardoning power.**—The principle of pardon by the executive having been introduced into our government from England, the principle settled in that country respecting the operation and effect of a pardon will be applied by our courts, and they will look into English authorities for the rules prescribing the manner in which it may be used by the person who would avail himself of it. *United States v. Wilson*, 7 Pet., 160.

§ 8109. **Christian religion.**—Though the Christian religion is a part of the common law of Pennsylvania, yet it is only so in the qualified sense that its divine origin and truth are admitted, and therefore it is not to be maliciously and openly reviled and blasphemed against to the annoyance of believers and the injury of the public. *Vidal v. Girard*, 2 How., 198.

§ 8110. **Law of the place.**—Where the law of the place of the contract is not proved on the trial, the rights of the parties are to be considered as governed by the rules of the common law. *Whalen v. Sheridan*, 17 Blatch., 12.

§ 8111. **No vested interest in any rule of.**—A mere common law regulation of trade or business may be changed by statute. A person has no property, no vested interest, in any rule of the common law. *Munn v. Illinois*, 4 Otto, 118 (§§ 1849-67).

XV. FOREIGN LAWS.

[See EVIDENCE.]

§ 8112. **When recognized — Comity.**—State laws have no inherent authority extraterritorially. Nations, from convenience and comity, and from mutual interest and a sort of moral necessity to do justice, recognize and administer the laws of other countries. But as to the nature, extent and utility of such laws as respect property, or the state and condition of persons within her territories, each nation judges for herself, and is never bound, even on the ground of comity, to recognize them, if prejudicial to her own interests. The recognition is

purely from comity, and not from any absolute or paramount obligation. (Per NELSON, J.) *Scott v. Sanford*, 19 How., 460.

§ 8113. In the silence of any positive rule affirming, or denying, or restraining the operation of foreign laws, courts of justice presume the tacit adoption of them by their own government, unless they are repugnant to its policy or prejudicial to its interests. It is not the comity of the courts, but the comity of the nation, which is administered, and is ascertained in the same way and guided by the same reasoning by which all other principles of municipal law are ascertained and guided. *Bank of Augusta v. Earle*, 18 Pet., 589 (CORPORATIONS, §§ 1123-35).

§ 8114. In the absence of legislation to the contrary the federal courts will presume that the different states of the United States have adopted the comity of nations towards each other, and so corporations created by the laws of one state will be presumed competent to contract in other states unless restrained by legislation. *Ibid.*

§ 8115. The *lex loci contractus* must be resorted to in order to ascertain the meaning of every contract made abroad. This does not proceed from mere comity or courtesy towards other nations, but from the immutable principles of justice, which would be violated by applying to a foreign contract, when deciding upon its obligation and effect, any other law than that of the place where it was made. *Adams v. Storey*, 1 Paine, 100; *Le Roy v. Crowninshield*, 2 Mason, 157.

§ 8116. The laws and usages of foreign countries where contracts are made and to be executed, which respect their validity, construction and discharge, or the capacity of the parties, are regarded here as rules of decision. *Willings v. Consequa*, Pet. C. C., 301; *Bank of the United States v. Tyler*, 4 Pet., 380; *United States v. Garlinghouse*, 4 Ben., 201; *Brine v. Insurance Co.*, 6 Otto, 637.

§ 8117. Noticed by admiralty courts.—The public laws of a foreign nation on a subject of common concern to all nations, which have been promulgated by the governing power of a country, will be noticed as law by the admiralty courts of the nation thus promulgating them. *Talbot v. Seeman*, 1 Cr., 38.

§ 8118. A court of admiralty cannot presume that the laws of any country were enacted *in terrorem*, nor that they will be disregarded by the courts of such country. Even though the law in question is in violation of the laws of nations, it cannot be presumed by a court of admiralty that the courts of the country enacting it would not execute it. *Ibid.*

§ 8119. Not to be presumed to be the same as of this country.—A court of the United States cannot presume that the statutory law of the Dominion of Canada is the same as that of the United States. *The Yacht Countess of Dufferin*, 10 Ben., 157.

§ 8120. Maritime law presumed to control maritime matters.—In the absence of any evidence as to the law of the place where a contract for services as a sailing master was made, and to be in a substantial part performed, the law maritime will be presumed to be the law controlling the contract. *Ibid.*

§ 8121. No presumption as to legality of marriage.—Foreign laws must be proved, and a court will not presume a foreign marriage to be valid until the law under which it was contracted is given in evidence. *United States v. Jennegen*, 4 Cr. C. C., 120.

§ 8122. Construction.—Where a case is governed by the laws of a foreign country, if any doubts exist as to their construction, that construction must be given which is sanctioned by the courts of the country in question. *Smith v. Condry*, 1 How., 33.

§ 8123. How proved.—The written or statute laws of foreign countries are to be proved by the laws themselves, if they can be produced; if not, inferior evidence of them may be received. The unwritten laws or usages may be proved by parol evidence. When foreign laws are proved, it is for the court to construe them and decide upon their effect. *Consequa v. Willings*, Pet. C. C., 225.

§ 8124. The statute or written law of a foreign country should be proved by the law itself, as written. The common customary or unwritten law may be proved by parol. The court may presume that the law with regard to a certain subject is a written law, and reject parol proof of what that law is. *Robinson v. Clifford*, 2 Wash., 1.

§ 8125. In admiralty, as well as in other courts, foreign laws must be pleaded and proved as facts. *The Pawashick*, 3 Low., 144; *Strother v. Lucas*, 6 Pet., 763; *Talbot v. Seeman*, 1 Cr., 38; *United States v. Wiggins*, 14 Pet., 345; *Church v. Hubbard*, 2 Cr., 236; *Dainese v. Hale*, 1 Otto, 20.

§ 8126. Testimony unattainable will not be required in proof of foreign laws, nor will the courts require that species of testimony which the institutions and usages of foreign countries do not admit of. *Church v. Hubbard*, 2 Cr., 187.

§ 8127. Parol evidence is not admissible to prove a foreign law, when the presumption is that the subject, with regard to which the foreign law is sought to be established, is regulated by written law. *Lonsdale v. Brown*, 3 Wash., 404.

§ 8128. Parol evidence is not admissible to prove a commercial regulation of a foreign country, without proof that a certified copy of the law could not be obtained. Such a law, being the subject of pure municipal arrangement, is presumed to be a written law. *Seton v. Delaware Ins. Co.*, 2 Wash., 175; *Wilcocks v. Phillips*, 1 Wall. Jr., 47.

§ 8129. The general rule as to the proof of foreign laws is that the statute law must be proved by a copy properly authenticated, and that the unwritten law must be proved by the testimony of experts, that is, by those acquainted with the law. But this rule may be varied by statute. *Pierce v. Indseth*, 16 Otto, 551; *Ennis v. Smith*, 14 How., 423.

§ 8130. A paper purporting to be a duly authenticated copy or an exemplification of a statute of a state, under the seal of the state, it is *prima facie* evidence that a statute has been passed, and in the absence of any evidence or suggestion to the contrary would justify an action upon it. But when evidence is exhibited or suggestions made that there is no such statute, or that it was not passed according to the forms of law, the officer called upon to act with reference thereto must determine what the facts are. *Existence of Statutes*,* 13 Op. Att'y Gen'l, 225.

§ 8131. Printed statutes of England, purchased of the queen's printer, are admissible as *prima facie* evidence of the laws contained therein. *United States v. Certain Casks of Glass Ware*,* 4 Law Rep., 36.

§ 8132. Foreign laws, like other facts, must be proved by the best evidence of which the nature of the thing admits. The sanction of an oath is required for their establishment, unless they can be verified by some other such high authority that the law respects it not less than an oath. Edicts of Portugal, certified to be copies from the originals by the American consul at Lisbon, who was not sworn, are not evidence of those laws, since it is not one of the consular functions to which the laws of this country attach full credit. *Church v. Hubbart*, 2 Cr., 237.

§ 8133. A certificate of a minister of a foreign country transmitted to this country through our department of state, that the provisions of a foreign law are thus and so, is *prima facie* evidence of the fact certified to. *Brown v. United States*,* 5 Ct. Cl., 575.

§ 8134. The unwritten law of England may be proved in courts of admiralty of the United States by the opinions of learned professors; by the opinions of eminent writers as delivered in books of great legal credit and weight, and in certified adjudications of the courts. Statutes may be proved by copies reasonably proved to be genuine. Changes in laws once shown to exist will not be presumed, but must be shown. *The Pawashick*, 2 Low., 144.

§ 8135. A person who has been admitted to practice in the courts of a foreign country is a competent witness as to what the laws of such country are, and his competency is not affected by the fact that he has not practiced therein for many years, though that may affect the weight of his testimony. *Brown v. United States*,* 5 Ct. Cl., 576.

XVI. ORDINANCE OF 1787.

SUMMARY — *Navigable rivers; admission of Ohio*, §§ 8136, 8137. — *Some provisions temporary*, § 8138. — *Any citizen may object to a violation of*, § 8139.

§ 8136. The admission of Ohio on an equal footing with the other states did not release that state from the operation of that provision of the ordinance of 1787, making all the navigable rivers free and common highways, though it did not prevent the state from improving the rivers and charging tolls for using them in their improved state. *Spooner v. McConnell*, §§ 8140-8162.

§ 8137. The states included within the northwestern territory may, notwithstanding the provision of the ordinance of 1787, improve navigable rivers, and authorize the construction of any works on them which shall not materially obstruct navigation. *Ibid.*

§ 8138. Some of the provisions of the ordinance of 1787 were temporary, others assumed the form of a compact. Those provisions which were guaranteed by the constitution were superseded; also such provisions as were repugnant to the constitution of Ohio. That provision which made certain navigable waters free was not modified, but it seems that the state may improve the navigation of the rivers, and exact toll on account of the increased facilities. *Ibid.*

§ 8139. Any citizen of the United States has the right to object to a violation of the ordinance of 1787. *Ibid.* See §§ 1224, 1240.

[NOTES. — See §§ 8163-8172.]

SPOONER v. McCONNELL.

(Circuit Court for Ohio: 1 McLean, 837-884. 1838.)

Opinion by the Court.

STATEMENT OF FACTS.—This is an application for an injunction by the complainant, who is a citizen of Massachusetts, and who represents himself to be the proprietor of a tract of eighty acres of land, situated at the head of the rapids, above the Maumee Bay, and bounded by the Maumee river, north; and also of a certain island in said river, opposite the above tract, containing two and four-fifths acres, in Wood county, and state of Ohio. He states that during a great part of the year, the river is navigable from the head of the rapids to Fort Wayne, a distance of one hundred and twenty miles. That a steamboat and other vessels ply between these points; and that this part of the river has been navigated and used as a principal thoroughfare for the transportation of merchandise and articles of produce, from the first settlement of the country. That around the rapids, which are about sixteen miles in length, there is a portage that connects with the Maumee Bay, which is navigable for steamboats and other vessels that ply upon the lake. That this river leads into the St. Lawrence, through Lake Erie, and is within the country formerly called the Northwestern Territory; and to which the ordinance of the 13th of July, 1787, applied.

That among certain articles of compact contained in said ordinance, and which are declared to be unalterable, except by common consent, it is declared "the navigable waters leading to the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of the said territory as to the citizens of the United States and those of any other state that may be admitted into the confederacy, without any tax, impost or duty therefor." That by an act of congress entitled an "Act providing for the sales of the lands of the United States in the territory northwest of the river Ohio, and above the mouth of the Kentucky river," passed the 18th May, 1798, this article of the compact is recognized and affirmed. And that in making the surveys and sales of the public lands, the bed of the Maumee river has never been included.

The complainant also states that the legislature of Ohio, the 3d of March, 1834, passed an act entitled "An act to authorize the locating and establishing so much of the line of the Wabash and Erie canal as lies within the state of Ohio, and to authorize the selection, location, sale and application of the proceeds of the sales of its lands;" under the authority of which law, and other acts of the legislature, which provided that a navigable canal shall be constructed, a canal has been located from the west boundary of Ohio to the mouth of the Maumee river, the construction of which is in active progress. That the canal commissioners who superintend the work, under a pretense of a right in the state of Ohio to control and at her discretion obstruct the navigable rivers within the limits of the state, are about to erect one or more dams across the Maumee river, above the rapids, for the purpose of supplying the above canal with water.

The complainant further represents that he purchased the property above mentioned, situated at the head of the rapids, at a very large price, with a view to the benefits of the navigation of that part of the river which is above the rapids; and which he alleges is secured to him by the ordinance, the law of congress cited, and the constitution of the United States. That there is an

extensive water-power on his property. That two extensive saw mills and one flouring mill have already been erected thereon, and it was his expectation that many others would speedily be erected, were it not for the dam or dams which the defendants threaten to build. That, although the dam or dams intended to be erected are some miles above his property, yet the effect would be greatly to obstruct, if not entirely to prevent, the navigation of the river, which would materially lessen, if it should not wholly destroy, the value of his property. And, as a citizen of the United States, he claims a right to navigate the river, etc. He prays, therefore, that an injunction may issue, etc.

At the last term, an injunction having been previously allowed *nisi*, cause was shown by the defendants, and the case was fully argued on both sides; and, as the principles involved are deeply interesting to those states which have been formed within the limits of the northwestern territory, and were for the first time raised for judicial examination in the federal tribunals, the cause was continued under advisement to the present term.

There are two grounds on which the complainant rests his right, both of which must be sustained to entitle him to the prayer of his bill. 1. He must show that the compact in the ordinance is in force. 2. That, under the circumstances of the case, and in the form presented, he is entitled to the interposition of the court.

§ 3140. *Some of the provisions of the ordinance of 1787 were temporary, others assumed the form of a compact.*

These positions have been earnestly and ingeniously controverted by the counsel for the defendants; and it becomes necessary carefully to examine them. The ordinance was passed before the adoption of the federal constitution. It was entitled "An ordinance for the government of the territory of the United States northwest of the river Ohio." Many of its provisions were temporary in their nature, having for their object the organization and operation of a territorial government. Others assume the solemn form of a compact between the original states and the people and states in the territory, which were to remain forever unalterable, unless by common consent. These were comprised in six articles, the first of which provided that no person should be molested for his religious sentiment or his mode of worship. The second secured the benefits of the writ of *habeas corpus*; trial by jury; the right of representation in the legislature; that crimes, unless capital, should be bailable; against the infliction of cruel punishment; the sacredness of private property and of private contracts. The third article declared that schools and the means of education should be encouraged, and that good faith should be observed towards the Indians.

The fourth article declares that the states which may be formed in the territory shall forever remain a part of the confederacy, subject to the articles of confederation. That the inhabitants shall be liable to pay a part of the federal debt, according to a just apportionment. That no tax should be imposed on the lands of the United States, or any interference in their sale by the federal government. That non-resident holders of land should not be taxed higher than residents; and then it is declared "that the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of said territory as to the citizens of the United States and those of any other states that may be admitted into the confederacy, without any tax, impost or duty therefor." The fifth article relates to the boundaries of the states

to be formed in the territory, and what number of inhabitants shall entitle them to be admitted into the Union on an equal footing with the original states. The sixth article declares "that there shall neither be slavery nor involuntary servitude in the territory, otherwise than in the punishment of crimes whereof the party shall have been duly convicted." In the act of cession of this territory by the state of Virginia to the United States, among other conditions, it is declared that it should be laid out and formed into states, etc., which shall be distinct republican states, and admitted members of the federal Union, having the same rights of sovereignty, freedom and independence as the other states."

§ 3141. *Certain provisions of the ordinance of 1787 were superseded by the constitution.*

Some of the provisions of the compact contained in the ordinance were subsequently guarantied by the federal constitution. And, so far as this guaranty extends, it may be considered, practically, as superseding the ordinance. This remark applies to that provision of the constitution which declares that the new states shall be admitted into the Union with the same rights of sovereignty as the original states, the rights of conscience, the inviolability of contracts, etc. That this ordinance was obligatory in all its parts at the time of its adoption, no one can doubt; and the only inquiry now is whether, by the adoption of the federal constitution, the constitution of the state, or by any other means, it has been superseded or annulled, in whole or in part. The change from a territorial government to that of a state necessarily abolished all those parts of the ordinance which gave a temporary organization to the government; and also such parts as were designed to produce a certain moral and political effect. Of the latter description were those provisions which secured the rights of conscience, which declared that education should be encouraged, that excessive bail should not be required, etc.

§ 3142. *Such parts of the ordinance of 1787 as are repugnant to the constitution of Ohio were annulled by "common consent."*

And it may be admitted that any provision in the constitution of the state must annul any repugnant provision contained in the ordinance. This is within the terms of the compact. The people of the state formed the constitution, and it was sanctioned by congress; so that there was the "common consent" required by the compact to alter or annul it. But in regard to the great question in this case, as to the navigable waters, the state constitution purports to make no alteration; and if the ordinance in this part be annulled, it must be done by implication; and on this ground the motion for an injunction is resisted. It is insisted that if effect be given to this provision of the ordinance, it is restrictive of the sovereign power of the state; and is repugnant not only to the constitution of the state and the constitution of the United States, but to the act of congress which declares that the state of Ohio shall be admitted into the Union on an equal footing with the original states. If this position be correct, it must be fatal to the plaintiff's right.

At this stage of the controversy it would be a sufficient answer to this argument to say that the legislative power of the state has not, expressly, authorized the defendants to obstruct the navigation of the Maumee. Under the laws of the state they have authority to superintend the construction of public works, and of the canal stated; and when necessary to the work, to appropriate private property to public use; but as their authority does not expressly extend to the obstructions threatened, it cannot be so construed in opposition to even a

doubtful right under the compact. And this view is greatly strengthened by the positive action of the legislature. In all cases, it is believed, where they have authorized a bridge to be built, or a dam to be constructed, over a navigable stream, special provision has been made to preserve the navigation free from obstruction. But the case has not been argued upon this narrow ground, nor are the court disposed to rest their opinion upon it.

§ 3143. *No political change in a government annuls a compact made with another sovereign power or with individuals.*

It is a well established principle that no political change in a government annuls a compact made with another sovereign power or with individuals. The compact is protected by that sacred regard for plighted faith which should be cherished alike by individuals and organized communities. A disregard of this great principle would reject all the lights and advantages of civilization, and throw us back on the age of vandalism. This compact was formed between political communities and the future inhabitants of a rising territory, and the states which should be formed within it. And all who became inhabitants of the territory made themselves parties to the compact. And this compact so formed could only be rescinded by the common assent of those who were parties to it.

§ 3144. *The article in the ordinance of 1787 respecting navigation has not been modified.*

When application was made to congress by the people of the eastern part of the territory, to authorize the call of a convention to form a constitution, modifications of certain provisions of the compact were proposed, some of which were embodied in the constitution subsequently formed, and others of them, after various alterations, were also inserted. But that provision of the compact which declared that the navigable waters falling into the St. Lawrence and the Mississippi, and the carrying places between them, shall be common highways, and forever free, etc., was not proposed to be modified. By an act of congress of the 18th May, 1796, which provided for the sale of the lands of the United States in the territory, it is declared "that all navigable rivers, within the territory to be disposed of by virtue of the act, shall be deemed to be and remain public highways." And all the surveys made on such rivers were bounded by them, and the beds of the rivers were never included in the surveys nor sold to individuals. From this act of congress and these surveys it clearly appears that the navigable waters within the territory were considered by one party to the compact, as declared by that instrument, public highways. Is there anything in the constitution of the state which by implication must be held repugnant to this part of the compact?

§ 3145. *The sovereignty of the state of Ohio was not impaired by its agreement not to tax the lands of the United States.*

The state has been admitted into the Union on an equal footing with the original states. And yet the state is bound by compact not to tax the lands of the United States, nor until the expiration of five years after they shall have been sold. The power to tax is an incident to sovereignty. Does this exemption take away or lessen this power? If it does, in the sense contended, then the state of Ohio was not admitted into the Union with the same powers of sovereignty as the original states. This consequence is not obviated by the fact that this was a restriction imposed, with the consent of the state, for an equivalent. If it be an abridgment of the sovereign power of the state, the objection stands in its full force.

§ 3146. *The incorporation of a company to improve the navigation of a river is not incompatible with state sovereignty.*

The compact not to tax was the voluntary act of the people of the state, but not more so than was the compact by the same people that the navigable waters should be common highways. And this exemption from taxation is as much a restriction on the exercise of the sovereign power as the exemption of the navigable streams from obstruction by the same power. The right to authorize works on a navigable stream, which may, to some extent, obstruct its navigation, by the sovereign power of a state, is not less clear, on general principles, than the right to tax. By compact with the federal government, the national road, that lies within the state, is to be kept in repair by tolls imposed by the state for that purpose. The state cannot, under this compact, vacate this road, as it may all public roads established by its authority; and does this compact abridge the sovereignty of the state?

By the eighth article of the treaty of peace made with Great Britain in 1783, the "navigation of the river Mississippi from its source to the ocean," it is declared, "shall forever remain free and open to the subjects of Great Britain and the citizens of the United States." A part of this river was within the established boundary of the United States, and did this compact abridge the sovereignty of the Union? If the state of Ohio grant a charter to a company to improve the navigation of a certain river, and authorize them to charge a toll, this would withdraw such river from ordinary legislation, but would it affect the sovereignty of the state? It is not unusual for independent governments to stipulate that the navigation of certain rivers within the territories of each shall be common to the subjects of both governments.

Individuals are free to do that which may be done lawfully, but by a compact they may stipulate that they will not do certain things, and does this destroy their agency? On the contrary, does not the obligation of the compact or agreement, voluntarily formed, show their power and regulate their rights? The same may be done under certain restrictions by the people of a state.

§ 3147. *"Sovereignty" defined.*

The terms "sovereign power of a state" are often used without any very definite idea of their meaning, and they are often misapplied.

Prior to the formation of the federal constitution the states were sovereign in the absolute sense of the term. They had established a certain agency, under the articles of confederation, but this agency had little or no power beyond that of recommending to the states the adoption of certain measures. It could not be properly denominated a government, as it did not possess the power of carrying its acts into effect. The people of the states, by the adoption of the federal constitution, imposed certain limitations in the exercise of their powers which appertain to sovereignty. But the states are still sovereign. They are bound by the compact not to exercise certain powers which they have delegated to the federal government, and the citizens of the state are bound to respect and obey the powers thus delegated. But this compact, or federal constitution, was voluntarily formed by the people of the states in their sovereign capacity, and may be changed at their pleasure in the mode provided. The sovereignty of a state does not reside in the persons who fill the different departments of its government, but in the people from whom the government emanated, and who may change it at their discretion. Sovereignty, then, in this country, abides with the constituency and not with the agent. And this remark is true, both in reference to the federal and state gov-

ernments. If the people of a state, in their sovereign capacity, enter into a compact, either from motives of sound policy or for a valuable consideration paid, that certain lands within the state shall be exempt from taxation, or that certain navigable rivers shall remain unobstructed, the sovereignty of the state is no more affected than it is by every act of incorporation, where exclusive privileges are given to a company or an individual.

§ 3148. *Although certain objects be withdrawn from taxation by compact, the sovereignty of the state remains unimpaired.*

Certain objects on which the sovereign power may act are, by its own consent, withdrawn from its action; but this does not divest the state of any attribute of its sovereignty. If certain lands be exempt from taxation, the general power to tax is not affected; and so as to any exclusive right or privilege which is vested by compact or act of incorporation. A state cannot divest itself of its essential attributes of sovereignty. It cannot enter into a compact not to exercise its legislative and judicial functions, or its elective rights; because this would be to change the form of government which is guarantied by the federal constitution.

§ 3149. *What is meant by admitting a state into the Union on equal footing.*

But it is earnestly contended that the rights asserted by the complainant are wholly incompatible with the sovereignty of the state, and with the provision that the state was admitted on an equal footing with the original states. Does this provision mean that the new state shall exercise the same powers and in the same modes as are exercised by any other state? Now this cannot be the true construction of the provision, for there cannot be found, perhaps, any two states in the Union whose legislative, judicial and executive powers are in every respect alike. If the argument be sound, that there is no equal footing short of exact equality in this respect, then the states are not equal. But if the meaning be, that the people of the new state, exercising the sovereign powers which belong to the people of any other state, shall be admitted into the Union, subject to such provisions in their fundamental law as they shall have sanctioned, within the restrictions of the federal constitution, then the states are equal. Equal in rank, equal in their powers of sovereignty; and only differ in their restrictions, which, in the exercise of those powers, they may have voluntarily imposed upon themselves. Thus a state may, in her constitution, prohibit the legislature from incorporating banks, or in fact from passing any act of incorporation; and yet this state would be admitted into the Union on an equal footing with the other states.

The same powers were exercised in forming a constitution, but in the distribution of the powers of the state government they were not given to the same extent, nor were they to be exercised in the same manner. But this produces no inequality. The states are equal, inasmuch as each has by its own voluntary will established its own government, and has the power to alter it. This is the principle on which the state governments are established, and consequently they all stand upon an equal footing. They have the same basis; have been formed according to the will of the people, and may be changed at their discretion. If, then, there is nothing in the constitution of the state which is repugnant to the compact in the ordinance in relation to navigable waters, and the parties to the compact have in no form annulled it, and it is not inconsistent with that equality which the state of Ohio claims with the original states, it follows that this compact is in full force, and is a subject of judicial cognizance.

§ 3150. *The effect of the compact of 1787 upon the subsequently admitted states.*

The sixth article of the compact prohibits slavery. The constitution of the state also prohibits it. Now notwithstanding this inhibition in the constitution, the people of the state, in convention, might so alter the constitution as to admit slavery. But does not the compact prevent such an alteration without the consent of the original states? If this be not the effect of the compact, its import has been misconceived by the people of the state generally. They have looked upon this provision as a security against the introduction of slavery, even beyond the provisions of the constitution. And this consideration has drawn masses of population to our state, who now repose under all the guaranties which are given on this subject by the constitution and the compact. The provision of the compact in regard to slavery rests upon the same basis as that which regards the navigable waters within the state. They are both declared to be unalterable, except by common consent.

§ 3151. *Congress had the power to annul the compact of 1787, but the intent to do so must clearly appear.*

But it is contended that congress having made a donation of lands to aid in the structure of this canal on condition that its navigation shall be free to the United States for the transportation of troops and munitions of war, and as the canal can be of no use without the water of the Maumee, it must follow that the provisions of the compact, as it regards this river, are annulled by the assent of both parties. This argument would have great force if it were impracticable to draw the necessary water for the canal from the river without materially obstructing its navigation. This is not pretended. And if a sufficient supply of water may be drawn from the river without injury to its navigation, it would be a most unreasonable implication to hold that the compact, in regard to this river, is annulled or was intended to be annulled.

§ 3152. *Natural falls do not destroy the character of the river above them if it be navigable.*

It is insisted that the Maumee river above the falls is not embraced by the compact. That by the common law rivers were only held to be navigable as far as the tide ebbed and flowed; and that by analogy this principle may be applied in this country to a river so far as its navigation is continuous, but no further. That in this view the obstruction of the falls of the Maumee must terminate its navigableness. If this position be correct, the navigation of the St. Lawrence, and the waters connected with it, terminate at the falls of the Niagara. And if the same rule were applied to our rivers generally, it would do violence to the common understanding of the country, and contradict the daily demonstrations which are everywhere witnessed.

§ 3153. *Rivers, when considered navigable.*

In England, where the common law rule on this subject prevails, the rivers are of no great length; and they are not, in fact, navigable above the flowing of the tide. Neither this rule nor any principle drawn from it has been applied to rivers in this country. Obstructions do often occur on navigable rivers, without changing their character; and where a river, like the Maumee, affords a continuous navigation for steamboats one hundred and twenty miles above an obstruction, two-thirds of the year, it must be held navigable, within the meaning of the compact.

§ 3154. *Navigability, how proved.*

The fact of navigableness may be proved, like any other fact in the cause,

and, for the purposes of the injunction, may be considered as proved by the oath of the complainant.

The supreme court of this state, in the case of *Williams v. Zanesville Canal and Manuf. Co.*, 5 Ham., 410, had occasion to examine the point now under consideration. That was an action of trespass, in which the plaintiffs claimed damages for the loss of a boat and cargo in crossing a dam over the Muskingum river, which the legislature had authorized the defendants to construct, but they were required to make and keep in repair a lock in the dam of certain dimensions, which would afford a safe passage for boats. This lock had fallen out of repair, in consequence of which the loss was suffered of which the plaintiffs complained. In their opinion the court say, "to the validity of certain statutes as affording a protection to the defendants, the plaintiffs object on the ground that they interfere with the ordinance," etc. This portion of the ordinance of 1787, the court say, is as much obligatory upon the state of Ohio as our own constitution. In truth it is more so; for the constitution may be altered by the people of the state, while this cannot be altered without the assent both of the people of this state and of the United States, through their representatives. It is an article of compact, and until we assume the principle that the sovereign power of the state is not bound by compact, this clause must be considered obligatory. Certain "navigable rivers" in Ohio are "common highways." Of this character is the Muskingum river. Every citizen of the United States has a perfect right to its free navigation. A right derived, not from the legislature of Ohio, but from a superior source. With this right the legislature cannot interfere. In other words, they cannot, by any law which they may pass, impede or obstruct the navigation of that river. That which they cannot do directly they cannot do indirectly. If they have not themselves the power to obstruct or impede the navigation, they cannot confer this favor upon an individual or a corporation.

On the part of the complainant it is insisted that the compact is violated if the legislature authorize the construction of any work, on a navigable stream, though it may improve its navigation. That a dam across the Maumee, though constructed with a lock, would delay and therefore obstruct the navigation. On the other hand the defendants' counsel insist that the legislature may improve the navigation of any river in the exercise of their discretion, and that it is for them to determine what shall amount to an obstruction. That this is not a judicial question, but one of expediency, which must be determined by the law-making power. If the compact be in force, if it secure to the public, and every citizen, a right to the unobstructed navigation of the navigable rivers within the state, the judicial power is bound to recognize this right. And there can be no more difficulty in this than in many other cases of daily cognizance in courts of justice. A court or jury must also decide from facts, whether an injury complained of amounts to a nuisance either public or private. And in the present case, the court can decide whether the acts threatened to be done by the defendants would be injurious to the public and to the complainant in particular; and whether they violate the compact.

§ 3155. *The ordinance of 1787 does not prohibit the state from improving the rivers and exacting toll.*

The provisions of the ordinance had reference to the navigable rivers and the carrying places as they then were. And in that state they were to remain free, without tax, etc. But this does not prevent the legislature from improving the navigation of rivers and the carrying places between them. Such im-

provements can in no sense be considered as repugnant to the ordinance, but in promotion of its great object. And it would seem to be no violation of the compact if the legislature should exact a toll, not for the navigation of the rivers in their natural state, but for the increased facilities established by the funds of the state. The carrying places between the navigable points at the date of the compact were in their natural state. No way had been opened for a solitary traveler, much less for purposes of commerce.

In this wild and unimproved state neither the territorial nor state legislature could prohibit the passage over these carrying places nor impose a tax on travelers or merchandise for passing over them. But if the legislature with the funds of the state, or through the instrumentality of an incorporated company, should construct a canal, a turnpike road or a railroad, connecting the navigable parts of these rivers, it could be no violation of the ordinance to exact a toll for the use of these ways. This would not impair any right given by the compact, but would require a compensation for a benefit conferred. And it would be no sufficient answer to this to say that the traveler or transporter of produce or merchandise had a right to thread his way through the unbroken forests, and therefore these must be permitted to remain in their natural state. Navigable rivers, and the carrying places between them, are placed on the same footing by the compact; and the only difference between them is, the rivers have established channels, whilst the carrying places are unmarked. They are both in their natural condition, and the state, it would seem, is no more prohibited from improving the navigation of the rivers than the carrying places between them. And if a toll may be charged for the increased facilities in the one case, for the same reason it may in the other. We therefore can entertain no doubt that the legislature may improve, at their discretion, the navigable rivers of the state, and authorize the construction of any works on them which shall not materially obstruct their navigableness. They may build a dam over the Maumee, if it shall be so constructed with a lock or otherwise as not materially to obstruct its navigation.

§ 3156. *The mere fact that the United States owns property within a state gives no sovereignty therein.*

The counsel for the complainant contend that the United States still hold the proprietary right in the streams of the state. And on this ground, independent of the compact, as well as under "the power to regulate commerce among the several states," congress had a right to declare, as in the act of 1798 they have declared, that these streams should remain free, etc.

It is true the United States held the proprietary right under the act of cession, and also the right of sovereignty, until the state government was established; but the mere proprietary right, if it exist, gives no right of sovereignty. The United States may own land within a state, but political jurisdiction does not follow this ownership. Where jurisdiction is necessary, as for forts and arsenals, a cession of it is obtained from the state. Even the lands of the United States, within the state, are exempted from taxation by compact. Jurisdiction over these rivers is vested in the local government, subject to the provisions of the compact. What legislative power congress may exercise over these rivers, under the power to regulate commerce among the several states, it does not seem to be necessary now to determine. Any law on this subject must be general in its provisions and consequently apply to all the states. The law of 1798 does not purport to be an exercise of power under this provision of the constitution.

§ 3157. *The right to object to a violation of the ordinance of 1787 lies with every citizen of the United States.*

We come now to inquire whether the complainant, under the circumstances of the case, and in the form presented, is entitled to an injunction. It is objected, in the first place, that the complainant, being a citizen of Massachusetts, is not a party to the compact. That this instrument was formed between the original states and the people of the territory and of the states which should be formed within it. The force of this objection is not perceived. Under no circumstances can it be material for any one who asks relief under the compact, to show that he is a party to it. The complainant is a citizen of the state of Massachusetts, which gives him a right to sue in this court, and if he bring himself within the rule which authorizes an injunction, he may ask it though no party to the compact. The injunction is not asked on the sovereign power of the state, but on certain individuals assuming to act in behalf of the state. This course of proceeding is fully sustained by the principle settled by the supreme court of the United States, in the case of *Osborn v. Bank of United States*, 9 Wheat., 738 (§§ 2363-87, *supra*).

§ 3158. *The right to an injunction need not, in a proper case, be first established by an action at law.*

Must the right of the complainant be established at law before he can claim an injunction? This is earnestly contended by the defendants. Whatever doubts may have formerly existed on this subject, there seems to be no ground for any at this day. The injunction is issued because, under the circumstances of the case, it is the only adequate remedy. In cases of an alleged violation of copyright, it is often resorted to. And in the case of the *Universities of Cambridge and Oxford v. Richardson*, 6 Ves. Jr., 689, Lord Eldon remarked, "it is said that in cases of this sort the universal rule is, not to grant or sustain an injunction until the right is made clear at law. With all deference to Lord Mansfield, I cannot accede to that proposition, so unqualified. There are many instances in my own memory in which the court has granted or sustained injunctions to the hearing, under such circumstances." And he also observes in the same case, "if there be a number of mills upon a stream, each having a right to the water, at the instance of any one the court would enjoin." Where waste is threatened, the party has a right to an injunction to prevent the mischief. *Gibson v. Smith*, 2 Atk., 182.

In the case of *Love v. Newdigate*, 20 Ves. Jr., 194, an injunction was granted to restrain the use of the water, so as not to injure the plaintiff's manufactory. And in the case of *Gardner v. Newburg*, 2 John. Ch., 164, the court say "that chancery has concurrent jurisdiction with a court of law, in cases of private nuisances." The diversion of water-courses is a common case for the exercise of this jurisdiction. 2 Vern., 390; 1 Vern., 120, 127, 275; 16 Ves., 338. There are some cases in the books where the chancellor has refused an injunction until the right was established at law. *Reid v. Gifford*, 6 John. Ch., 19; 7 John. Ch., 162; 6 Ves., 51; 7 John. Ch., 314. But these cases are clearly distinguishable from others where the injunction is held to be the proper remedy.

§ 3159. *Principles upon which injunctions are granted.*

Does the complainant bring his case within the principle on which this extraordinary interposition of the court is given. An injunction is granted to prevent an irreparable injury. In other words, an injury for which an action at law might not give complete redress. And the principle is well illustrated by

an injunction to prevent the diversion of the flowing of water to a mill, which would destroy its value. The foundation of this jurisdiction is the necessity of a preventive remedy, where great and immediate mischief or material injury would arise to the comfort and useful enjoyment of property. The interference rests on the principle of a clear and certain right to the enjoyment of the subject in question, and an injurious interruption of the right, which, upon just and equitable grounds, ought not to be prevented. 1 Vern., 120, 127, 275. This preventive remedy is never given against an ordinary trespass, for in such case the law will afford adequate redress. But where an action at law, from the nature of the injury, cannot give that full and ample indemnity which the party is justly entitled to, he may ask the interposition of chancery to prevent the injury. In 7 John. Ch., 314, the chancellor says: "An injunction is not granted to restrain a mere trespass, where the injury is not irreparable and destructive of the plaintiff's estate, but is susceptible of perfect pecuniary compensation, and for which the party may obtain adequate satisfaction in the ordinary course of law." "It must be a strong and peculiar case of trespass going to the destruction of the inheritance, or where the mischief is remediless, to entitle the party to the interference of the court by injunction." This is the principle on which this remedy is given. Does the case made by the complainant come within the rule?

He presents his rights, which are threatened to be invaded, in two aspects. 1. As a citizen of the United States, he claims the right of the free navigation of the Maumee river, which the proposed dam or dams would destroy. 2. That he owns a tract of land on the river, and a small island in it, the value of which would be materially injured, if not wholly destroyed, by the obstructions to the navigation of the river.

§ 3160. *A court of chancery does not by injunction deal with abstractions, but acts only on practical rights.*

As it regards the first ground, whatever rights the complainant may set up as a citizen of the United States, under the compact to navigate the river, it would seem to afford no ground for this extraordinary interference of the court. This right is in fact not impaired or practically affected unless he, as a citizen of the United States, is about to navigate the river. No such allegation is contained in the bill. It is then an abstract right which he asserts, and which he may never practically exercise. A court of chancery never deals with abstractions, but acts upon existing and practical rights and prevents impending wrongs. It will enjoin, as before stated, only to prevent an irreparable injury; and that cannot be considered as such an injury which depends on a future contingency, such as the exercise of an abstract right. If the complainant shall, at any future time, think proper to attempt to navigate the river, and shall be prevented from doing so by the dam or dams now threatened to be erected, or shall suffer injury from such dam or dams in his vessel or cargo, he may well claim damages for the injury. In this way can this right of navigation, which is common to all the citizens of the United States, be practically asserted.

§ 3161. *A private citizen cannot prosecute in his own name for a public nuisance. He can only prosecute when the subject complained of is a private nuisance to himself.*

The other ground requires a more particular examination. The complainant states that he purchased the property situated at the head of the rapids, as above described, at a very large price, with a view to the navigation of that part of

the river extending from the head of the rapids to Fort Wayne, and especially because it is situated at the lower termination thereof, which benefits he claims are secured to him by the ordinance and law of congress before mentioned, and the constitution of the United States. "That there is an extensive and valuable water-power upon the property, afforded by the rapids of the river which commence at said point. Two extensive saw mills and one flouring mill have already been erected thereon, and it was the expectation of the complainant that many others would speedily be erected, and he believes they still would be, but for the anticipated effects of said dam or dams, which are threatened to be located above." "That said dam or dams are intended to be erected some miles above his property, and that the effect thereof would be to greatly obstruct, if not entirely cut off and destroy, the navigation of the river, throughout the entire distance between the foot of the rapids and Fort Wayne. That the value of his property would be thereby greatly lessened, if not wholly destroyed, and his right as a citizen of the United States to navigate said river without obstruction, hindrance or payment of toll, would be violated and rendered of little or no practical value whatever." "And he insists that the dam or dams would be a public nuisance, and that, as such, their erection should be arrested by the interposition of the court."

From the case stated by the complainant it is clear that he considers the dam or dams as a public nuisance, and that he, as a citizen of the United States, being entitled to the free navigation of the river, has a right to prosecute for this nuisance, and ask the court to enjoin the defendants. No individual has a right to prosecute for a public nuisance in his own name, or at his own instance, in this form of action, unless such nuisance be irreparably injurious to himself. The United States through their law officer might well ask to have this nuisance, if it shall be one, abated; but the special and private injury to an individual is the only ground on which he can ask for relief against it. 18 Ves. Jr., 215; 6 John. Ch., 439; Attorney-General v. Nichol, 16 Ves. Jr., 338.

In the case of the City of Georgetown v. Alexandria Canal Co., 12 Pet., 98, the supreme court say, as the result of the cases examined, "a court of equity will now take jurisdiction of a public nuisance at the instance of a private person, where he is in imminent danger of suffering a special injury, for which, under the circumstances of the case, the law would not afford an adequate remedy." And in the case of Crowder v. Tinkler, 19 Ves. Jr., 616, the chancellor says, "the complaint is therefore to be considered as of not a public nuisance simply, but what, being so in its nature, is attended with extreme probability of irreparable injury to the property of the plaintiffs, including, also, danger to their existence, and on such case, clearly established, I do not hesitate to say an injunction would be granted."

We have already considered the mere abstract right of navigating the river, secured to every citizen of the United States, as too remote and contingent for the special interference of the court. The right may exist absolutely in the abstract, but whether it will ever be exercised is wholly contingent. If the complainant were actually engaged in plying a steamboat or other vessel, between Fort Wayne and the rapids, he would at least present a tangible case, by showing the exercise of a right which would be destroyed by the construction of the works complained of. It is a public nuisance to obstruct a highway on which every citizen has a right to travel; but can any citizen, on the ground of this right, ask a court of chancery to enjoin any persons who may threaten to erect such obstruction? The individual has suffered no special

injury, much less an injury that is irremediable, in any other form than by injunction. If, in attempting to travel the road, he should be prevented from doing so, by the obstruction, he would have a right to bring his action at law for damages. And this is the only appropriate redress which an individual, under such circumstances, can have. The persons who constructed the nuisance would be liable to a public prosecution, and in this form the redress to the public would be ample.

§ 3162. *It is necessary, to entitle a party to an injunction, that he shall show how his property will be injured.*

The complainant alleges that he paid a high price for his property on account of its situation, and that its value will be greatly injured, if not wholly destroyed, by the dam or dams which the defendants are about to build. But he does not state how this consequence will follow. If it result from destroying the navigableness of the river, is it not easy to state in what manner it injures his property? Has he a landing place on his ground, a place where the produce transported on the river is deposited, or what other facts or circumstances show that the value of property depends upon the navigation of the river? It is not enough for the complainant to say, generally, that he will be injured by the construction of the works; but he must state how his property will be injured. This is the turning point in the case; the ground on which the injunction must be allowed, if it shall be issued.

The complainant does not complain that the flowing of the water is diverted or will be diverted from his mill, so as to injure it; or that the volume of water will be so reduced as to prevent the construction of other mills. No special injury of any kind is alleged, but, generally, that the obstructions would injure the value of his property. This may be the estimate of the complainant, but by a statement of the facts on which his estimate is formed, he must enable the court to judge of its correctness. He has stated no fact going to show how the free navigation of the river gives value to his property. Is the river a highway to his mill, and is it used for the transportation of lumber to or from the mill? This is not stated in the bill. Does the river afford the only outlet or approach to his mill? Nothing of this kind is pretended. How then do the proposed obstructions on the river inflict on the complainant an irremediable injury? The court do not see how such an injury is inflicted, and the complainant has failed to enlighten them on the subject.

In the case of *Corning v. Lowerre*, 6 Johns., 439, an injunction was granted to restrain a defendant from obstructing a street, in the city of New York, by building a house thereon; it being not only a public nuisance, but producing special injury to the plaintiffs by affecting the enjoyment of their property in the vicinity, and the value of it. In that case there was an intimate connection between the enjoyment of the property and the street which led to it; and this was shown by the facts of the case. In the case of the *Attorney-General v. Nichol*, 16 Ves. Jr., 338, the chancellor said that an injunction against darkening ancient windows cannot be sustained in every case affecting the value of the premises, that would support an action. The effect must be, that material injury amounting to nuisance, which should not only be redressed by damages, but upon equitable principles prevented. And in 7 John. Ch., 314, where an injunction was refused, the chancellor says, "the plaintiff does not aver that the ledge of stone or mass of rock, on which the trespass is committed, is of any essential use, or that he does or can apply it to any valuable purpose. It cannot be compared then to a lead or coal mine, or a quarry of

marble, or a fine building, or precious stones, or a grove of timber, or a mill establishment, which the court of chancery has thought proper to protect from trespass and ruin by injunction."

The court would not hesitate to enjoin the defendants, and to give effect to their decree, on a proper case being made; but the complainant has failed to show that measure of injury which calls for its special interposition by an injunction. The injunction is therefore not allowed.

§ 3163. *Still in force.*—The ordinance of 1787 is in force in the states carved out of the original northwest territory. *Columbus Insurance Co. v. Curtenius*, 6 McL., 212; *Jolly v. Terre Haute Draw-Bridge Co.*, id., 241.

§ 3164. *Superseded by federal constitution.*—The ordinance of 1787, for the government of the territory northwest of the Ohio river, was superseded by the constitution on its adoption, and consequently an act of a state legislature permitting a dam to be built across the Wisconsin river is not affected by the provision of that ordinance that the navigable waters leading to the Mississippi and St. Lawrence shall be common highways and forever free. *Woodman v. Kilbourn Manuf. Co.*, 1 Abb., 161.

§ 3165. *Annulled, so far as repugnant to constitution, by admission of state.*—Upon the admission of a state into the Union, that state becomes as much bound by the constitution of the United States as any state, and this though it was formed out of what was the northwest territory; and every part of the ordinance of 1787 conflicting with the constitution is repealed by it. While it is true that that ordinance could only be repealed by mutual consent, yet that consent is to be implied by the acceptance by the people of such state of the constitution, and the recognition of the state by congress. *Vaughn v. Williams*, 8 McL., 532; *Strader v. Graham*, 10 How., 95.

§ 3166. *Connecticut Reserve.*—Though the Western Reserve of Connecticut was excepted from the operation of the ordinance of 1787, and was subject for some years thereafter to the control of the legislature of Connecticut, yet as soon as it was ceded to the United States, as it was afterwards, the provisions of the ordinance thereupon attached to it. *Palmer v. Commissioners of Cuyahoga County*, 8 McL., 228.

§ 3167. *Iowa.*—Although the territory of Iowa did incorporate into its system of laws, indirectly, many of the provisions of the ordinance of 1787, yet it at the same time provided that they should be subject to be altered, repealed or modified by the governor and legislative assembly of the territory, and hence anything in the laws of that territory contrary to the ordinance is not for that reason invalid. *Messenger v. Mason*, 10 Wall., 507.

§ 3168. *Rivers of northwest territory.*—Under the ordinance of 1787, and the continuous legislation of congress since, it is clear that the rivers of the original northwest territory which are tributaries of the St. Lawrence and Mississippi, whether now within the boundaries of states or not, are free and common highways and cannot be materially obstructed by state authority. *Columbus Ins. Co. v. Curtenius*, 6 McL., 211.

§ 3169. The fourth section of the ordinance of 1787, providing that navigable rivers leading into the St. Lawrence and Mississippi shall remain common highways and free to all, applies only to those rivers in their natural state; but it seems that a state may improve the navigability of such rivers by removing obstructions, or by so constructing dams and locks that navigation may be extended. A toll charged for the improvement of such navigation is not within the prohibition of the ordinance. The tax in such case would not be for the use of the river in its natural state, but for the use of the increased commercial facilities. *Palmer v. Commissioners of Cuyahoga Co.*, 8 McL., 227.

§ 3170. *Ferries.*—The power of a state legislature to grant the right to maintain a ferry across the Mississippi is not affected by the ordinance of 1787 or the power of congress to regulate navigation. *Fanning v. Gregoire*, 16 How., 534.

§ 3171. *Land titles.*—The provisions of the ordinance of 1787 relating to the conveyance of lands applies to conveyances of the legal title and not to mere equitable transfers. *Lewis v. Baird*, 8 McL., 62.

§ 3172. The fugitive slave law of February 12, 1793 (1 Statutes at Large, 302), is not invalid in Ohio as being in conflict with that clause of the ordinance of 1787, for the government of the northwest territory, which prohibited slavery in that territory. That prohibition does not affect the domestic institution of slavery as other states may choose to allow it among their people, nor impair their rights of property under it when their slaves happen to escape into this territory. To allow the recapture of slaves escaping into this territory is not repugnant to the ordinance. Wherever it existed, states still maintain their own laws, as well as the ordinance, by not allowing slavery to exist among their own citizens; but in relation

to the inhabitants of other states, if they escape into states within the limits of the ordinance, and if the constitution allow them, when fugitives from labor, to be reclaimed, this does not interfere with their own laws as to their own people, nor do acts of congress interfere with them which are rightfully passed to carry these constitutional rights into effect there as fully as in other portions of the Union. *Jones v. Van Zandt*, 5 How., 230.

XVII. LAW OF NATIONS.

[See MARITIME LAW; TREATIES; WAR.]

SUMMARY — *Contracts by citizens in aid of war against friendly power*, § 3173. — *Seizure of foreign vessel in our ports*, § 3174.

§ 3173. Our government owes the duty to every nation with whom it is on terms of friendship to compel its citizens to abstain from any encouragement of rebellion against such nations. Therefore a contract entered into in this country to convey land in Texas, in consideration of money loaned for the purpose of enabling that state to carry on its military operations against Mexico, before the independence of Texas was acknowledged by our central government, is void. *Kennett v. Chambers*, §§ 3175-3179.

§ 3174. A public armed ship, in the service of a foreign sovereign with whom the government of the United States is at peace, entering under stress of weather an American port open for her reception and demeaning herself in a friendly manner, is exempt from the jurisdiction of our courts, and is, therefore, not liable to seizure, even on the libel of American citizens alleging their ownership of her, and its forcible seizure from them by the agents of such sovereign. *Schooner Exchange v. McFaddon*, §§ 3180-3186.

[NOTES.—See §§ 3187-3232.]

KENNETT v. CHAMBERS.

(14 Howard, 83-52. 1852.)

Opinion by TANEY, C. J.

STATEMENT OF FACTS.—This is an appeal from the decree of the district court of the United States for the district of Texas.

The appellants filed a bill in that court against the appellee, to obtain the specific execution of an agreement which is set out in full in the bill, and which they allege was executed at the city of Cincinnati, in the state of Ohio, on or about the 16th of September, 1836. Some of the complainants claim as original parties to the contract, and the others as assignees of original parties, who have sold and assigned to them their interest. The contract, after stating that it was entered into on the day and year above mentioned, between General T. Jefferson Chambers, of the Texan army, of the first part, and Morgan Neville and six others, who are named in the agreement, of the city of Cincinnati, of the second part, proceeds to recite the motives and inducements of the parties in the following words: "That the said party of the second part, being desirous of assisting the said General T. Jefferson Chambers, who is now engaged in raising, arming and equipping volunteers for Texas, and who is in want of means therefor; and being extremely desirous to advance the cause of freedom and the independence of Texas, have agreed to purchase of the said T. Jefferson Chambers, of his private estate, the lands hereinafter described." And after this recital follows the agreement of Chambers, to sell and convey to them the land described in the agreement, situated in Texas, for the sum of \$12,500, which he acknowledged that he had received in their notes, payable in equal instalments of four, six and twelve months, and he covenanted that he had a good title to this land, and would convey it with general warranty. There are other stipulations on the part of Chambers, to secure the title to the parties, which it is unnecessary to state, as they are not material to the questions before the court.

After setting out the contract at large, the bill avers that the notes given, as aforesaid, were all paid, and sets forth the manner in which the complainants, who were not parties to the original contract, had acquired their interest as assignees; and charges that, notwithstanding the full payment of the money, Chambers, under different pretexts, refuses to convey the land according to the terms of his agreement. It further states that they are informed, and believe, that he received full compensation in money, scrip, land, or other valuable property, for the supplies furnished by him, and in arming and equipping the Texan army referred to in the said contract, and which it was in part the object of the said parties of the second part to assist him to do, by the said advances made by them, as before stated, and which said advances did enable the said Chambers so to do.

To this bill the respondent Chambers demurred, and the principal question which arises on the demurrer is whether the contract was a legal and valid one, and such as can be enforced by either party in a court of the United States. It appears on the face of it, and by the averments of the appellants in their bill, that it was made in Cincinnati with a general in the Texan army, who was then engaged in raising, arming and equipping volunteers for Texas, to carry on hostilities with Mexico, and that one of the inducements of the appellants in entering into this contract and advancing the money was to assist him in accomplishing these objects.

§ 3175. *A contract made for the purpose of aiding hostilities against a power with whom the United States were at peace is in violation of the neutrality laws of the United States, and void.*

The district court decided that the contract was illegal and void, and sustained the demurrer and dismissed the bill; and we think that the decision was right. The validity of this contract depends upon the relation in which this country then stood to Mexico and Texas, and the duties which those relations imposed upon the government and citizens of the United States. Texas had declared itself independent a few months previous to this agreement. But it had not been acknowledged by the United States; and the constituted authorities charged with our foreign relations regarded the treaties we had made with Mexico as still in full force, and obligatory upon both nations. By the treaty of limits (8 Stats. at Large, 372), Texas had been admitted by our government to be a part of the Mexican territory; and, by the first article of the treaty (8 Stats. at Large, 410) of amity, commerce and navigation, it was declared "that there should be a firm, inviolable and universal peace, and a true and sincere friendship between the United States of America and the United Mexican States, in all the extent of their possessions and territories, and between their people and citizens respectively, without distinction of persons or place." These treaties, while they remained in force, were, by the constitution of the United States, the supreme law, and binding not only upon the government, but upon every citizen. No contract could lawfully be made in violation of their provisions.

Undoubtedly, when Texas had achieved her independence, no previous treaty could bind this country to regard it as a part of the Mexican territory. But it belonged to the government, and not to individual citizens, to decide when that event had taken place. And that decision, according to the laws of nations, depended upon the question whether she had or had not a civil government in successful operation, capable of performing the duties and fulfilling the obligations of an independent power. It depended upon the state of the fact,

and not upon the right which was in contest between the parties. And the president, in his message to the senate of December 22, 1836, in relation to the conflict between Mexico and Texas, which was still pending, says: "All questions relative to the government of foreign nations, whether of the old or the new world, have been treated by the United States as questions of fact only, and our predecessors have cautiously abstained from deciding upon them until the clearest evidence was in their possession to enable them not only to decide correctly, but to shield their decision from every unworthy imputation." Senate Journal of 1836, 37, p. 54.

Acting upon these principles, the independence of Texas was not acknowledged by the government of the United States until the beginning of March, 1837. Up to that time it was regarded as a part of the territory of Mexico. The treaty which admitted it to be so was held to be still in force and binding on both parties, and every effort made by the government to fulfil its neutral obligations, and prevent our citizens from taking part in the conflict. This is evident from an official communication from the president to the governor of Tennessee, in reply to an inquiry in relation to a requisition for militia, made by General Gaines. The dispatch is dated in August, 1836, and the president uses the following language: "The obligations of our treaty with Mexico, as well as the general principles which govern our intercourse with foreign powers, require us to maintain a strict neutrality in the contest which now agitates a part of that republic. So long as Mexico fulfils her duties to us, as they are defined by the treaty, and violates none of the rights which are secured by it to our citizens, any act on the part of the government of the United States, which would tend to foster a spirit of resistance to her government and laws, whatever may be their character or form, when administered within her own limits and jurisdiction, would be unauthorized and highly improper." Ex. Doc., 1836, 1837, Vol. 1, Doc. 2, p. 58.

And on the very day on which the agreement of which we are speaking was made, September 16, 1836, Mr. Forsyth, the secretary of state, in a note to the Mexican minister, assured him that the government had taken measures to secure the execution of the laws for preserving the neutrality of the United States, and that the public officers were vigilant in the discharge of that duty. Ex. Doc., Vol. 1, Doc. 2, pp. 63, 64.

And still later, the president in his message to the senate of December 22, 1836, before referred to, says: "The acknowledgment of a new state as independent, and entitled to a place in the family of nations, is at all times an act of great delicacy and responsibility; but more especially so when such a state has forcibly separated itself from another, of which it formed an integral part, and which still claims dominion over it." And, after speaking of the policy which our government had always adopted on such occasions, and the duty of maintaining the established character of the United States for fair and impartial dealing, he proceeds to express his opinion against the acknowledgment of the independence of Texas, at that time, in the following words:

"It is true, with regard to Texas, the civil authority of Mexico has been expelled, its invading army defeated, the chief of the republic himself captured, and all present power to control the newly organized government of Texas annihilated within its confines. But, on the other hand, there is, in appearance at least, an immense disparity of physical force on the side of Mexico. The Mexican republic, under another executive, is rallying its forces under a new leader, and menacing a fresh invasion to recover its lost dominion. Upon the

issue of this threatened invasion the independence of Texas may be considered as suspended; and, were there nothing peculiar in the relative situation of the United States and Texas, our acknowledgment of its independence at such a crisis would scarcely be regarded as consistent with that prudent reserve with which we have heretofore held ourselves bound to treat all similar questions." The whole object of this message appears to have been to impress upon congress the impropriety of acknowledging the independence of Texas at that time, and the more especially as the American character of her population, and her known desire to become a state of this Union, might, if prematurely acknowledged, bring suspicion upon the motives by which we were governed.

We have given these extracts from the public documents not only to show that, in the judgment of our government, Texas had not established its independence when this contract was made, but to show also how anxiously the constituted authorities were endeavoring to maintain untarnished the honor of the country, and to place it above the suspicion of taking any part in the conflict. This being the attitude in which the government stood, and this its open and avowed policy, upon what grounds can the parties to such a contract as this come into a court of justice of the United States and ask for its specific execution? It was made in direct opposition to the policy of the government, to which it was the duty of every citizen to conform. And, while they saw it exerting all its power to fulfil in good faith its neutral obligations, they made themselves parties to the war by furnishing means to a general of the Texan army for the avowed purpose of aiding and assisting him in his military operations.

It might indeed fairly be inferred, from the language of the contract and the statements in the appellants' bill, that the volunteers were to be raised, armed and equipped within the limits of the United States. The language of the contract is: "That the said party of the second part (that is, the complainants), being desirous of assisting the said General T. Jefferson Chambers, who is now engaged in raising, arming and equipping volunteers for Texas, and is in want of means therefor." And as General Chambers was then in the United States, and was, as the contract states, actually engaged at that time in raising, arming and equipping volunteers, and was in want of means to accomplish his object, the inference would seem to be almost irresistible that these preparations were making at or near the place where the agreement was made, and that the money was advanced to enable him to raise and equip a military force in the United States. And this inference is the stronger because no place is mentioned where these preparations are to be made, and the agreement contains no engagement on his part, or proviso on theirs, which prohibited him from using these means and making these military preparations within the limits of the United States.

If this be the correct interpretation of the agreement, the contract is not only void, but the parties who advanced the money were liable to be punished, in a criminal prosecution, for a violation of the neutrality laws of the United States. And certainly, with such strong indications of a criminal intent, and without any averment in the bill from which their innocence can be inferred, a court of chancery would never lend its aid to carry the agreement into specific execution, but would leave the parties to seek their remedy at law. And this ground would of itself be sufficient to justify the decree of the district court dismissing the bill. But the decision stands on broader and firmer ground,

and this agreement cannot be sustained either at law or in equity. The question is not whether the parties to this contract violated the neutrality laws of the United States or subjected themselves to a criminal prosecution, but whether such a contract, made at that time, within the United States, for the purposes stated in the contract and the bill of complaint, was a legal and valid contract, and such as to entitle either party to the aid of the courts of justice of the United States to enforce its execution.

§ 3176. *The decisions of the government as to intercourse with foreign nations are binding.*

The intercourse of this country with foreign nations, and its policy in regard to them, are placed by the constitution of the United States in the hands of the government, and its decisions upon these subjects are obligatory upon every citizen of the Union. He is bound to be at war with the nation against which the war-making power has declared war, and equally bound to commit no act of hostility against a nation with which the government is in amity and friendship. This principle is universally acknowledged by the laws of nations. It lies at the foundation of all government, as there could be no social order or peaceful relations between the citizens of different countries without it. It is, however, more emphatically true in relation to citizens of the United States. For as the sovereignty resides in the people, every citizen is a portion of it, and is himself personally bound by the laws which the representatives of the sovereignty may pass, or the treaties into which they may enter, within the scope of their delegated authority. And when that authority has plighted its faith to another nation that there shall be peace and friendship between the citizens of the two countries, every citizen of the United States is equally and personally pledged. The compact is made by the department of the government upon which he himself has agreed to confer the power. It is his own personal compact, as a portion of the sovereignty in whose behalf it is made. And he can do no act, nor enter into any agreement, to promote or encourage revolt or hostilities against the territories of a country with which our government is pledged by treaty to be at peace, without a breach of his duty as a citizen, and the breach of the faith pledged to the foreign nation. And if he does so, he cannot claim the aid of a court of justice to enforce it. The appellants say, in their contract, that they were induced to advance the money by the desire to promote the cause of freedom. But our own freedom cannot be preserved without obedience to our own laws, nor social order preserved if the judicial branch of the government countenanced and sustained contracts made in violation of the duties which the law imposes, or in contravention of the known and established policy of the political department, acting within the limits of its constitutional power.

§ 3177. *A state cannot be considered independent until the government has acknowledged its independence.*

But it has been urged in the argument that Texas was in fact independent and a sovereign state at the time of this agreement; and that the citizen of a neutral nation may lawfully lend money to one that is engaged in war, to enable it to carry on hostilities against its enemy. It is not necessary, in the case before us, to decide how far the judicial tribunals of the United States would enforce a contract like this, when two states, acknowledged to be independent, were at war, and this country neutral. It is a sufficient answer to the argument to say that the question whether Texas had or had not at that

time become an independent state, was a question for that department of our government exclusively which is charged with our foreign relations. And until the period when that department recognized it as an independent state, the judicial tribunals of the country were bound to consider the old order of things as having continued, and to regard Texas as a part of the Mexican territory. And if we undertook to inquire whether she had not in fact become an independent sovereign state before she was recognized as such by the treaty-making power, we should take upon ourselves the exercise of political authority, for which a judicial tribunal is wholly unfit, and which the constitution has conferred exclusively upon another department.

This is not a new question. It came before the court in the case of *Rose v. Himely*, 4 Cranch, 272, and again in *Gelston v. Hoyt*, 3 Wheat., 324. And in both of these cases the court said that it belongs exclusively to governments to recognize new states in the revolutions which may occur in the world; and until such recognition, either by our own government or the government to which the new state belonged, courts of justice are bound to consider the ancient state of things as remaining unaltered. It was upon this ground that the court of common pleas in England, in the case of *De Wutz v. Hendricks*, 9 Moore (C. B.), 586, decided that it was contrary to the law of nations for persons residing in England to enter into engagements to raise money by way of loan for the purpose of supporting subjects of a foreign state in arms against a government in friendship with England, and that no right of action attached upon any such contract. And this decision is quoted with approbation by Chancellor Kent in 1 Kent's Com., 116.

§ 3178. *An agreement void when made is always nugatory.*

Nor can the subsequent acknowledgment of the independence of Texas and her admission into the Union as a sovereign state affect the question. The agreement being illegal and absolutely void at the time it was made, it can derive no force or validity from events which afterwards happened.

§ 3179. *It is not the law of the state where the consideration is to be received, but where the contract is made, which determines its validity.*

But it is insisted, on the part of the appellants, that this contract was to be executed in Texas, and was valid by the laws of Texas, and that the district court for that state, in a controversy between individuals, was bound to administer the laws of the state, and ought, therefore, to have enforced this agreement. This argument is founded in part on a mistake of the fact. The contract was not only made in Cincinnati, but all the stipulations on the part of the appellants were to be performed there and not in Texas. And the advance of money which they agreed to make for military purposes was, in fact, made and intended to be made in Cincinnati by the delivery of their promissory notes, which were accepted by the appellee as payment of the money. This appears on the face of the contract. And it is this advance of money for the purposes mentioned in the agreement, in contravention of the neutral obligations and policy of the United States, that avoids the contract. The mere agreement to accept a conveyance of land lying in Texas, for a valuable consideration paid by them, would have been free from objection. But had the fact been otherwise, certainly no law of Texas then or now in force could absolve a citizen of the United States, while he continued such, from his duty to this government, nor compel a court of the United States to support a contract, no matter where made or where to be executed, if that contract was in violation of their laws

or contravened the public policy of the government, or was in conflict with subsisting treaties with a foreign nation.

We therefore hold this contract to be illegal and void, and affirm the decree of the district court.

JUSTICES DANIEL and GRIER dissented.

SCHOONER EXCHANGE v. MFADDON.

(7 Cranch, 116-147. 1812.)

APPEAL from U. S. Circuit Court, District of Pennsylvania.

STATEMENT OF FACTS.—The question involved in this case was whether a French man-of-war, putting into an American port under stress of weather, is liable to seizure by the district court in admiralty on the libel of those claiming that the vessel is theirs, and that it was seized by the French authorities without right, and since transformed by the French government into an armed vessel.

Opinion by MARSHALL, C. J.

This case involves the very delicate and important inquiry whether an American citizen can assert, in an American court, a title to an armed national vessel, found within the waters of the United States. The question has been considered with an earnest solicitude that the decision may conform to those principles of national and municipal law by which it ought to be regulated. In exploring an unbeaten path, with few, if any, aids from precedents or written law, the court has found it necessary to rely much on general principles, and on a train of reasoning founded on cases in some degree analogous to this.

The jurisdiction of courts is a branch of that which is possessed by the nation as an independent sovereign power. The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction. All exceptions, therefore, to the full and complete power of a nation within its own territories must be traced up to the consent of the nation itself. They can flow from no other legitimate source. This consent may be either express or implied. In the latter case it is less determinate, exposed more to the uncertainties of construction; but, if understood, not less obligatory.

The world being composed of distinct sovereignties, possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other, and by an interchange of those good offices which humanity dictates and its wants require, all sovereigns have consented to a relaxation in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers. This consent may in some instances be tested by common usage, and by common opinion growing out of that usage. A nation would justly be considered as violating its faith, although that faith might not be expressly plighted, which should suddenly and without previous notice exercise its territorial powers in a manner not consonant to the usages and received obligations of the civilized world. This full and absolute territorial jurisdiction being

alike the attribute of every sovereign, and being incapable of conferring extra-territorial power, would not seem to contemplate foreign sovereigns nor their sovereign rights as its objects. One sovereign being in no respect amenable to another, and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him. This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction which has been stated to be the attribute of every nation.

§ 3180. *A sovereign is exempt from arrest within foreign territory.*

1st. One of these is admitted to be the exemption of the person of the sovereign from arrest or detention within a foreign territory. If he enters that territory with the knowledge and license of its sovereign, that license, although containing no stipulation exempting his person from arrest, is universally understood to imply such stipulation. Why has the whole civilized world concurred in this construction? The answer cannot be mistaken. A foreign sovereign is not understood as intending to subject himself to a jurisdiction incompatible with his dignity and the dignity of his nation, and it is to avoid this subjection that the license has been obtained. The character to whom it is given, and the object for which it is granted, equally require that it should be construed to impart full security to the person who has obtained it. This security, however, need not be expressed; it is implied from the circumstances of the case. Should one sovereign enter the territory of another, without the consent of that other, expressed or implied, it would present a question which does not appear to be perfectly settled, a decision of which is not necessary to any conclusion to which the court may come in the cause under consideration. If he did not thereby expose himself to the territorial jurisdiction of the sovereign whose dominions he had entered, it would seem to be because all sovereigns impliedly engage not to avail themselves of a power over their equal, which a romantic confidence in their magnanimity has placed in their hands.

§ 3181. — *so are foreign ministers.*

2d. A second case, standing on the same principles with the first, is the immunity which all civilized nations allow to foreign ministers. Whatever may be the principle on which this immunity is established, whether we consider him as in the place of the sovereign he represents, or by a political fiction suppose him to be extraterritorial, and, therefore, in point of law, not within the jurisdiction of the sovereign at whose court he resides; still, the immunity itself is granted by the governing power of the nation to which the minister is deputed. This fiction of extraterritoriality could not be erected and supported against the will of the sovereign of the territory. He is supposed to assent to it. This consent is not expressed. It is true that in some countries, and in this among others, a special law is enacted for the case. But the law obviously proceeds on the idea of prescribing the punishment of an act previously unlawful, not of granting to a foreign minister a privilege which he would not otherwise possess.

The assent of the sovereign to the very important and extensive exemptions

from territorial jurisdiction which are admitted to attach to foreign ministers is implied from the considerations that, without such exemption, every sovereign would hazard his own dignity by employing a public minister abroad. His minister would owe temporary and local allegiance to a foreign prince, and would be less competent to the objects of his mission. A sovereign committing the interests of his nation with a foreign power to the care of a person whom he has selected for that purpose cannot intend to subject his minister in any degree to that power; and, therefore, a consent to receive him implies a consent that he shall possess those privileges which his principal intended he should retain — privileges which are essential to the dignity of his sovereign, and to the duties he is bound to perform. In what cases a minister, by infracting the laws of the country in which he resides, may subject himself to other punishment than will be inflicted by his own sovereign, is an inquiry foreign to the present purpose. If his crimes be such as to render him amenable to the local jurisdiction, it must be because they forfeit the privileges annexed to his character; and the minister, by violating the conditions under which he was received as the representative of a foreign sovereign, has surrendered the immunities granted on those conditions; or, according to the true meaning of the original assent, has ceased to be entitled to them.

§ 3182. — *so are foreign troops passing through the country by permission.*

3d. A third case in which a sovereign is understood to cede a portion of his territorial jurisdiction is, where he allows the troops of a foreign prince to pass through his dominions. In such case, without any express declaration waiving jurisdiction over the army to which this right of passage has been granted, the sovereign who should attempt to exercise it would certainly be considered as violating his faith. By exercising it, the purpose for which the free passage was granted would be defeated, and a portion of the military force of a foreign independent nation would be diverted from those national objects and duties to which it was applicable, and would be withdrawn from the control of the sovereign whose power and whose safety might greatly depend on retaining the exclusive command and disposition of this force. The grant of a free passage, therefore, implies a waiver of all jurisdiction over the troops during their passage, and permits the foreign general to use that discipline, and to inflict those punishments, which the government of his army may require. But if, without such express permit, an army should be led through the territories of a foreign prince, might the jurisdiction of the territory be rightfully exercised over the individuals composing this army?

§ 3183. *The passing of foreign troops through the country without permission is a quasi act of war, and entitles them to war privileges only.*

Without doubt, a military force can never gain immunities of any other description than those which war gives, by entering a foreign territory against the will of its sovereign. But if his consent, instead of being expressed by a particular license, be expressed by a general declaration that foreign troops may pass through a specified tract of country, a distinction between such general permit and a particular license is not perceived. It would seem reasonable that every immunity which would be conferred by a special license would be in like manner conferred by such general permit. We have seen that a license to pass through a territory implies immunities not expressed, and it is material to inquire why the license itself may not be presumed? It is obvious that the passage of an army through a foreign territory will probably be at all times inconvenient and injurious, and would often be imminently dangerous to the

sovereign through whose dominion it passed. Such a practice would break down some of the most decisive distinctions between peace and war, and would reduce a nation to the necessity of resisting, by war, an act not absolutely hostile in its character, or of exposing itself to the stratagems and frauds of a power whose integrity might be doubted, and who might enter the country under deceitful pretexts. It is for reasons like these that the general license to foreigners to enter the dominions of a friendly power is never understood to extend to a military force; and an army marching into the dominions of another sovereign may justly be considered as committing an act of hostility; and, if not opposed by force, acquires no privilege by its irregular and improper conduct. It may, however, well be questioned whether any other than the sovereign power of the state be capable of deciding that such military commander is without a license.

§ 3184. — *but ships of war entering our ports are not subject to the above rule.*

But the rule which is applicable to armies does not appear to be equally applicable to ships of war entering the ports of a friendly power. The injury inseparable from the march of an army through an inhabited country, and the dangers often, indeed generally, attending it, do not ensue from admitting a ship of war, without special license, into a friendly port.

§ 3185. *A foreign ship of war is exempt from process when entering our ports by our assent, express or implied.*

A different rule, therefore, with respect to this species of military force, has been generally adopted. If, for reasons of state, the ports of a nation generally, or any particular ports, be closed against vessels of war generally, or the vessels of any particular nation, notice is usually given of such determination. If there be no prohibition, the ports of a friendly nation are considered as open to the public ships of all powers with whom it is at peace, and they are supposed to enter such ports, and to remain in them while allowed to remain, under the protection of the government of the place. In almost every instance the treaties between civilized nations contain a stipulation to this effect in favor of vessels driven in by stress of weather or other urgent necessity. In such cases the sovereign is bound by compact to authorize foreign vessels to enter his ports. The treaty binds him to allow vessels in distress to find refuge and asylum in his ports, and this is a license which he is not at liberty to retract. It would be difficult to assign a reason for withholding from a license thus granted any immunity from local jurisdiction which would be implied in a special license. If there be no treaty applicable to the case, and the sovereign, from motives deemed adequate by himself, permits his ports to remain open to the public ships of foreign friendly powers, the conclusion seems irresistible that they enter by his assent. And if they enter by his assent, necessarily implied, no just reason is perceived by the court for distinguishing their case from that of vessels which enter by express assent. In all the cases of exemption which have been reviewed much has been implied, but the obligation of what was implied has been found equal to the obligation of that which was expressed. Are there reasons for denying the application of this principle to ships of war?

In this part of the subject a difficulty is to be encountered, the seriousness of which is acknowledged, but which the court will not attempt to evade. Those treaties which provide for the admission and safe departure of public vessels entering a port from stress of weather, or other urgent cause, provide in like

manner for the private vessels of the nation; and where public vessels enter a port, under the general license which is implied merely from the absence of a prohibition, they are, it may be urged, in the same condition with merchant vessels entering the same port for the purposes of trade who cannot thereby claim any exemption from the jurisdiction of the country. It may be contended, certainly with much plausibility, if not correctness, that the same rule and same principle are applicable to public and private ships; and since it is admitted that private ships entering without special license become subject to the local jurisdiction, it is demanded on what authority an exception is made in favor of ships of war.

It is by no means conceded that a private vessel, really availing herself of an asylum provided by treaty, and not attempting to trade, would become amenable to the local jurisdiction, unless she committed some act forfeiting the protection she claims under compact. On the contrary, motives may be assigned for stipulating and according immunities to vessels in cases of distress, which would not be demanded for or allowed to those which enter voluntarily and for ordinary purposes. On this part of the subject, however, the court does not mean to indicate any opinion. The case itself may possibly occur, and ought not to be prejudged. Without deciding how far such stipulations in favor of distressed vessels, as are usual in treaties, may exempt private ships from the jurisdiction of the place, it may safely be asserted that the whole reasoning upon which such exemption has been implied in other cases applies with full force to the exemption of ships of war in this. "It is impossible to conceive," says Vattel, "that a prince who sends an ambassador or any other minister can have any intention of subjecting him to the authority of a foreign power; and this consideration furnishes an additional argument, which completely establishes the independency of a public minister. If it cannot be reasonably presumed that his sovereign means to subject him to the authority of the prince to whom he is sent, the latter, in receiving the minister, consents to admit him on the footing of independency; and thus there exists between the two princes a tacit convention, which gives a new force to the natural obligation."

Equally impossible is it to conceive, whatever may be the construction as to private ships, that a prince who stipulates a passage for his troops, or an asylum for his ships of war in distress, should mean to subject his army or his navy to the jurisdiction of a foreign sovereign. And if this cannot be presumed, the sovereign of the port must be considered as having conceded the privilege to the extent in which it must have been understood to be asked. To the court it appears that where, without treaty, the ports of a nation are open to the private and public ships of a friendly power, whose subjects have also liberty, without special license, to enter the country for business or amusement, a clear distinction is to be drawn between the rights accorded to private individuals or private trading vessels, and those accorded to public armed ships which constitute a part of the military force of the nation.

The preceding reasoning has maintained the propositions that all exemptions from territorial jurisdiction must be derived from the consent of the sovereign of the territory; that this consent may be implied or expressed; and that, when implied, its extent must be regulated by the nature of the case, and the views under which the parties requiring and conceding it must be supposed to act. When private individuals of one nation spread themselves through another as business or caprice may direct, mingling indiscriminately with the inhabitants of that other, or when merchant vessels enter for the purposes of trade,

it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction and the government to degradation, if such individuals or merchants did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country. Nor can the foreign sovereign have any motive for wishing such exemption. His subjects thus passing into foreign countries are not employed by him, nor are they engaged in national pursuits. Consequently, there are powerful motives for not exempting persons of this description from the jurisdiction of the country in which they are found, and no one motive for requiring it. The implied license, therefore, under which they enter, can never be construed to grant such exemption. But in all respects different is the situation of a public armed ship. She constitutes a part of the military force of her nation; acts under the immediate and direct command of the sovereign; is employed by him in national objects. He has many and powerful motives for preventing those objects from being defeated by the interference of a foreign state. Such interference cannot take place without affecting his power and his dignity. The implied license, therefore, under which such vessel enters a friendly port, may reasonably be construed, and it seems to the court ought to be construed, as containing an exemption from the jurisdiction of the sovereign within whose territory she claims the rights of hospitality.

Upon these principles, by the unanimous consent of nations, a foreigner is amenable to the laws of the place; but certainly, in practice, nations have not yet asserted their jurisdiction over the public armed ships of a foreign sovereign entering a port open for their reception. Bynkershoek, a jurist of great reputation, has indeed maintained that the property of a foreign sovereign is not distinguishable by any legal exemption from the property of an ordinary individual, and has quoted several cases in which courts have exercised jurisdiction over causes in which a foreign sovereign was made a party defendant.

Without indicating any opinion on this question, it may safely be affirmed that there is a manifest distinction between the private property of the person who happens to be a prince, and that military force which supports the sovereign power, and maintains the dignity and the independence of a nation. A prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction; he may be considered as so far laying down the prince, and assuming the character of a private individual; but this he cannot be presumed to do with respect to any portion of that armed force which upholds his crown and the nation he is intrusted to govern. The only applicable case cited by Bynkershoek is that of the Spanish ships of war seized in Flushing for a debt due from the king of Spain. In that case, the states-general interposed, and there is reason to believe, from the manner in which the transaction is stated, that either by the interference of government, or the decision of the court, the vessels were released. This case of the Spanish vessels is, it is believed, the only case furnished by the history of the world, of an attempt made by an individual to assert a claim against a foreign prince, by seizing the armed vessels of the nation. That this proceeding was at once arrested by the government, in a nation which appears to have asserted the power of proceeding in the same manner against the private property of the prince, would seem to furnish no feeble argument in support of the universality of the opinion in favor of the exemption claimed for ships of war. The distinction made in our own laws between public and private ships would appear to proceed from the same opinion.

It seems, then, to the court, to be a principle of public law, that national ships of war, entering the port of a friendly power open for their reception, are to be considered as exempted by the consent of that power from its jurisdiction.

Without doubt, the sovereign of the place is capable of destroying this implication. He may claim and exercise jurisdiction either by employing force, or by subjecting such vessels to the ordinary tribunals. But until such power be exerted in a manner not to be misunderstood, the sovereign cannot be considered as having imparted to the ordinary tribunals a jurisdiction which it would be a breach of faith to exercise. Those general statutory provisions, therefore, which are descriptive of the ordinary jurisdiction of the judicial tribunals, which give an individual whose property has been wrested from him a right to claim that property in the courts of the country in which it is found, ought not, in the opinion of this court, to be so construed as to give them jurisdiction in a case in which the sovereign power has impliedly consented to waive its jurisdiction. The arguments in favor of this opinion which have been drawn from the general inability of the judicial power to enforce its decisions in cases of this description, from the consideration that the sovereign power of the nation is alone competent to avenge wrongs committed by a sovereign, that the questions to which such wrongs give birth are rather questions of policy than of law, that they are for diplomatic rather than legal discussion, are of great weight and merit serious attention. But the argument has already been drawn to a length which forbids a particular examination of these points.

§ 3186. — *and no inquiry can be had into the title of the foreign government to the vessel, even though it is claimed it was unlawfully taken from an American citizen.*

The principles which have been stated will now be applied to the case at bar. In the present state of the evidence and proceedings, the Exchange must be considered as a vessel, which was the property of the libelants, whose claim is repelled by the fact that she is now a national armed vessel, commissioned by, and in the service of, the emperor of France. The evidence of this fact is not controverted. But it is contended that it constitutes no bar to an inquiry into the validity of the title by which the emperor holds this vessel. Every person, it is alleged, who is entitled to property brought within the jurisdiction of our courts, has a right to assert his title in those courts, unless there be some law taking his case out of the general rule. It is therefore said to be the right, and if it be the right it is the duty, of the court to inquire whether this title has been extinguished by an act, the validity of which is recognized by national or municipal law. If the preceding reasoning be correct, the Exchange being a public armed ship, in the service of a foreign sovereign, with whom the government of the United States is at peace, and having entered an American port open for her reception, on the terms on which ships of war are generally permitted to enter the ports of a friendly power, must be considered as having come into the American territory under an implied promise that, while necessarily within it, and demeaning herself in a friendly manner, she should be exempt from the jurisdiction of the country. If this opinion be correct, there seems to be a necessity for admitting that the fact might be disclosed to the court by the suggestion of the attorney for the United States.

I am directed to deliver it, as the opinion of the court, that the sentence of the circuit court, reversing the sentence of the district court in the case of the Exchange, be reversed, and that of the district court, dismissing the libel, be affirmed.

§ 3187. **Defined — Origin.**— The law of nations is defined to be the law of nature, rendered applicable to political societies, and modified in progress of time by tacit or express consent, by long established usages and written compacts of nations. *Johnson v. 21 Bales*,* *Van Ness*, 5; 2 *Paine*, 604.

§ 3188. Usages and compacts become so general, that every civilized people ought to adopt and recognize their principles. *Ibid*.

§ 3189. The common municipal law of England is not one of the sources from which international law is derived. It is derived from natural reason and justice, from writers of known wisdom, and from the practice of civilized nations. *Right of Expatriation*,* 9 *Op. Att'y Gen'l*, 358.

§ 3190. **Governs all nations.**— The law of nations is the law of all tribunals in the society of nations, and is supposed to be equally understood by all. *Rose v. Himely*, 4 *Cr.*, 277.

§ 3191. The general laws of nations are binding on us. *Thompson v. The Ship Cathrina*, 1 *Pet. Adm.*, 104.

§ 3192. The law of nations, though not specially adopted by the constitution of the United States, or by any municipal act, is essentially a part of the law of the land. Its obligation commences and runs with the existence of a nation, subject to modifications on some points of indifference. A people may regulate it so that it shall be binding upon the departments of their own government in any form whatever, but with regard to foreigners, every change is at the peril of the nation which makes it. *Privilege from Arrest*,* 1 *Op. Att'y Gen'l*, 27; *Territorial Rights*,* 1 *id.*, 69; *Enlistment of Aliens*,* 8 *id.*, 671.

§ 3193. The law of any nation which operates on the interests and rights of other states or peoples must be made and executed according to the law of nations. A sovereign who tramples upon the public law of the world cannot excuse himself by pointing to a provision of his own municipal code. The municipal code of a country is the offspring of its own sovereign will; and public law must be paramount to local law on every question where local laws are in conflict. *Right of Expatriation*,* 9 *Op. Att'y Gen'l*, 362.

§ 3194. **Slavery.**— By the general law of nations no nation is bound to recognize the state of slavery as to foreign slaves found within its dominions, in favor of the subjects of other nations where slavery is recognized, where it is in opposition to its own policy and intention. If it does, it is as a matter of comity and not as a matter of international right, and it was for this reason that the clause relating to the return of fugitive slaves was inserted in the constitution. *Prigg v. Commonwealth of Pennsylvania*, 16 *Pet.*, 611.

§ 3195. **Jurisdiction of each nation.**— Every government has exclusive jurisdiction within its own territorial limits, and a community of jurisdiction on the high seas. Each nation can make for itself such political and social constitutions as it pleases, without any other nation having a right to intermeddle in the matter, and every nation has a right to enact such merely municipal laws as it may please in the exercise of its own sovereign will, which laws are co-extensive in operation with its territorial power and sovereignty. *Responsibility for the Unskillfulness of Public Officers*,* 7 *Op. Att'y Gen'l*, 232.

§ 3196. **Not changed by municipal laws.**— The municipal laws of countries cannot change the law of nations so as to bind the subjects of another nation. The municipal laws of a country bind only its own subjects. *Miller v. The Ship Resolution*, 2 *Dal.*, 4; *Jones v. Walker*,* 2 *Paine*, 638.

§ 3197. **Foreigners subject to local laws.**— Every foreigner sojourning in a country is to be subject to the general laws of that country, and, in regard to such private rights as the policy of the country may permit him to enjoy, is to have the protection of the public authorities. He is subject to certain disabilities; otherwise there would be no independence of states. *Responsibility for the Unskillfulness of Public Officers*,* 7 *Op. Att'y Gen'l*, 233.

§ 3198. **When a nation may interfere in behalf of its citizens.**— A nation ought not to interfere in the causes brought by its citizens before foreign tribunals excepting in case of a refusal of justice— palpable and evident injustice— or a violation of rules and forms. When a suitor appeals to a foreign tribunal for justice he must of necessity submit to the rules by which such cases are governed. *Foreign Tribunals*,* 1 *Op. Att'y Gen'l*, 54.

§ 3199. **Status of our citizens in foreign lands.**— An American citizen who goes into a foreign country, although he owes a local and temporary allegiance to that country, yet if he performs no other act changing his condition he is entitled to the protection of his own government; and if, without violation of any municipal law, he should be oppressed unjustly, he would have a right to claim that protection, and the interposition of the American government in his favor would be considered as a justifiable interposition. But his situation is completely changed, where, by his own act, he has made himself the subject of a foreign power. *Murray v. Schooner Charming Betsey*, 2 *Cr.*, 120.

§ 3200. **How far other nations may commit acts in our country.**— The law of nations is international, not domestic or municipal. It is the *ensemble* of international conventions,

usages and received opinions, aided, in case of need, by the doctrines of abstract justice and universal reason. It is not restricted within the limits of the legislative actions of any country or countries, and it is a false assumption that a foreign government may lawfully do, in the territory of another, anything which is not made penal by the local statutes. Such acts, if contrary to public policy, though not forbidden by penal statute, are a grave national insult and wrong. *Foreign Enlistments*,* 7 Op. Att'y Gen'l, 380.

§ 8201. **Right of our officers to enter foreign territory.**—An officer of the United States has no right, without express instruction from his government, to enter the territory of a nation at peace with the United States, and there seize and take property claimed by a citizen of the United States. *Davison v. Seal Skins*, 2 Paine, 336.

§ 8202. **Forcible seizure of property.**—It is an offense against the laws of nations for any persons, whether citizens or foreigners, inhabiting within the limits of our sovereignty, to go into the territory of another with the intent to recover their property by their own strength, or in any other manner than its laws authorize. *Territorial Rights*,* 1 Op. Att'y Gen'l, 68.

§ 8203. **When government must make satisfaction for offenses.**—Though, by the law of nations, if the citizens of one state do an injury to the citizens of another, the government of the offending subject ought to take every reasonable measure to cause reparation to be made by the offender, yet if the offender is subject to the ordinary processes of law, this principle does not generally extend to oblige the government to make satisfaction in case of the inability of the offender. *Compensation for Seizures*,* 1 Op. Att'y Gen'l, 107.

§ 8204. **United States not liable for detention of foreign vessel.**—A Prussian vessel was allowed to enter the port of New Orleans during its occupation by the federal troops in the late war, upon condition that she should not take anything on board which was contraband of war, and would not leave without a proper clearance certificate. When she was ready to depart a clearance certificate was refused by order of the commanding general till she should unload certain contraband articles. *Held*, that under the law of nations the owner of the vessel had no claim against the United States for damages arising from a detention caused by a refusal to unload the contraband goods. *United States v. Diekelman*, 2 Otto, 525.

§ 8205. **Rights of inhabitants of annexed territory.**—On the cession of Louisiana to the United States by France by the treaty of 1803, the full propriety, sovereignty and dominion, as she had acquired and held it, passed to the United States. By it the United States put itself in the place of the former sovereigns, and became invested with all their rights, subject to their concomitant obligations to the inhabitants. Both were regulated by the law of nations, according to which the rights of property are protected, even in the case of a conquered country, and held sacred and inviolate when it is ceded by treaty, with or without any stipulation to that effect; and the laws of such country, whether in writing or evidenced by usage and custom, continue in force till altered by the new sovereign. *Strother v. Lucas*, 12 Pet., 435; *Tobin v. Walkinshaw*, McAL, 192; *American Ins. Co. v. Canter*, 1 Pet., 512; *Soulard v. United States*, 4 Pet., 512; *Langdeau v. Hanes*, 21 Wall., 521.

§ 8206. **Where the territory and government of a kingdom pass to, and become merged in, the territory and government of another nation, all of its subjects pass also, though they may at the time be living in a foreign country. The tie which binds and carries them is not bodily presence, but allegiance.** *Brown v. United States*,* 5 Ct. Cl., 575.

§ 8207. **Cession of territory.**—Under the rules of international law, upon the cession of territory to another nation, the nation making it may stipulate that the people of the ceded territory shall have the right to elect whether they will retain their citizenship under the former government or not, and the nation acquiring the territory has the right to prescribe in what way that election shall be manifested. *Tobin v. Walkinshaw*, McAL, 193.

§ 8208. **The king of Spain, in ceding Florida to the United States, could not impart to the United States any of his prerogatives, and much less would they have any right to take or exercise the power. Every nation acquiring territory, by treaty or otherwise, must hold it subject to the constitution and laws of its own government, and not according to those of the government ceding it.** *Pollard v. Hagan*, 3 How., 223.

§ 8209. **Peace and war.**—As the state of nature is a state of peace, and not a state of war, the natural state of nations is a state of peace and society; and hence it is a maxim of the law of nations, founded on every principle of reason, justice and morality, that one nation ought not to do an injury to another. As the natural state of nations is peace and benevolence, nations are morally bound to observe it. Peace and friendship must always be presumed among nations, and therefore he who founds a claim upon the rights of war must prove the existence of a state of war. *Miller v. The Ship Resolution*, 2 Dal., 8.

§ 8210. **Neutrality.**—The law of nations required of the United States strict neutrality between Spain and Buenos Ayres during the war between that nation and her powerful colony. *The Maria Josepha*,* 2 Wheel. Cr. Cas., 600. See WAR.

§ 8211. The sale, by a belligerent, of a war ship to a neutral in a neutral port is void by the law of nations as understood both in America and Europe. *The Georgia*, 1 Low., 97.

§ 8212. A Spanish vessel, having been captured by a cruiser of the revolted province of Buenos Ayres, put into a port of the United States in distress. She was libeled by the Spanish consul in behalf of the Spanish owners, and by the district court ordered to be restored, on the ground that this government could not recognize the commission under Buenos Ayres. But the circuit court dismissed the libel, on the ground that it was not necessary to recognize the independence of Buenos Ayres, and that the fact, recognized by our own executive in many official communications, of the existence of open and solemn war between Spain and that powerful colony, was sufficient to impose on us the duties of neutrality. *Consul of Spain v. The Schooner Conception*, *2 Wheel. Cr. Cas., 597.

§ 8213. Confiscation.—By the strict law of nations a government has a right, during war with another, to confiscate all movable property belonging to citizens of the latter within its borders, and this power of confiscation extends to debts. *Ware v. Hylton*, 3 Dal., 226.

§ 8214. Reprisals.—The law of nations does not allow reprisals, except in cases of injuries supported and directed by the state, and for which justice is absolutely denied by the tribunals of the state and lastly by the state itself. *Reprisals*, *1 Op. Att'y Gen'l, 82.

§ 8215. Prize.—It seems that by the original law of nations the goods of an enemy, found in the vessel of a friend, are prize of war, and that the goods of a friend, found in the vessel of an enemy, are free. *The Nereide*, 9 Cr., 418.

§ 8216. Belligerent and neutral rights.—Rules respecting belligerent and neutral rights are drawn from the law of nations, and are recognized by all the civilized and commercial states of Europe and America. This law is in part unwritten and in part conventional. To ascertain that which is unwritten, resort must be had to the great principles of reason and justice; but as these principles will be differently understood by different nations under different circumstances, we consider them as being in some degree fixed and rendered stable by a series of judicial decisions. The decisions of the courts of every country, so far as they are founded upon a law common to every country, will be received, not as authority, but with respect. The decisions of the courts of every country show how the law of nations, in a given case, is understood in a given country, and will be considered in adopting the rule which is to prevail in this. *Thirty Hogsheads of Sugar v. Boyle*, 9 Cr., 197.

§ 8217. Conquest destroys jurisdiction of conquered country.—Upon the conquest and occupation of New Mexico by the troops of the United States, and the establishment of the provisional government, the authority of the Mexican government, so far as it contravened the laws of such provisional government, and the constitution and laws of the United States, was abrogated and was not revived upon the cessation of hostilities, but the provisional government continued in force till superseded by the laws of congress. *Leitensdorfer v. Webb*, 20 How., 178.

§ 8218. It is a principle of the law of nations that upon the conquest of a country the allegiance of the inhabitants to their former sovereign is dissolved, but their relations to each other and their rights of property remain undisturbed. *Leitensdorfer v. Webb*, 20 How., 177; *Mitchell v. United States*, 9 Pet., 734.

§ 8219. Acts of public agent binding so long as authority is not revoked.—It is a rule of international law that where a public agent has been appointed, as, for instance, to fix a line determined on by treaty, and the government to whom he is sent is notified of his appointment, he continues in authority, and his public acts bind his government, until notice of the cessation of his authority. *Construction of Mesilla Treaty*, *7 Op. Att'y Gen'l, 586.

§ 8220. In questions of boundaries, decisions of political department followed.—In case of a controversy between nations as to boundary lines, the courts of a country will follow the decision of the political department of the government. A question respecting the proper boundaries of nations is more a political than a legal question, and in its discussion the courts of every country must respect the pronounced will of the legislature. *Foster v. Neilson*, 2 Pet., 307.

§ 8221. The right of expatriation is one given by international law, though denied by the common law of England. *Right of Expatriation*, *9 Op. Att'y Gen'l, 838.

§ 8222. Enlistment of foreigners.—By the law of nations aliens might voluntarily enlist in the military service of the government. *Enlistment of Aliens*, *3 Op. Att'y Gen'l, 671; 6 id., 476.

§ 8223. Subject not affected by bad faith of sovereign.—The bad faith of a sovereign cannot be imputed to his subjects. So, the infraction of a treaty by one of the powers making the same can affect no rights of one of his subjects guaranteed thereby. *Jones v. Walker*, *2 Paine, 688.

§ 3224. **Alien enemies — Right to sue.**— After the treaty of peace with Great Britain, the subjects of that kingdom were not alien enemies in the sense that they could not sue in our courts. *Ibid.*

§ 3225. **Common tribunal.**— Sovereign nations acknowledge no common tribunal for redress of a breach of faith, and such breach can never be called into question, directly or collaterally, in courts of justice. *Ibid.*

§ 3226. **Debts due British subjects.**— Debts due by those who remained citizens of this country after the Revolution to British subjects were not annulled by the dissolution of the then existing government. *Ibid.*

§ 3227. The state of Virginia had the right, after the declaration of independence, to confiscate debts owed by its citizens to British subjects. *Ware v. Hylton*, 3 Dal., 222.

§ 3228. The defendant was a debtor of the plaintiffs at the outbreak of the Revolution. In 1777 the Virginia legislature passed a law for the sequestration of British property, "enabling those indebted to British subjects to pay off such debts," providing that they might pay into the state land office their debts or any part thereof, receiving a certificate in the name of the creditor and delivering it to the governor, whose receipt should discharge him from so much of the debt. The defendant took advantage of this act and paid in a large portion of his debt, receiving the receipt in said act mentioned. In 1783 the legislature again provided that no debt due a British subject should be recoverable in any court of the state, *although* assigned to one competent to sue in the courts of the state. In 1783, by the treaty of peace between Great Britain and the United States, it was stipulated that "all lawful impediments" to the recovery of debts by the subjects of either power were thereby removed. This suit was brought for the recovery of the debt first mentioned after the treaty was made. The defendant objected that the act of 1782 disabled the plaintiffs to sue; also that the state had discharged him from a portion of the debt; also that the state had sequestered the said debt by the act of 1777, as the property of a British subject, and that the plaintiffs' right of action was gone. It was held that the act of 1782 left British creditors under the same disabilities that the laws of war and nations had already placed them, the object of the act being only to provide against fraudulent and collusive assignments; that the discharge and substitution under the act of 1777 was annulled by the treaty of peace; and that the creditors were not prevented by these acts from recovering. *Jones v. Walker*,* 2 Paine, 668.

§ 3229. **The control a sovereign has over suits against him.**— One nation treats with the citizens of another only through their government. A sovereign cannot be sued in his own courts without his consent. His own dignity, as well as the dignity of the nation he represents, prevents his appearance to answer a suit against him in the courts of another sovereignty, except in performance of his obligations voluntarily assumed by treaty or otherwise. Hence, the citizen of one nation, wronged by the conduct of another nation, must seek redress through his own government. His sovereign must assume the responsibility of presenting his claim, or it need not be considered. If this responsibility be assumed, the claim may be prosecuted as one nation proceeds against another, not by suit in the courts, as of right, but by diplomacy, or, if need be, by war. It rests with the sovereign against whom demand is made to determine for himself what he will do in respect to it. He may pay or reject it; he may submit to arbitration, open his own courts to suit, or consent to a trial in the courts of another nation. All depends upon himself. *United States v. Diekelman*, 2 Otto, 524.

§ 3230. **Construction of treaties.**— No construction of a treaty which would impair that security of private property which the laws and usages of nations would have conferred, without express stipulation, is admissible, further than the positive words require. *Strother v. Lucas*, 12 Pet., 438.

§ 3231. **Boundaries.**— It is a part of the general right of sovereignty belonging to independent nations to establish and fix the disputed boundaries between their respective territories; and the boundaries so established and fixed by compact between nations become conclusive upon all the subjects and citizens thereof, and bind their rights, and are to be treated, to all intents and purposes, as the true and real boundaries. *Poole v. Fleegeer*, 11 Pet., 209.

§ 3232. **Right to discharge contracts.**— It seems that a sovereign state, and one of the states of the Union, if the latter were not restrained by constitutional prohibitions, might, in virtue of sovereignty, act upon contracts of its citizens, wherever made, and discharge them, by denying a right of action in its courts. But the validity of such contracts as were made out of the sovereignty or state would exist and continue everywhere else, according to the *lex loci contractus*. *Suydam v. Broadnax*, 14 Pet., 74.

See the cross-references at the beginning of the subject.

CONSTITUTIONS.

See CONSTITUTION AND LAWS.

CONSTRUCTION.

See **BILLS AND NOTES; CONSTITUTION AND LAWS; CONTRACTS.** Of Statutes, see **CONSTITUTION AND LAWS, XIII, 5.** Of Wills, see **ESTATES OF DECEDENTS.**

CONSTRUCTIVE DELIVERY.

See **CARRIERS; SALES.**

CONSTRUCTIVE NOTICE.

To Purchaser, see **LAND; NOTICE.**

CONSULS AND MINISTERS.

[See **MARITIME LAW.**]

- I. **IN GENERAL, §§ 1-102.**
- II. **OFFENSES AFFECTING MINISTERS, §§ 103-113.**
- III. **CONSULAR COURTS, §§ 114-136.**

I. IN GENERAL.

SUMMARY — Powers, §§ 1-5. — Compensation, § 6. — Privileges, § 7. — Suits against, §§ 8, 9.

§ 1. Judicial power is not incident to the office of a consul, but depends upon treaties with the nation to which he is accredited and the laws of the state which he represents. *Dainese v. Hale*. §§ 10-15. See §§ 54-59, 130-136.

§ 2. The courts do not take judicial notice of the judicial powers and functions of ministers and consuls to foreign nations, so far as the same depend upon foreign laws. *Ibid.*

§ 3. Prussian consuls to the United States have, under the treaty of May 1, 1823, sole jurisdiction over controversies between the master and seamen of a Prussian ship, and the court refused to interfere where the consul of the North German Union had decided in a cause before him that a crew had forfeited their wages, and the crew upon his requisition had been imprisoned as deserters, for leaving the vessel and going on shore against the will of the master. *The Elwine Kreplin*, §§ 16-19.

§ 4. The United States district court has no jurisdiction to pronounce upon the validity of the proceedings of a Prussian consul, under said treaty, in a controversy between master and crew of a Prussian ship. *Ibid.*

§ 5. A great distinction is observed between consuls to Mohammedan and consuls to Christian countries, both in the powers intrusted to them and the duties with which they are charged. *Mahoney v. United States*, §§ 20-24.

§ 6. A was appointed consul at Algiers after that city ceased to belong to a power of Turkey and became subject to France. *Held*, that under the acts of congress of May 1, 1810, March 1, 1855, and August 18, 1856, he was not entitled to any salary as compensation for his services. *Ibid.*

§ 7. A consul is not entitled, by the laws of nations, to the privileges or immunities of an ambassador or public minister. *Gittings v. Crawford*, §§ 25-29. See §§ 76-79.

§ 8. The constitutional grant of jurisdiction, in suits affecting ambassadors or other public ministers and consuls, to the supreme court, does not exclude or prohibit the jurisdiction of the United States district courts in cases against consuls and vice-consuls conferred by the

act of congress of September 24, 1789, section 9, as was held in an action against a consul upon a promissory note. *Ibid.*

§ 9. Foreign consuls may be sued in the United States courts by a citizen of the nation they represent, even if it becomes necessary to pass upon the proper exercise of their duties; and where illegal fees have been paid to a consul, under protest, the same may be recovered back. *Lorway v. Lousada*, §§ 80-84. See §§ 80-88.

[NOTES.— See §§ 85-102.]

DAINESE v. HALE.

(1 Otto, 13-21; 8 Chicago Legal News, 97. 1875.)

ERROR to the Supreme Court of the District of Columbia.

STATEMENT OF FACTS.— This was an action for the value of personal property, attached in a cause between citizens of the United States, not at the time residents of or sojourners within the Turkish dominions, of which the defendant, as consul-general of the United States in Egypt, took jurisdiction. The defense was that the defendant, as consul-general, exercised the functions and duties of a minister, and took cognizance of the cause and issued the attachment by virtue of the judicial functions and powers with which he was clothed by the law of nations and the laws of the United States, over citizens of the United States resident in Egypt, to which a general demurrer was interposed.

§ 10. *Judicial powers are not necessarily incident to the office of consul.*

Opinion by MR. JUSTICE BRADLEY.

The defendant, by his plea, asked the court to take judicial notice that his official character gave him the jurisdiction which he assumed to exercise. Could the court do this? Can this court do it? It cannot be contended that every consul, by virtue of his office, has power to exercise the judicial functions claimed by the defendant, for it is conceded that this is not the case in Christian countries. And whilst, on the other side, it is also conceded that in Pagan and Mahometan countries it is usual for the ministers and consuls of European states to exercise judicial functions as between their fellow-subjects or citizens, it clearly appears that the extent to which this power is exercised depends upon treaties and laws regulating such jurisdiction. The instructions given by the British foreign office to their consuls in the Levant in 1844, as quoted by Mr. Phillimore, do not claim anything more. They say: "The right of British consular officers to exercise any jurisdiction in Turkey in matters which in other countries come exclusively under the control of the local magistracy depends originally on the extent to which that right has been conceded by the sultans of Turkey to the British crown; and, therefore, the right is strictly limited to the terms in which the concession is made. The right depends, in the next place, on the extent to which the queen, in the exercise of the power vested in her majesty by act of parliament, may be pleased to grant to any of her consular servants authority to exercise jurisdiction over British subjects." *Int. Law*, vol. II, p. 273, sec. 276.

§ 11. *The judicial power of a consul depends upon the treaties between the nations concerned, and the laws of the nation which he represents.*

Historically, it is undoubtedly true, as shown by numerous authorities quoted by Mr. Warden in his treatise on "The Origin and Nature of Consular Establishments," that the consul was originally an officer of large judicial as well as commercial powers, exercising entire municipal authority over his countrymen in the country to which he was accredited. But the changed circumstances of Europe, and the prevalence of civil order in the several Christian states, have

had the effect of greatly modifying the powers of the consular office; and it may now be considered as generally true, that, for any judicial powers which may be vested in the consuls accredited to any nation, we must look to the express provisions of the treaties entered into with that nation, and to the laws of the states which the consuls represent.

§ 12. *Judicial powers of United States consuls in Turkey under the treaty of 1830 and acts of congress to carry same into effect.*

The transactions which are the subject of this suit took place in 1864, and the powers of our consul-general in Egypt at that time must be regulated by the treaties with Turkey and by the laws of the United States then in force. The first treaty between the United States and the Ottoman Porte was concluded in 1830, and, amongst other things, it provided, in article III, that "American merchants established in well-defended states of the Sublime Porte for purposes of commerce shall not be disturbed in their affairs, nor shall they be treated in any way contrary to established usages." By article IV, it was further provided as follows: "If litigations and disputes should arise between the subjects of the Sublime Porte and citizens of the United States, the parties shall not be heard, nor shall judgment be pronounced, unless the American dragoman be present. Causes in which the sum may exceed five hundred piasters shall be submitted to the Sublime Porte, to be decided according to the laws of equity and justice. Citizens of the United States of America, quietly pursuing their commerce, and not being charged or convicted of any crime or offense, shall not be molested; and, even when they may have committed some offense, they shall not be arrested and put in prison by the local authorities, but they shall be tried by their minister or consul, and punished according to their offense, following, in this respect, the usage observed towards other Franks."

In 1848 an act of congress was passed, entitled "An act to carry into effect certain provisions in the treaties between the United States and China and the Ottoman Porte, giving certain judicial powers to ministers and consuls of the United States in those countries." 9 Stat., 276. A treaty had been made with China in 1844, conceding to the authorities of the United States full civil and criminal jurisdiction between citizens of the United States in that country. The law was passed in reference to this treaty and to that with the Ottoman Porte before cited. This act contained regulations as to the mode of exercising the judicial powers stipulated for in the treaty with China. It conferred these powers upon the resident commissioner and consuls respectively, and authorized them to adjudicate in accordance with the laws of the United States and the common law, supplemented, when these were insufficient, by decrees and regulations to be made by the commissioner himself. The commissioner, with the advice of the consuls, was to prescribe the forms of process and proceeding. By the twenty-second section of the act, its provisions, so far as related to crimes committed by citizens of the United States, were extended to Turkey under the treaty of 1830, to be executed by the ministers and consuls of the United States in that country, who were *ex officio* vested with the powers given by the act to similar officials in China, so far as regarded the punishment of crime.

It is evident that this act failed to confer upon the consuls of the United States in Turkey any power to exercise judicial functions in civil cases, whatever may have been the scope and intention of the treaty of 1830. Whilst it may be true that the expression, in the third article of the treaty, that Ameri-

can merchants shall not be disturbed in their affairs, nor treated contrary to established usages, was understood to and did confer upon American merchants the same privileges of extritoriality enjoyed by the subjects of other Christian nations, the act of 1848 did not assume to enforce such a construction of it. But, in 1860, another act was passed to carry into effect a new treaty made with China in 1858, and other treaties made with Japan, Siam, Persia and other countries (12 Stat., 72), by which very full and explicit regulations were again made in reference to the exercise of judicial powers by ministers and consuls of the United States in those countries. By the twenty-first section of this act, the same declaration was made as in the twenty-second section of the act of 1848 in reference to the criminal jurisdiction to be exercised by the minister and consuls of the United States in Turkey, and a clause was added, giving them civil jurisdiction also, as follows: "who [referring to such minister and consuls] are hereby *ex officio* vested with the powers herein conferred upon the minister and consuls in China, for the purposes above expressed, so far as regards the punishment of crime;" adding, "and also for the exercise of jurisdiction in civil cases wherein the same is permitted by the laws of Turkey, or its usages in its intercourse with the Franks or other foreign Christian nations." So far, then, as the true construction of the treaty of 1830 would permit the exercise of civil jurisdiction by our consuls, the act of 1860 authorized it to be exercised, and supplied all the regulations necessary for that purpose.

§ 13. — *under the treaty of 1862.*

In 1862 another treaty was entered into with the Ottoman Porte, by which, after confirming all such parts of the treaty of 1830 as were not abrogated or changed, amongst other things it was provided, in article I, as follows: "All rights, privileges or immunities which the Sublime Porte now grants or may hereafter grant to, or suffer to be enjoyed by, the subjects, ships, commerce or navigation of any foreign power, shall be equally granted to, and exercised and enjoyed by, the citizens, vessels, commerce and navigation of the United States of America." If, therefore, it be true, as laid down by writers and public documents, that the subjects of other Christian nations have and enjoy in Turkey the right to have their civil controversies decided by their own minister and consuls, it would seem clear that, under the treaty of 1862, if not under that of 1830, the same right is guarantied to citizens of the United States.

§ 14. — *legislation is not required to give effect, as law, to treaties.*

But it is objected that, in 1864, no act had been passed by congress to carry the last treaty into effect. Such an act was passed in 1866, simply, however, extending to Egypt and the consul-general there the provisions of the act of 1860. Sec. 11 of Appropriation Bill (14 Stat., 322). This clause was probably adopted merely to obviate any doubt on the subject. For as treaties made under the authority of the United States are, by the constitution, declared to be part of the supreme law of the land, when they are complete in themselves, and need no supplemental legislation to carry them into effect, such legislation is not necessary for the purpose of giving them force and validity. So far as relates to the jurisdiction in question, this is the character of the treaty of 1862, taken in connection with the act of 1860. The act gave the jurisdiction so far as usage in Turkey would permit it. The treaty secured the consent of the Turkish government to its exercise. The state department of the United States seems to have regarded the treaty of 1830 as establishing the jurisdiction in question. In the instructions contained in the "Consuls' Manual," promulgated by the department in December, 1862 (adopting the learned opinion of

Attorney-General Cushing, dated October 23, 1855), it is said that the acts of congress of 1848 [and 1860] provide in terms for the exercise of judicial authority by ministers and consuls in Turkey only so far as regards the punishment of crime, leaving the question of civil jurisdiction to stand upon treaties or the peculiar public law of the Levant. § 165. And after referring to the language of article III of the treaty of 1830, which stipulated that "American merchants established in the well-defended states of the Sublime Porte for purposes of commerce . . . shall not be disturbed in their affairs, nor shall they be treated in any way contrary to established usages," and conceding that its construction might admit of discussion, the following conclusions were, nevertheless, reached:

"As to all civil affairs to which no subject of Turkey is a party, Americans are wholly exempt from the local jurisdiction; and in civil matters, as well as criminal, Americans in Turkey are entitled to the benefit of 'the usage observed towards other Franks.' . . . The phrase in the second article engages that citizens of the United States in Turkey shall not be 'treated in any way contrary to established usages.' The 'established usages' are the absolute exemption of all Franks, in controversies among themselves, from the local jurisdiction of the Porte.

"The general doctrine thus in force in the Levant, of the exterritoriality of foreign Christians, has given rise to a complete system of peculiar municipal and legal administration, consisting of:

"1. Turkish tribunals for questions between subjects of the Porte and foreign Christians.

"2. Consular courts for the business of each nation of foreign Christians.

"3. Trial of questions between foreign Christians of different nations in the consular court of the defendant's nation.

"4. Mixed tribunals of Turkish magistrates and foreign Christians, at length substituted in part for cases between Turks and foreign Christians.

"5. Finally, for causes between foreign Christians, the substitution at length of mixed tribunals in place of the separate courts,—an arrangement introduced first by the legations of Austria, Great Britain, France and Russia, and then tacitly acceded to by the legations of other foreign Christian nations." Consuls' Manual of December, 1862, §§ 169-171.

These conclusions, being publicly issued by the proper executive department of the government for the instruction and guidance of our consuls, are entitled to the highest respect in construing the statutes and treaties upon which their powers depend. And in view of the confirmatory as well as independent effect of the act of 1860, and the treaty of 1862, we have no doubt that, in 1864, when the transactions in question took place, the minister and principal consuls of the United States in Turkey (including the consul-general in Egypt) had all such jurisdiction in civil causes between citizens of the United States as was permitted by the laws of Turkey, or its usages in its intercourse with other Christian nations.

§ 15. *The laws of a foreign country must be specially pleaded. (a)*

But here we are met by a difficulty arising from the extreme generality of the defense set up in the plea. What are the laws of Turkey and its usages in its intercourse with other Christian nations, in reference to the powers allowed to be exercised by their public ministers and consuls in judicial matters? The plea does not inform us. It leaves the court to infer or to take judicial knowl-

(a) *Reversing Dainese v. Hale*,* 1 MacArth., 86.

edge of those laws and usages. But can it do this? Foreign laws and usages are, as to us, matters of fact, and not matters of law; and although the court may take judicial cognizance of many matters of fact of public importance, yet of foreign laws and customs, which are multiform and special in their character, it would be very dangerous for it to do so, at least without having had them brought to its attention and knowledge by previous adjudications or proofs. The general fact that public ministers and consuls of Christian states in Turkey exercise jurisdiction in civil matters between their fellow-citizens or subjects, might be assumed as sufficiently attested by the works on international law and the acts and instructions of our own government. But the precise extent of this jurisdiction is unknown to us. Whether it applies to any but residents in Turkey, or to travelers as well; whether to persons not in the country at all, but having property there, or claims against persons who are there; whether to cases like the present, where neither party resides in Turkey, or is sojourning there, are questions which are not answered by the ordinary statements made in reference to this jurisdiction. As the power of the consuls of the United States, according to the treaties and laws as they stood in 1864, depended on the laws or usages of Turkey, those laws or usages should have been pleaded in some manner, however briefly, so that the court could have seen that the case was within them; for failing to do this, the plea was defective in substance, and judgment should have been rendered for the plaintiff on the demurrer.

The judgment of the supreme court of the District of Columbia must be reversed, and the cause remanded with directions to allow the defendant to amend his plea on payment of costs.

THE ELWINE KREPLIN.

(Circuit Court for New York: 9 Blatchford, 433-447. 1872.)

Opinion by WOODRUFF, J.

STATEMENT OF FACTS.—By the tenth article of the treaty made by the United States with the king of Prussia, on the 1st of May, 1828 (8 U. S. Stat. at Large, 378, 382), it is provided that “the consuls, vice-consuls and commercial agents,” — which each of the parties to the treaty is declared entitled to have in the ports of the other — “shall have the right, as such, to sit as judges and arbitrators, in such differences as may arise between the captains and crews of the vessels belonging to the nation whose interests are committed to their charge, without the interference of the local authorities. . . . It is, however, understood that this species of judgment or arbitration shall not deprive the contending parties of the right they have to resort, on their return, to the judicial authority of their country.” To this general rule there is a qualification: “Unless the conduct of the crews, or of the captain, should disturb the order or tranquillity of the country, or the said consuls, vice-consuls or commercial agents should require their assistance” (the assistance of the local authorities) “to cause their decisions to be carried into effect or supported.” This treaty is, by the constitution of the United States, the law of the land, and the courts of justice are bound to observe it. When a case arises which is within this provision of the treaty, jurisdiction thereof belongs to the consul, vice-consul or commercial agent of the nation whose interests are committed to his charge, and with the exercise of that jurisdiction the local tribunals are

not at liberty to interfere, unless such consul, vice-consul or commercial agent requires their assistance to cause their decision to be carried into effect or supported.

In the present case, the mate and several of the crew of the barque Elwine Kreplin prosecuted their libels against the vessel, in the district court, for the recovery of wages alleged to be due to them, which the master of the vessel denied to be due, upon various grounds; and the vessel was attached to answer. The master of the barque, intervening for the interest of the owner, sets up, in his answer, various grounds of defense to the claim, some of which arise under the laws of Prussia; and, especially, he invokes the protection of the treaty above mentioned, and denies the jurisdiction of the district court, alleging, moreover, that the matter in difference — the claim of the libelants for wages — has already, in fact, been adjudicated by the Prussian consul at the port of New York. Before the cause was tried in the district court, the consul-general of the North German Union presented to the district court his formal protest against the exercise of jurisdiction by that court in the matter in difference. He invoked therein the treaty above referred to, and claimed exclusive jurisdiction of such matter in difference; and he also declared, that, before the filing of the libel, the said matter had been adjudicated by him, and insisted that his adjudication was binding between the parties, and could only be reviewed by the judicial tribunals of Prussia.

The barque is a Prussian vessel, the mate and crew are Prussian seamen, who shipped in Prussia, under and with express reference to the laws of Prussia, referred to in the shipping articles, and it should be assumed that the treaty which binds this nation and its citizens and seamen binds also Prussia and her subjects and seamen. The consul-general of the North German Union is commissioned by the king of Prussia, and, by certificate of the secretary of state of the United States, under the seal of that department, it appears that the executive department of the United States recognizes the consuls of the North German Union as consuls of each one of the sovereign states composing that Union, "the same as if they had been commissioned by each one of such states." The kingdom of Prussia is one of the states composing the North German Union. The treaty does not require that the consuls, vice-consuls, etc., should bear any specific name. It is sufficient that the "interests" of Prussia "are committed to their charge," and quite sufficient that the government of the United States, by its executive, recognizes the consul as consul of the kingdom of Prussia.

The discussion of the case at the hearing on the appeal was, on the part of the libelants, very largely devoted to the merits of the claim for wages, upon principles applicable, it may be, to the subject, if no such treaty was in force, and under decisions of our courts in reference to the rights and duties of seaman and master, the effect of the misconduct of either upon the obligation of the other, for the purpose of showing that the treatment of the libelants by the master exonerated them from their duty to serve according to the terms of the shipping articles, and also from all others of its stipulations, even from such as arise from the laws of Prussia forming a part of the terms, stipulations and conditions which enter into the relation of the crew to the master and owners, and to the vessel. That discussion was very full, and was presented in argument with great ability by the counsel for the libelants. With most of the rules of law invoked by the counsel, when considered apart from and independent of any treaty stipulation, the claimants have no contest; and they are,

no doubt, settled by the cases cited. But the prior question of jurisdiction must be determined before it is competent even to inquire into the merits of the libelants' claim to recover their wages.

§ 16. *The master of a foreign vessel is, in an American port, the representative of the vessel and its owners.*

In the first instance, it would seem clear that a claim of the crew of a Prussian vessel to recover wages which the master of the vessel either denied to be due, or refused to pay, was, *par eminence*, a matter in difference between the captain and crew, of which, by the very terms of the treaty, the Prussian consul or vice-consul had jurisdiction, as judge or arbitrator, to determine, "without the interference" of the courts of this country; and such jurisdiction, when it exists, is, by such terms as these, exclusive. It is, however, claimed that the present cause is not at all embraced within the treaty, for the reason that it is a proceeding *in rem* to enforce a maritime lien upon the vessel itself, and not a difference between the captain and crew; and, also, because the Prussian consul has no power to conduct and carry into effect a proceeding *in rem* for the enforcement of such a lien. The treaty can receive no such narrow and technical construction. The master is the representative, in this port, of the vessel, and of all the interests concerned therein. He is plainly so regarded in the treaty. The matter in difference in this cause is the claim for wages. That arises between the crew and the master, either as master or as the representative here of vessel and owners. It is precisely that which is in litigation in this case. The lien, and the proceeding *in rem* against the vessel, appertain to the remedy, and only to the remedy. The very first step in this cause is to settle the matter in dispute. If the claim be established, then, as incident to the right to the wages, the lien and its enforcement against the vessel follow. The district court can have no jurisdiction of the lien, nor jurisdiction to enforce it, if it has no jurisdiction of the difference or dispute touching the claim for wages. To hold that the jurisdiction of the consul is confined to cases in which there is no maritime lien, and in which no libel of the vessel could, apart from the treaty, be maintained, is to take from the treaty very much of its substance. The existence of any lien, and of any right to charge the vessel, is in difference here. To say that the treaty gives the consul jurisdiction of claims against the master *in personam*, and does not include a claim to remove the vessel itself from his custody, as the owner *pro hac vice*, or as the representative of all the interests therein, that the voyage may be broken up, and the vessel sold for the wages of the crew, and that an effort by judicial proceeding, to do this, is not included in the terms, a difference arising between captain and crew, seems to me to destroy the very substance of the stipulation, and defeat its obvious purpose, to confine both masters and crews of Prussia to the rights and obligations of the Prussian law, and compel obedience to its mandates. And, be it observed, the treaty gives the same protection to, and requires the like obedience by, the masters and crews of vessels of the United States. It does not add to the legal reasons for this view, but, if a vessel of the United States were sold in a port in Prussia, to pay the wages of its crew, alleged by the master not to be payable, and in repudiation of any right of the United States consul at that port to act as judge or arbitrator upon that claim, it would at least stimulate our quickness of apprehension to discover, and would incline us to insist that the treaty intended to protect our ship-owners against the application of foreign laws, and the decisions of foreign courts to our vessels and the relations of the master and crews thereof.

§ 17. *Powers of a Prussian consul under the treaty of May 1, 1828.*

To the suggestion that the consul has no power to enforce the maritime lien, and cause the vessel to be sold to satisfy the wages, if he should find that wages are due and payable, it is sufficient to say that the treaty has been deliberately entered into, and has become the law for both nations. Each preferred to employ its own officers. The power given to consuls to act as judge or arbitrator is not made final. The parties have the right of resort to the tribunals of their own country without being concluded by the decisions of the consul. This was deemed a sufficient protection, and to afford, for the time being, a sufficient remedy to both master and crew; and it is not for this court to say that the remedy here, by attachment of the vessel, will be more efficient and useful, and, on that ground, to apply it. Besides, this court cannot know that the remedy by resort to the vessel is not, if it exists, so regulated in Prussia that it was intended that her seamen should not invoke against the vessel the remedies permitted by our laws, under the mode of administration and rules of decision by which our courts are governed. And, further, under the expressed exception which permits resort to local tribunals by consuls, etc., who may require their assistance to cause their decisions to be carried into effect or supported, it is plausible, at least, to say, that if the consul decide on a difference between captain and crew that wages are payable, the power of the court to attach and condemn the vessel for their payment may be invoked to support and give effect to such decision.

§ 18. *The United States district court has no jurisdiction to pronounce upon the proceedings of a Prussian consul in a controversy between master and crew of a Prussian ship.*

Again, it is said that in this case the captain and crew were not confronted before the consul, witnesses were not examined, no adjudication in writing was made, but the consul only orally declared his judgment of the matter in difference, after hearing the statement of the master and the statement of the libellants, and then declared that he had nothing further to do therein. The proceeding does not, it is true, conform to our ideas of the requisites of a judicial proceeding; but are the courts of this country to prescribe to the Prussian consul the forms and modes of proceeding which he must adopt when he acts as a judge or arbitrator between master and crew under this treaty? Must he follow the practice, and be governed by the rules, governing trials and arbitrations under our laws? Must our consuls in Prussia follow the rules and practice of the courts of that kingdom? If so, then the district court here was sitting as a court of error, to review the judgment or award of the Prussian consul. What can this court say are the formal requisites of a Prussian arbitration? It is manifest, by the reservation of the right to resort to the judicial tribunals of the home country without being concluded by the decision of the consul, that the proceeding before him as an arbitrator or judge was intended to be summary, and its conduct left very much in his discretion; and, especially, it is manifest that the nations respectively intended to confide in their consul, and temporarily intrust to him the adjustment of differences between officer and crew of their vessel in the port of the other, and it was not intended that the courts of such other nation should sit in judgment upon the form or regularity, or the justice, of the acts of the consul, or interfere therewith in any manner. It was deemed safe and proper to leave to such consuls this temporary administration of the interests of their seamen abroad, assured that they would act with fairness and integrity therein, but yet giving the right of full and final investigation and

adjudication at home, where home laws, home remedies, and home modes of investigation could be resorted to. The district court here not only passed upon the requisites of the proceeding as judicial, or as an arbitrament, but assumed to inquire into the details of the evidence, and the truth of the declared grounds upon which the vice-consul testified that he acted, and which he says were before him in the admissions of the crew,—thus, in effect, reviewing the law and the facts which the consul made the basis of his decision.

It is claimed that the consul did not act as judge or arbitrator to determine this case, and that, he not having taken jurisdiction, a proceeding in our courts is no interference in disregard of the treaty. It is by no means clear that the attachment of the vessel, on the libel of the crew, is not, in itself, such an interference as precludes the action of the consul. But in this case the argument disregards the clearly established fact that the consul or his vice-consul (who is, in terms, included in the treaty, and whose acts in the matter the consul recognizes) did hear the parties respectively. On the statement of the case by the crew (who, whichever of them was the first speaker, had the opportunity to tell their story), he pronounced against them. On their own story, he decided that they had forfeited their wages, by the Prussian law, applied to their contract of shipment; and afterwards, when this suit was commenced, he formally represents to the court that he had already adjudicated the matter in difference, and claimed that his jurisdiction for that purpose is exclusive of the courts of this country. It was after such declaration of his decision to the crew that he, knowing that the vessel was laid up, advised them to see the captain, and, by civil and conciliatory deportment, induce him to waive the forfeiture and pay the wages which had accrued. In the situation in which the vessel and her master then were, it is obvious that, if the men had forfeited their wages (of which I here express no opinion), their acts had wrought no great harm, the captain had no present need of the services of so many, and many considerations might properly have moved him to pay their wages and let them go. The advice of the consul indicated that he thought the loss of their service was no inconvenience to the captain, and, even if wrong theretofore, they had claims to his consideration, while destitute and in a foreign country, which might, and, perhaps, ought to, induce him to pay their wages. This is all there is of the argument that the consul himself regarded the crew as practically discharged.

I do not propose to examine the merits of the libelants' claim for wages. That they were, on the requisition of the consul, and without sufficient grounds therefor, held in prison as deserters, is most probable. That their departure from the vessel, and going ashore without leave and against the will of the master (save as to one, who had his consent), is not desertion by our law, unless it was done without the intention to return, is, no doubt, true. That the master did not, in fact, consent to the discharge of any of them, is, I think, clear, while I think it in the highest degree probable that, if this difficulty had not arisen, he would, in view of the laying up of the vessel, have consented to part with most of them.

I do not think it certain that an imprisonment, on the requisition of the consul, though induced by a statement of the facts by the captain, operated to discharge the seamen from their articles, even though the imprisonment was not warranted by the facts. *Jordan v. Williams*, 1 Curt., 69, 83. Nor is it certain that, under this treaty and the act of March 2, 1829 (4 U. S. Stats. at Large, 359), a state magistrate can have no jurisdiction to arrest and detain a

seaman charged as a deserter. True, the laws of the United States may not make it the duty of a state judge to act; but it does not follow that, if he is included in the law, his acts will be without authority. There are many powers conferred upon state magistrates by the laws of the United States which, if executed, are valid. Whether such magistrate is bound to accept the authority and act upon it is another question. The act of 1829, in determining the duty, confers the power on "any court, judge, justice, or other magistrate having competent power, to issue warrants" to arrest, etc. See *Parsons on Shipp.*, p. 102; *Kentucky v. Dennison*, 24 How., 66, 107, 108. It is apparent that the requisition was given to the master to be delivered to the justice at Staten Island, who, as the captain informed the consul, then detained the seamen; and if, as stated by counsel (though it does not appear as printed in the copy proofs handed to me), it was addressed to "any magistrate," etc., the power of the magistrate is not clearly wanting.

But all these and other questions go to the merits. They bear on the broad question whether, under the terms of the shipping articles, and the Prussian rules contained in the navigation book, etc., the seamen had a right to their wages. The effect of the stipulation not to sue in a foreign country, which appears to be one of those rules, also, and what amounts to a discharge from the contract, actual or constructive, are questions on the merits; and the sympathy which the condition of these men, penniless in a foreign land, whether with or without fault on their part, must awaken in every mind susceptible of human emotion, strongly inclines to a condemnation of the conduct of the master in this matter.

§ 19. *The Prussian consul has, under the treaty of May 1, 1828, sole jurisdiction over controversies between master and seamen of a Prussian ship.*

But I am constrained to the conclusion that the treaty required that this matter in difference should have been left where, I think, the treaty with Prussia leaves it—in the hands and subject to the determination of their own public officer. The necessary result is the dismissal of the libels.

MAHONEY v. UNITED STATES.

(10 Wallace, 62-68. 1869.)

APPEAL from the Court of Claims.

STATEMENT OF FACTS.—In 1831 the city of Algiers became subject to France, and from 1854 till November, 1859, the plaintiff was United States consul thereat, receiving no salary and making no returns of fees, but was paid the necessary expenses of his office, and was allowed by the government to engage in trade. He made no claim for salary or compensation for his services until 1869, when he presented his claim for \$4,000 per annum, as salary, to the treasury department. It was referred to the state department, disallowed, and he sued in the court of claims, where his bill was dismissed. The act of 1810, to which reference is made in the opinion, provided that the president should not allow to any consul residing at Algiers more than \$4,000 for his services and expenses, and prohibited consuls of the United States residing in the Barbary States from owning any vessel or engaging in trade.

§ 20. *It seems that a statute providing that the president shall not allow an officer more than a stated yearly sum gives no absolute right to the sum named.*

Opinion by MR. JUSTICE FIELD.

The language of the act of congress of May 1, 1810, would seem to indicate that the extent of the compensation to be made to the consul at Algiers was,

within the limits prescribed, \$4,000 a year, subject to the control of the president, and that the amount specified was not payable absolutely to the person appointed. But assuming, for the purposes of this case, that the act fixes absolutely the rate of compensation, we do not think it sustains the claim of the appellant.

§ 21. *The act of May 1, 1810, applied to the consulate at Algiers only while that province belonged to the Barbary powers.*

When that act was passed Algiers was a part of one of the Barbary States of that name, and it is evident, from an examination of its provisions, that the act was intended to apply to a consulate at that place only so long as it belonged to one of the Barbary powers. Years before the appointment of the appellant, Algiers, and the country of which it was the principal city, had become a province of France.

§ 22. *Distinction between consuls to Mohammedan and consuls to Christian countries.*

A great distinction has always been made between consuls to Mohammedan and consuls to Christian countries, both in the powers intrusted to them and in the duties with which they are charged. The full reciprocity which, by the general rule of international law, prevails between Christian states in the exercise of jurisdiction over the subjects or citizens of each other in their respective territories, is not admitted between a Christian state and a Mohammedan state in the same circumstances; and, in our treaties with Mohammedan powers, express stipulations are made for the enjoyment by our citizens of certain extritorial rights with respect to their persons and property. Whilst, therefore, in Christian countries, consuls are little more than mere commercial agents, in Mohammedan countries they are clothed with diplomatic, and even with judicial, powers. Consuls to Christian countries are often allowed to engage in business; but consuls to Mohammedan countries are restricted to the duties of their offices, are paid a stated salary, and are prohibited from entering into commercial transactions. Halleck on Int. Law, ch. 10, §§ 21, 22; 7 Op. Att'y Gen'l, 346-348. Thus, in the treaty with the Dey of Algiers, made in 1816 (8 Stats. at Large, 244), it was stipulated that disputes between citizens of the United States should be decided by the consul; and in case a citizen of the United States should kill, wound or strike a subject of Algiers, or, on the contrary, a subject of Algiers should kill, wound or strike a citizen of the United States, the law of the country should "take place, and equal justice" be rendered, the consul assisting at the trial; and that the property of a citizen of the United States dying in Algiers should be under the immediate direction of the consul, unless otherwise disposed of by will. Provisions like these are not generally made in treaties between Christian nations; and they impose duties upon consuls which are not exacted of those officers when acting as mere commercial agents. It is plain that the duties for which a consul, inhibited from engaging in commerce, and charged with diplomatic and judicial functions, was required at Algiers, whilst that place formed part of a Mohammedan power, and this treaty was in force, ceased when that country passed under the jurisdiction of a Christian nation, and the treaty with the Dey thus expired.

§ 23. *The construction of statutes acted upon by the executive and legislative departments has weight with the courts.*

The department of state from that time has treated the consulate there as one without salary, to which the provisions of the act of May, 1810, were no

longer applicable; one which allowed the incumbent, as consuls in the countries subject to France are allowed, to engage in business, and only entitled to receive as compensation for his services such fees as he might collect, besides the necessary expenses of his office. 8 Stats. at Large, 106; 10 id., 992. The construction thus given by the secretary was impliedly sanctioned by the act of congress of March 1, 1855, "to remodel the diplomatic and consular systems of the United States" (10 id., 621), and was expressly sanctioned by the act of August 18, 1856, to regulate those systems. 11 id., 52.

§ 24. *The act of 1810 was impliedly repealed by the acts of 1855 and 1856.*

The act of 1810, after specifying the compensation which might be allowed to the consul appointed to reside at Algiers, designated the sum which might be allowed to other consuls appointed to reside in any other of the states on the coast of Barbary, thus making provision for all the Barbary States. The ports of these states where consuls were appointed to reside were Tangiers, Algiers, Tripoli and Tunis. Now in the act of March 1, 1855, compensation is fixed under the head of "Barbary States," for consuls to all those places except Algiers, and no provision is anywhere made for the appointment of a consul at that place, or for compensation to one there, showing that congress did not think that a consul with a salary there existed, or was there required. The act of August 18, 1856, enumerates the same places, under the same head of Barbary States, at which consuls are to be appointed to reside, and designates their compensation, omitting, as in the act of 1855, the city of Algiers, and provides that consuls not thus enumerated shall be entitled, as compensation for their services, to such fees as they may collect, a provision which in effect declares, when read in connection with the preceding clauses of the act, that they shall receive no other compensation. And this latter act repeals all acts and parts of acts inconsistent with its provisions.

We find no error in the judgment of the court of claims, and it is accordingly affirmed. (a)

GITTINGS v. CRAWFORD.

(Circuit Court for Maryland: Taney, 1-11. 1838.)

Opinion by TANEY, C. J.

STATEMENT OF FACTS.—The suit in this case was brought by John S. Gittings against John Crawford, upon a promissory note made by Crawford to Gittings, for \$980, dated December 27, 1834, and payable twenty days after date. The writ stated the plaintiff to be a citizen of the state of Maryland, and the defendant to be the consul of his Britannic majesty. The defendant appeared to the suit, and moved to quash the writ, on the ground that the district court had no jurisdiction over the case; the court below sustained the motion, quashed the writ, and gave judgment in favor of the defendant for costs. The case has been brought here by the plaintiff, by writ of error, and the question to be now decided by this court is, whether the act of congress of September 24, 1789, § 9, giving jurisdiction to the district court of the United States, in cases of this description, against consuls and vice-consuls, is constitutional or not.

§ 25. *The constitutional grant of jurisdiction, in suits affecting ambassadors, etc., to the supreme court, does not prohibit the jurisdiction of the United States district courts, conferred by act of congress as to consuls and vice-consuls.*

The clause of the constitution of the United States which is supposed to be violated by this law is that part of the second section of the third article which

(a) *Affirming Mahoney v. United States*, * 3 Ct. Cl., 1852.

declares that, "in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the supreme court shall have original jurisdiction." It is insisted that the grant of original jurisdiction in these cases to the supreme court means *exclusive* original jurisdiction, and that it is not in the power of congress to confer original jurisdiction, in the cases there mentioned, upon any other court. The question thus presented for the decision of the circuit court is certainly a difficult and embarrassed one. Different opinions have been expressed upon it by eminent men in high judicial stations; and the difficulties which arise from the words of the constitution itself have been greatly multiplied by the different constructions which, at different times, have been given to the clause in question.

§ 26. — *authorities reviewed.*

The earliest case upon the subject is in 2 Dal., 297, *United States v. Ravara*, in the year 1793. That was an indictment in the circuit court against a consul for a misdemeanor; and the counsel for the defendant moved to quash the indictment, upon the ground that the clause of the constitution above quoted vested exclusive jurisdiction in such cases in the supreme court, and that the act of 1789, which conferred original jurisdiction on the circuit court, was unconstitutional and void. A majority of the court, however, overruled the objection, and decided that the grant of original jurisdiction to the supreme court was not exclusive; that congress might vest original jurisdiction, in the cases there enumerated, in other courts, and that the act of 1789, conferring jurisdiction upon the circuit court, was constitutional and valid. At a subsequent term of the circuit court, in 1794, the case came up for trial, Chief Justice Jay presiding, and the court charged that the defendant was not privileged from prosecution in virtue of his consular appointment, and the jury, under that charge, found him guilty. It appears, then, that in the circuit court, upon two different occasions, it was held that the jurisdiction conferred by the constitution upon the supreme court, in cases affecting consuls, was not exclusive. And these decisions were made by eminent and distinguished judges, some of whom had been members of the convention which framed the constitution, and all of whom had taken prominent and leading parts in the discussions which preceded its adoption by the people. These discussions have all the force and authority which courts have uniformly given to the contemporaneous construction of a law.

But the authority of the decisions in the circuit court was shaken by the case of *Marbury v. Madison*, 1 Cranch, 137, where the question as to the construction of this clause of the constitution came, for the first time, before the supreme court. In the opinion delivered in that case, it was said, in general terms, by the court, that the original jurisdiction conferred on the supreme court was exclusive. In *Cohens v. State of Virginia*, 6 Wheat., 378, the construction of this part of the constitution again came under consideration. And although the court reviewed and recalled some of the *dicta* in the case of *Marbury v. Madison*, yet what had been there said on the point now in question was not disturbed, and the court again strongly intimated that the clause granting original jurisdiction to the supreme court was so far exclusive, that congress could not grant original jurisdiction, in the cases enumerated, to an inferior tribunal of the United States. And in *Osborn v. United States Bank*, 9 Wheat., 820, the chief justice distinctly expressed the opinion that the original jurisdiction granted to the supreme court is exclusive, and cannot be given by congress to any other tribunal.

It is worthy of remark that in two of these three cases in the supreme court the question was upon the jurisdiction of that court, and not upon the jurisdiction of an inferior tribunal of the United States. And in the last of them, the question was upon the jurisdiction of the courts of the United States, as contradistinguished from the state courts; and the further question whether the case before them arose under a law of the United States. In neither of these three was the point directly presented, whether congress could grant original jurisdiction to an inferior court, in the cases enumerated in the clause now in controversy. All, therefore, that was said by the court in these cases, on that question, was by way of argument and illustration, and not necessarily involved in the decision of the cases then before the court. And we are warned by the chief justice, in the opinion delivered by him in *Cohens v. Virginia*, that principles thus stated are not to be regarded as binding adjudications; and some of the principles strongly put forth by him in the case of *Marbury v. Madison* are repudiated and overruled in *Cohens v. Virginia*. Yet, after these repeated declarations of the opinion of the supreme court, so explicitly reiterated in the case of *Osborn v. United States Bank*, I should not have felt myself at liberty to adopt a different construction of the article in question, if the action of the supreme court on this subject had stopped with the last-mentioned case; for the controversy involves no right reserved to the states or secured to individual citizens. It is a question merely of the distribution of power among the courts of the United States, and when the supreme court had so repeatedly expressed its opinion that that court, under the constitution, had exclusive original jurisdiction over the subject-matters enumerated in the clause now under consideration, it would hardly have been proper or decorous in the circuit court to disregard those opinions, although they were expressed when the point in controversy was not directly before it.

But the action of the supreme court did not stop with the cases above cited; the point in dispute was brought directly before the court in *United States v. Ortega*, 11 Wheat., 467. That case came before the supreme court upon a certificate of division of the judges of the circuit court, and the points presented by the certificate were: 1. Whether it was a case affecting an ambassador or public minister; and 2. If it were such a case, was the act of 1789, giving original jurisdiction to the circuit court, constitutional or not? The court said it was not necessary to decide the second point, because they were of opinion that it was not a case affecting an ambassador or public minister. It can hardly be supposed that the supreme court would have refused to express an opinion on the second point, if they had regarded the question as settled by the previous decisions of that court. The manner in which they treated it, when thus directly brought into discussion, shows that in their opinion it was still an open one, and had not been concluded by anything said in the different opinions of the court to which I have before referred; and the reporter, in a note to this case, expressly states that the point in question had not been decided by the supreme court.

But in another and very late case the court have, in my judgment, distinctly affirmed the constitutionality of the act of 1789, on the very point in controversy. In the case of *Davis v. Packard*, 7 Pet., 281, the question was brought before the court by writ of error from the court of errors of New York, which court was supposed to have decided that a state court had jurisdiction in cases where a consul was concerned. It turned out afterwards that the court had not so decided; but the supreme court, when the case came before them, inter-

preted the record otherwise, and, acting upon that interpretation, reviewed the judgment of the court of errors of New York. Judge Thompson, in delivering the judgment of the supreme court, says: "As an abstract question it is difficult to understand on what ground a state court can claim jurisdiction of civil suits against foreign consuls. By the constitution the judicial power of the United States extends to all cases affecting ambassadors, other public ministers and consuls; and the judiciary act of 1789, section 9 (1 Stat., 76), gives to the district courts of the United States, exclusively of the courts of the several states; jurisdiction of all suits against consuls and vice-consuls, except for certain offenses mentioned in the act." This language used by the court, with the point directly before them, can only be understood as an affirmation of the constitutionality of the act of 1789; for the exclusion of the state courts is not put upon the ground that they were impliedly excluded by the grant of original jurisdiction in such cases to the supreme court; but the decision is placed on the grant of power to the courts of the United States generally, and on the act of 1789, which conferred the jurisdiction on the district courts and excluded the state courts. No notice is taken in that opinion of the clause conferring original jurisdiction on the supreme court. The exclusion of the state courts is not derived from it, but from the act of 1789; so, of course, that act was deemed constitutional.

This decision is in conformity with the contemporaneous construction of the constitution, given by the circuit court in the case of the *United States v. Ravara*, before referred to. And although the authority of that case was much doubted, after the opinions delivered in *Marbury v. Madison*, *Cohens v. Virginia*, and *Osborn v. United States Bank*, and more especially on account of the high and just reputation of the eminent judge by whom those opinions were delivered, yet this vexed question ought, in my judgment, to be regarded as now settled by the case of *Davis v. Packard*. It is worthy of remark, also, that the elementary writers, generally, seem to have regarded the act of 1789 as constitutional, and to have relied on the case of the *United States v. Ravara*. *Vide* 11 Wheat., 473 (note); Rawle on the Const., 221, 222; Conkling, 160; Sergeant, 17, 18.

§ 27. — *contemporaneous construction.*

Independently, however, of any judicial authority, the conclusions of my own mind must have been very clear and free from doubt, before I should have felt myself justified in pronouncing an act of congress passed in 1789 a violation of the constitution. It was the first congress that met under the constitution, and in it were many men who had taken a prominent and leading part in framing and supporting that instrument, and who certainly well understood the meaning of the words they used. The fact that the law in question was passed by such a body is strong evidence that the words of the constitution were not intended to forbid its passage.

§ 28. *The grant of jurisdiction to a court does not imply that it is exclusive.*

Nor am I by any means satisfied that the words used require a different construction from that given to them by the act of 1789. There are no express words of exclusion in the clause which confers original jurisdiction, in the cases mentioned, upon the supreme court. Why should they be implied? They are clearly not implied in relation to the state courts, in the clause immediately preceding, which gives judicial power in certain cases to the courts of the United States; for there are some subjects there enumerated from which it never could have been designed to exclude altogether the state authorities.

For example, the constitution of the United States is the supreme law in the several states, and the courts of the states are bound to respect and interpret it, and to declare any state law null and void which violates its provisions. Again, the laws of congress, when passed in the exercise of its constitutional powers, are obligatory upon the state courts, and must be construed by the courts, and obeyed by them, whenever they come in conflict with the laws of the state. It is true, that the decisions of the state courts must be subordinate to, and subject to the revision of, the supreme court of the United States, to whom the ultimate decision of such questions belongs; yet, the state courts are not, and cannot, from the nature of our institutions, be excluded from all jurisdiction in such matters, and the grant of power to the courts of the United States has never been held to exclude them. If the grant of jurisdiction to the courts of the United States, generally, is not, by implication, the exclusion of all other courts, in the cases enumerated in that grant of power, why should the grant of original jurisdiction to the supreme court in certain cases, in the very same section, and by the next succeeding clause, be held to imply such exclusion? The original jurisdiction conferred on the supreme court is not inconsistent with the exercise of original jurisdiction on the same subjects by the inferior courts of the United States, and there is no necessity, therefore, for implying an intention to exclude them.

Indeed, if the grant of original jurisdiction, in the cases mentioned, implied exclusion of jurisdiction on those subjects, the exclusion would seem most naturally to apply to the appellate jurisdiction of the court itself, and to prohibit it from the exercise of the latter in the cases where the former was given. The subject-matter of this part of the section is the jurisdiction of the supreme court, and it is divided into appellate and original. The cases are enumerated in which it shall have original jurisdiction; and appellate is given to it in others. Now it might very well be supposed that in thus classing the subjects upon which it should have original, and upon which it should have appellate, jurisdiction, the framers of the constitution meant to limit its jurisdiction in the manner in which it is there divided, and to exclude it from original jurisdiction where appellate was given, and to exclude it from appellate where original was given; and this was supposed to be the construction given to it in the case of *Marbury v. Madison*, by the learned judge who delivered the opinion. But when the subject was further discussed and considered in the case of *Cohens v. State of Virginia*, it became manifest that such a construction could not be sustained without depriving the supreme court of some of its most important and necessary powers; powers which, from the whole frame of the instrument, it was evidently intended that the court should exercise, and which, although classed in its original jurisdiction, it could exercise only in an appellate form, when the question arose in a suit in a state court. The language used in *Marbury v. Madison* was therefore qualified and explained, and it was decided that the grant of original jurisdiction, in the cases enumerated, to the supreme court, did not exclude from appellate jurisdiction over the same subjects. And this latter construction is now the established law of the country. If the arrangement and classification of the subjects of jurisdiction into appellate and original, as respects the supreme court, do not exclude that tribunal from appellate power in the cases where original jurisdiction is granted, can it be right, from the same clause, to imply words of exclusion as respects other courts whose jurisdiction is not there limited or prescribed, but left for the future regulation of congress? The true rule in this case is, I think, the rule

which is constantly applied to ordinary acts of legislation, in which the grant of jurisdiction over a certain subject-matter to one court does not, of itself, imply that that jurisdiction is to be exclusive. In the clause in question, there is nothing but mere affirmative words of grant, and none that import a design to exclude the subordinate jurisdiction of other courts of the United States on the same subject-matter.

§ 29. *A consul is not entitled by the law of nations to the immunities of a public minister.*

Nor is there anything in the official character and functions of a consul which should lead us to suppose that the framers of the constitution meant to confine cases affecting such officer exclusively to the supreme court. A consul is not entitled, by the laws of nations, to the immunities and privileges of an ambassador or public minister. He is liable to civil suits, like any other individual, in the tribunals of the country in which he resides; and may be punished in its courts for any offense he may commit against its laws. Wheat., Int. Law, 181; 1 Kent's Com., 43, 45. He usually is a person engaged in commerce, and in this country as well as others, it often happens that the consular office is conferred by a foreign government on one of our own citizens. It could hardly have been the intention of the statesmen who framed our constitution, to require that one of our citizens who had a petty claim of even less than \$5 against another citizen, who had been clothed by some foreign government with the consular office, should be compelled to go into the supreme court to have a jury summoned in order to enable him to recover it; nor could it have been intended that the time of that court, with all its high duties to perform, should be taken up with the trial of every petty offense that might be committed by a consul, in any part of the United States; that consul, too, being often one of our own citizens. There is no reason, either of policy or convenience, for introducing such a provision in the constitution; and we cannot, with any probability, impute such a design to the great men who, with so much wisdom and foresight, framed the constitution of the United States; they have used no words expressly prohibiting congress from giving original jurisdiction, in cases affecting consuls, to the inferior judicial tribunals of the United States; and in the absence of every express prohibition, I see no sufficient grounds to justify this court in implying it, and pronouncing, merely upon such implication, that the act of 1789 is unconstitutional and void.

The judgment of the district court in this case must, therefore, be reversed, and the motion to quash the writ which issued from that court overruled.

LORWAY v. LOUSADA.

(District Court for Massachusetts: 1 Lowell, 77-88. 1866.)

Opinion by LOWELL, J.

STATEMENT OF FACTS.—This is a suit by an inhabitant of one of the British Provinces of North America against her Britannic majesty's consul at Boston, and the pleadings raise the preliminary question, whether an action will lie here, between these parties, to recover back an alleged excess of fees exacted by the defendant for an official service. Whether the facts would show that any overcharge had been made is not now the question; but, supposing one to have been made, and that the payment was not such as the law would presume to have been voluntary, the point raised is, that no action can be maintained in our courts.

§ 30. *Aliens may sue and be sued by each other in our courts.*

That foreigners, even transiently here, may sue and be sued by citizens and by each other in our courts of common law and equity, is now the better opinion, and is in accordance with the law of England. Story, *Conf. of Laws*, § 542; 2 Kent Com., 64; Westlake, *International Law*, § 120 *et seq.* Such actions are constantly brought in our state courts, and this general practice meets the approval of jurists. A late French writer has said that the other nations have just cause of complaint against France, in that her laws deny to strangers the right to sue each other in France; a privilege which is allowed, he says, in almost all civilized countries. Foelix, *Droit. Int. Privé*, § 127, *etc.*

§ 31. *Jurisdiction of courts of admiralty over suits by aliens.*

Courts of admiralty, it is true, exercise a considerable latitude of discretion in entertaining suits between strangers; and they are guided to some extent in the particular case by the nature of the controversy, whether it involves a question of general law, or only of the local law of the foreign country. This distinction perhaps arose out of the great diffidence with which courts of admiralty in England were formerly accustomed to approach questions of local law, whether domestic or foreign. However this may be, it is now the better opinion, in this country at least, that where circumstances make it either necessary or highly convenient that the jurisdiction should be retained, as, for instance, when the voyage of a foreign vessel is broken up here, a court of admiralty will take the case, whether the law which it will be bound to administer happen to be local or general. In short, the work is one of discretion in the exercise of an admitted power, and not of the power itself. See, per Taney, C. J., *Taylor v. Caryll*, 20 How., 611; *The Havana*, 1 Spr., 402; *The Wilhelm Frederick*, 1 Hagg., 138; *Patch v. Marshall*, 2 Curt., 452; *The Jerusalem*, 2 Gall., 191; *Notes to 2 Parsons, Marit. Law*, book 3, ch. 3. And the remark of Mr. Justice Curtis in *Patch v. Marshall*, 2 Curt., 455, is to be understood, I have no doubt, in reference to a court of admiralty and its jurisdiction, which alone was involved in that case. One other assumption of fact was made by both parties at the argument, which was, that, by the law of England, if an overcharge, such as is here alleged, had been made, and the payment was compulsory, an action would lie against the officer to recover the excess; and it has not been shown that such an action must, by the English law, be brought in the home courts. Assuming this to be so, I am of opinion that such an action may be maintained here, there being no treaty provision to the contrary.

§ 32. *Consuls may be sued here, even if it becomes necessary to pass upon the proper exercise of their duties.*

So far as the official character of the defendant is concerned, it has long been settled as the law of England and America that consuls may be sued, and even arrested, for debt or damages. Wheat., *Int. Law*, 423; 1 Phillimore, *Int. Law*, 240; and see Foelix, *Droit Int. Privé*, § 191; Massé, *Droit Com.*, No. 446; Pardessus, *Droit Com.*, No. 1448; *Davis v. Packard*, 7 Pet., 276. If the defendant owes a debt, however small, to one of his countrymen, it can be sued in this court. Is there anything in the nature of this supposed debt to put it on a different footing? I am unable to see any such difference. All the reasons of propriety and convenience are the same. The defendant for many purposes has his domicile here, where the cause of action, too, arose, and where the witnesses may be supposed to be. Story, *Conf. of Laws*, § 69; Westlake, *Int. Law*, § 139. Indeed it is not easy to see how any effective suit could be main-

tained in any other forum. If the laws of England allow one of their consuls to be sued at home while residing abroad, the service upon him must be made by aid of some local rule, allowing a substituted, if not a fictitious, service; and a judgment so founded could hardly furnish the ground of an action out of England. In the case of some not unimportant consulates, the office is exercised by our own citizens, who have neither real nor fictitious residence elsewhere; and in other cases the controversies may arise with our own citizens. The rule of necessity in many cases, and of convenience in all, is plainly in favor of the jurisdiction here. It must be admitted that the mere fact of the defendant being a consul is unimportant, because consuls are liable to suit; nor is it more important that the plaintiff is a foreigner, for alien friends may freely sue in our courts; nor that the plaintiff is a British subject, for he may have suit against his consul somewhere. And the only point strenuously argued was that a court here cannot or ought not to pass upon the proper exercise of the consul's duties. No doubt our government, in all its departments, is bound to accord to the consul, after the executive authority has received him, the free exercise of all his consular authority, such as may exist by custom, treaty or general international law. But, after he has done an act professedly official, I see no reason why an individual may not try the question here, whether the act was within the scope of his authority. I perceive no greater objection to a court undertaking to construe the English law in a case of this kind than in any other in which it may be involved between party and party, nor any reason of comity that should forbid it. International comity is rather on the other side. All nations are supposed to desire that justice should be done between their own subjects, and international law does not in the case of consuls exempt them from the jurisdiction of the courts at the place of their residence. For these reasons I must overrule the plea to the jurisdiction.

Demurrer sustained.

ON TRIAL BEFORE A JURY.

The question was as to the validity of two fees, of 7s. 6d. for each ship, charged by the consul.

Charge by LOWELL, J.

So far as this case turns on the laws of Great Britain, we must decide it merely upon the evidence before us, trusting that any mistakes we may fall into will be corrected by the official persons who may be called upon to consider the effect of our judgment upon the usages of the consul's office here and in other ports; for it is said to be rather for the examination of these usages than for the recovery of the very trifling sum at issue that this action is prosecuted. It is admitted that the sums of money now sued for were paid by the plaintiff, not only under protest, but under compulsion, in order to recover his ship's papers which were in the defendant's possession. This being so, this action will lie if the exaction was illegal. The laws and orders in council of Great Britain have been given in evidence, and you will decide (no question of construction being involved in the issue) whether the charge of seven shillings and sixpence is the lawful fee for each certificate of the kind given in this case, and whether such certificates are required to be given by those laws or orders. If you find no such certificates mentioned, your next inquiry will be whether the plaintiff made any such request in respect to the second certificate as is mentioned in the order of May, 1855, to authorize services to be rendered which are not re-

quired by law. If you find either a request by the plaintiff, or a legal duty imposed on the consul, you will find for the defendant on this part of the case; otherwise for the plaintiff.

§ 33. *Provisions of act of congress, March 3, 1817 (3 Stats., 362), with reference to the papers of foreign ships.*

The first certificate stands upon other grounds more familiar to us. By a statute of the United States, passed March 3, 1817 (3 Stats., 362), and still in force, the master of every foreign ship and vessel must deposit his register and the clearance and other papers granted by the officers of customs at the port from which he came with the consul of the nation to which the vessel belongs within forty-eight hours of his arrival in an American port, and must deliver to the collector of the port a certificate from the consul that they have been so deposited; and this under a severe penalty. And the consul is not to deliver back the papers until the master has exhibited to him a clearance in due form from the collector of the port, and this under a penalty of not less than \$500 nor more than \$5,000. This right to make the consul the depository of the ship's papers is evidently regarded as a privilege, because the act goes on to say that it shall not extend to the vessels of those nations in whose ports our consuls have not a like privilege. Now it is argued to you very forcibly on behalf of the defendant, that a certificate thus required by our law, and which is necessary for the master in dealing with our custom-house, cannot be refused by the consul and cannot but have been required by the plaintiff, and that its registration was essential for the protection of both parties in fixing the dates of the transaction.

§ 34. *Provisions of act of 17 and 18 Vict., chapter 104, section 279.*

It is argued for the plaintiff that the statute 17 and 18 Vict., ch. 104, § 279, commonly called the Merchant Shipping Act, requires of masters a deposit of papers in the hands of the consul, within exactly the same time of forty-eight hours after arriving at any foreign port, and that by the other laws and orders already referred to, the services of the consul, in respect to the deposit and redelivery of those papers, are to be gratuitous. This is admitted to be true; but it appears by inspection of that part of the Merchant Shipping Act that the papers there referred to are wholly different from the register and other papers mentioned in our law, being those which relate to the crew, and that the law is looking to the due supervision by the consul of the relation between the master and the men, while our statute touches only those which show the nationality of the vessel and the legality of the voyage, and deals with what may be called the international aspects of the voyage. If this be so, the provision that the deposit of wholly different papers shall not be the subject of a charge, is, of course, immaterial. So far as our law is concerned, then, I rule to you that the first certificate is required to be given, and that the second certificate, namely, that the vessel has been duly cleared, is not required, and is useless for any purposes connected with our port or custom-house. You will apply this law to that of the foreign country, proved as a fact before you, and decide accordingly, under the instructions above given, whether these charges, or either of them, were lawful.

A good deal was said by learned counsel on both sides about the reasonableness of the charges. It will not be necessary for you to concern yourselves with that question, if you find the case is provided for by the laws and orders given in evidence. If you find it wholly untouched by those laws and orders, and yet that the services were rendered at the request of the plaintiff, he

must pay what they were reasonably worth. But I think it my duty to say to you that I see nothing in the evidence which would warrant you in coming to that conclusion in respect to the second certificate.

§ 35. **In general.**—By "ambassadors and other public ministers" is meant all officers having diplomatic functions, whatever their title or designation. The president can appoint, temporarily, a diplomatic officer, or he can change the designation of any mission during the recess of the senate. The president has full power and authority to make new appointments and remove for cause, etc.; the discretion vested in the president being wholly independent of any act of congress. *Ambassadors and Other Public Ministers*, * 7 Op. Att'y Gen'l, 186. See § 94.

§ 36. **Recognition.**—Courts of justice are not authorized to decide who are accredited diplomatic ministers. The recognition of the executive branch of the government is conclusive upon the judicial. *United States v. Ortega*, 4 Wash., 581.

§ 37. A certificate by the secretary of state, under seal of office, that a person has been recognized by the department of state as a foreign minister, is full evidence that he has been received as such by the president. *United States v. Benner*, 1 Bald., 235.

§ 38. **Power.**—An assurance given by a minister of the United States, without special authority to do so, that if a treaty with the United States was ratified by a foreign power, a certain claim against it would be paid by the United States, is null and void. *Meade v. United States*, 9 Wall., 691. See §§ 60-75.

§ 39. **Accepting commission from foreign power.**—A minister plenipotentiary of the United States to one foreign power, holding an office of profit under the United States, cannot, without consent of congress, accept a similar commission from another foreign power. *Foreign Diplomatic Commission*, * 13 Op. Att'y Gen'l, 537.

§ 40. **Certificate of evidence.**—The certificate and seal of the British minister resident in Hanover authenticates only those acts which pertain to his office, and is not a proper authentication for the proceedings of a foreign court or officer authorized to take depositions, which is a matter in no way connected with the functions of a minister. *Stein v. Bowman*, 13 Pet., 209. See §§ 88-92.

§ 41. **Compensation.**—A minister appointed to represent us at a foreign country is entitled to a full outfit, not exceeding one year's salary, even though he was not in the United States at the time of his appointment. *Outfit of Public Ministers*, * 5 Op. Att'y Gen'l, 139. See §§ 93-95.

§ 42. Where the government pays a minister abroad by bills of exchange, to be negotiated by him at his station, the foreign money in which he is paid must be reckoned at its commercial value, at the time and place of payment, in the coin of the United States. *Clay v. United States*, * 8 Ct. Cl., 209.

§ 43. Where a charge d'affaires in a foreign country, entitled to a stipulated compensation, is authorized to draw upon a banker abroad for his salary, and the drafts bring a premium at the foreign residence, he is chargeable with such premium, and is a trustee for the amount to the government, and the government is chargeable with the costs and damages resulting from such a draft being protested. *Ministers Chargeable with Premiums on Exchange*, * 4 Op. Att'y Gen'l, 295.

§ 44. A party acting in the capacity of representative of the United States, and treated as such, is entitled to compensation, though never having received any appointment as representative. *Savage's Case*, * 1 Ct. Cl., 170.

§ 45. **Privilege of ambassador.**—An ambassador is not liable to answer, criminally or civilly, before any court of a foreign nation to which he is sent. *Libelous Publications*, * 1 Op. Att'y Gen'l, 71. See §§ 76-79.

§ 46. — **secretary of legation.**—A secretary of the Spanish legation was held to be under the protection of the law of nations, and not amenable to the tribunals of this country, upon a civil or criminal charge. *Ex parte Cabrera*, * 1 Wash., 232.

§ 47. — **minister's servant.**—The United States courts have no jurisdiction to try the domestic servant of a foreign minister charged with crime. *United States v. Lafontaine*, 4 Cr. C. C., 173. See § 105.

§ 48. By the act of congress the arrest of a domestic of a foreign minister is criminal, unless, being an inhabitant of the United States, he has contracted debts before becoming such domestic, and his name has been registered with the secretary of state and transmitted to the marshal at the seat of government. If there be an entering of a minister's house and an arrest of his servant, the entering will be absorbed in the arrest, if the arrest be criminal; if not criminal, the entering is punishable, if at all, only by the law of nations. *Who Privileged from Arrest*, * 1 Op. Att'y Gen'l, 26. See §§ 105-113.

§ 49. — **minister not recognized.**— A person coming to this country as foreign minister, but not recognized or received as such, has no diplomatic privilege except of transit, and that by courtesy and not of full right. *Diplomatic Privilege*,* 8 Op. Att'y Gen'l, 471.

§ 50. — **hiring slave.**— The minister of a foreign government, residing here, has no power or authority, by the law of nations, to make contracts of any kind with persons who are under legal disability to perform them. And the arrest of a slave, whom the Austrian minister had taken into his house as a servant, was held not a breach of his privileges. *Diplomatic Privileges*,* 9 Op. Att'y Gen'l, 7.

§ 51. — **extent.**— The persons and personal effects of foreign ambassadors and their attachés are exempt from arrest, seizure or violence by the law of nations, and act of congress of April 30, 1790. And a hotel keeper, with whom an attaché of a foreign legation is a boarder, cannot prevent the latter removing his effects by his lien as an innkeeper. *Immunities of Public Ministers*,* 5 Op. Att'y Gen'l, 69.

§ 52. By the law of nations a minister's house, equipage, etc., are entitled to the same protection as his person. To insult him is an attack on him and his sovereign, and seems to be punishable by the act of congress. *United States v. Hand*, 2 Wash., 435. See §§ 105-118.

§ 53. — **walver.**— A foreign minister cannot waive his official privileges, and his submission to an arrest is no justification. *United States v. Benner*, 1 Bald., 284. See §§ 80-88.

§ 54. **Consuls — Powers.**— Our statutes do not pretend to define the powers of American consuls, but that depends upon the course of trade and the common functions established by general consent and the law of nations. *Potter v. Ocean Ins. Co.*, 3 Sumn., 27. See §§ 1, 180-186.

§ 55. Consular jurisdiction depends on the general law of nations, on treaties subsisting between the governments concerned, or on the activity and obligatory force of the rule of reciprocity. *Authority and Jurisdiction of Consuls*,* 2 Op. Att'y Gen'l, 378. See §§ 1, 180-186.

§ 56. — **judicial powers.**— The principles of international law, as recognized in Europe, afford no warrant for the exercise of judicial power by consuls, and the rights and duties of these functionaries depend, both for their authority and its extent, upon the treaties subsisting between the governments respectively interchanging this species of commercial agents. *Ibid.* See §§ 1, 180-186.

§ 57. Under treaties between the United States and France, a consul of the latter power, resident in this country, has no jurisdiction over offenses committed on board of French merchant vessels by French subjects, while such vessels are lying in our ports; and the rule of reciprocity will not authorize the executive department of our government to interfere with the functions committed by the national legislature to the judicial department, by extending to a foreign consul judicial powers not existing by treaty. *Ibid.*

§ 58. Treaties between the United States and Turkey authorize our consuls in Egypt to exercise judicial powers over American citizens in that country, both civil and criminal. *Dainese v. Hale*,* 1 MacArth., 86. See §§ 10-15, 48.

§ 59. Under the act of congress of May 7, 1830, United States consuls in Turkey have judicial powers only in criminal cases. *Jurisdiction of Consuls in Turkey*,* 9 Op. Att'y Gen'l, 296.

§ 60. — **miscellaneous powers.**— It is not competent for a consul, without the special authority of his government, to interpose a claim in a prize case for the assertion of violated rights of his sovereign in the capture of a ship. He is supposed to be clothed with authority only for commercial purposes. He has an undoubted right to interpose claims for the restitution of property belonging to the subjects of his country, but is not a minister or diplomatic agent of his sovereign, intrusted by virtue of his office with authority to represent him in his negotiations with foreign states, or to vindicate his prerogatives. *The Anne*, 3 Wheat., 435. See §§ 38, 76-79.

§ 61. A vice-consul of a foreign power, duly recognized by our government, is a competent party to assert or defend the rights of property of the individuals of his nation, in any court having jurisdiction of causes affected by the application of international law. *The Bello Corrunes*, 6 Wheat., 152.

§ 62. A consul of a foreign power cannot intervene for his sovereign when such sovereign has a minister or ambassador resident in the country, but he may intervene in a cause of salvage on behalf of citizens of his own country who are absent, but interested. *Robson v. The Huntress*, 2 Wall. Jr., 59.

§ 63. A consul of a nation may claim on behalf of its subjects a captured ship if no authorized agent appears. *The London Packet*, 1 Mason, 14.

§ 64. A foreign vice-consul may petition the court to order its officers to discharge their official duty in regard to the proceeds of a sale of property belonging to the citizens of the nation which he represents. *The Ship Adolph*, 1 Curt., 87.

§ 65. Consuls of the United States are authorized to perform any notarial acts; but a certificate to official character is not a notarial act. Notarial Power of American Consuls,* 12 Op. Att'y Gen'l, 1.

§ 66. It seems that a United States consul in France has not general power to administer oaths, but only in particular cases. He is not a person authorized to administer oaths by the law of France. *Herman v. Herman*, 4 Wash., 555.

§ 67. A consul of the United States has no authority to order the imprisonment of an American seaman in a foreign port; and his order will not exempt the master from liability for such imprisonment, if without good cause. *The William Harris*, 1 Ware, 373.

§ 68. It is no justification of an illegal imprisonment of seamen, by the master of a vessel, in a foreign port, that the same was done by the advice or with the approval of the American consul, though if the case were fully and fairly stated to him, and his advice faithfully pursued, it would afford a strong protection, on the ground of malicious or wrongful intention. *Wilson v. The Mary, Gilp.*, 31.

§ 69. No consul, by virtue of his office, particularly in an enemy's country, can grant a permit exempting an enemy's vessel from capture. *Rogers v. The Amado*, 1 Newb., 400. See § 78.

§ 70. An American consul has authority to detain the papers of a ship only for the purpose of enforcing the payment of wages in certain cases, and consular fees; a consul can sue for and receive the penalties incurred by the master of a vessel for neglecting to deposit his papers; but he has no right to enforce the penalties otherwise, and has no general authority to enforce disputed claims against a vessel. *Powers of American Consuls*,* 9 Op. Att'y Gen'l, 384.

§ 71. — *discharge of seamen abroad.*— Under the act of July 20, 1840 (5 U. S. Stat., 395), a seaman may be discharged abroad at his own request by the consul, without payment of three months' wages; but the consul must make an official entry of the facts, both upon the crew list and shipping articles. *Miner v. Harbeck*, 1 Abb. Adm., 546.

§ 72. It seems that when a consul, on clear *prima facie* evidence, orders a seaman to be discharged from a vessel for criminal conduct, threatening the safety of the vessel or her officers or company, and sends him home for trial on the accusations, such discharge is a bar to any continuing claim for wages. *Tingle v. Tucker*, 1 Abb. Adm., 519.

§ 73. The action of a consul in the discharge of a seaman in a foreign port is not conclusive upon the courts. *Campbell v. Steamer Uncle Sam*, 1 McAl., 77.

§ 74. If in a foreign port a seaman be discharged, with the approval of the resident consul, such fact does not preclude the court from inquiring into the cause of the discharge and awarding damages if the discharge was unjustifiable. *Hutchinson v. Coombs*, 1 Ware, 65.

§ 75. The consul is the proper judge upon what vessels destitute American seamen abroad shall be placed for their return to the United States. *Matthews v. Offley*, 3 Sumn., 115.

§ 76. — *privilege.*— Though a consul be authorized to communicate directly with the government, yet he does not thereby acquire diplomatic privileges of a minister. *Functions of Consuls*,* 7 Op. Att'y Gen'l, 342. See § 60.

§ 77. A consul-general of the French republic in the United States is not privileged from legal process either by the law of nations or by the consular convention between the United States and France. *Consular Privileges*,* 1 Op. Att'y Gen'l, 77.

§ 78. Where a foreign consul is carrying on trade in an enemy's country as a merchant, his official character will not protect his property from seizure and condemnation as enemy's property. *The Bark Pioneer*, 1 Bl. Pr. Cas., 666. See § 69.

§ 79. The treaty with France, which exempts consuls from compulsory process to secure their attendance as witnesses, is not in conflict with the sixth amendment of the constitution of the United States, securing to persons accused of crime compulsory process for their witnesses. The courts have no power, on motion of a defendant accused of crime, to compel the attendance of a consul of France as a witness. *In re Dillon*, 7 Saw., 563.

§ 80. — *suits by and against.*— A state court has no jurisdiction of an action of debt against a foreign consul. *McKay v. Garcia*,* 6 Ben., 556. See §§ 103-118.

§ 81. Where, in the New York court of errors, upon error to the supreme court of the state, it was assigned for error that the defendant was consul-general of a foreign power, and it was answered that the error alleged nowhere appeared in the record of the supreme court of the state, and the court of errors affirmed the judgment of the supreme court, *held*, that the question, whether the error alleged was assignable in the court of errors, was not involved in the judgment given; but that court, assuming the fact as alleged, decided that it did not exempt the defendant from suit in the state court, which decision was reviewable by the federal supreme court upon error. *Davis v. Packard*, 6 Pet., 41. See § 53.

§ 82. Where suit was instituted in the supreme court of the state of New York against a foreign consul, and the defendant did not plead his exemption in that court, but, upon the

case being carried to the court of errors, assigned the matter as error, and that court, notwithstanding, gave judgment against him on the merits,—not merely dismissing the writ of error,—the judgment of the court of errors was reversed, without deciding whether, had the judgment rested upon the ground that the exemption had been waived by not being pleaded below, the case would have been taken out of the revising power of the federal supreme court. *Ibid.*

§ 83. It seems that the exemption from suit in the state courts, extended to foreign ministers, is not a personal privilege, which is waived by not being pleaded, but belongs to the government which they represent. *Ibid.*

§ 84. A foreign consul may bring a suit in a state court, as an individual, but a suit cannot be brought in such a court against him. *Sagory v. Wissman*, 2 Ben., 240.

§ 85. Where A filed a bill in equity in a state court for the sale of lands which he had conveyed subject to a mortgage, and afterwards filed a supplemental bill making B, the owner of the mortgage, and a foreign consul, a party; and B answered the original and supplemental bills, and afterwards filed in the same court a bill in the nature of a cross-bill for the sale of the lands and the application of the proceeds to satisfy his mortgage, *held*, that the suit by B was an original suit of which the state court had jurisdiction. *Ibid.*

§ 86. United States circuit courts have jurisdiction of suits in equity against the consuls of foreign powers. *Graham v. Stucken*, 4 Blatch., 60.

§ 87. Aliens are subject to the jurisdiction of the circuit court of the United States. Consuls have no privilege except exemption from suit in state courts. The jurisdiction of the United States circuit courts is exclusive only of state courts. *St. Luke's Hospital v. Barclay*, 3 Blatch., 259.

§ 88. Where a contract was made by a firm, and a foreign consul became a partner in a firm, the successor of the former firm, it was held that the latter firm was not liable upon the contract, and that the federal court had no jurisdiction to give judgment against a party who was a member of both firms, in an action thereon against the latter firm, it having no jurisdiction of the cause except by reason of the character of the consul defendant, who was not liable. *Bixby v. Janssen*, 6 Blatch., 815.

§ 89. — certificate; evidence.— The certificate of a consul as to facts not within his knowledge, official or personal, is not evidence of those facts. *Brown v. The Independence*, Crabbe, 54. See §§ 41-44.

§ 90. The certificate of a consul under his consular seal is not a sufficient authentication of a foreign law to make it evidence, it not being one of his consular functions to grant such certificates. *Stein v. Bowman*, 18 Pet., 209.

§ 91. The seal on a consular certificate should, to entitle the certificate to be recorded as an official document, be so plain as to allow the vignette and motto to be distinguished. *The Atlantic*, Abb. Adm., 451.

§ 92. Under the act of congress of 1803, ch. 62, the certificate of the consul is *prima facie* evidence of the refusal of the master of a vessel to take destitute seamen on board, and of all facts which are necessary to bring the case within the penalty of the statute. *Matthews v. Offley*, 3 Sumn., 115.

§ 93. — compensation.— A consul is not entitled to a commission for merely witnessing payment to a seaman, upon his discharge from a vessel abroad. *Hathaway v. Jones*, 2 Spr., 56. See §§ 41-43.

§ 94. By act of congress, August 18, 1856, it is declared: "No consular officer can exercise diplomatic functions, . . . unless expressly authorized by the president so to do." A retiring minister cannot, of his own motion, place a consul in charge of the legation in his place, nor can the latter draw the pay incident to such office. *Otterbourg's Case*,* 5 Ct. Cl., 430. See § 35.

§ 95. When a consul is absent for over sixty days, during one year, from duty, his pay ceases during such absence. Pay of vice-consuls and vice-commercial agents does not stop during absence of principal. *Absence of Diplomatic and Consular Officers*,* 12 Op. Att'y Gen'l, 410. See § 102.

§ 96. — miscellaneous.— It was said to be the duty of a United States consul to have afforded assistance to, and sent home, a minor who had concealed himself in a vessel, and was not discovered till the vessel was at sea, he having offered himself as a seaman and been permitted by the master to perform the duties of one, though he had not signed the articles. *Luscom v. Osgood*, 1 Spr., 82.

§ 97. In a suit by the United States against the sureties on the official bond of a consul for the faithful discharge of his duties, and to account for money received by virtue of the act of April 14, 1792, the sureties are not responsible on account of moneys remitted to the consul for purposes not within the limits of his consular duties. *United States v. Bell*, Gilp., 41.

§ 98. Bills of exchange were drawn by the consul-general of the French republic. His

official title was added to his signature, and they were directed to the paymaster-general at the national treasury, and purported to be for value received by the government, conformably to account rendered. They bore a certificate of registration at a French consulate, and a declaration by the French minister plenipotentiary that the faith of the French nation was pledged for their payment, and requesting the proper officer of the treasury to pay them. *Held*, that they were contracts on account of the government, and the drawer was not personally liable thereon. *Jones v. Le Tombe*, 3 Dal., 384.

§ 99. A foreign seaman seeking to libel a vessel for wages in a port of the United States must procure the official sanction of the representative of the country to which he belongs. *The Infanta*, 1 Abb. Adm., 268.

§ 100. Vice-consuls, consular agents, etc.—The law forbidding payment of any compensation to any consul who is not a citizen of the United States does not apply to deputy and vice-consuls and consular and vice-commercial agents. *Citizenship of Consular Officers*,* 12 Op. Att'y Gen'l, 124.

§ 101. Consular agents are consular officers, and in law the representatives of the consuls to whom they are subordinate—consuls exercising through them consular powers, at places within their consulates different from those at which they are themselves located. *Gould v. Staples*, 9 Fed. R., 159. See § 29.

§ 102. In the absence of the consul, his clerk cannot invoke the aid of the local authorities to check insubordination of seamen in a foreign port. *Snow v. Wope*, 2 Curt., 301. See § 95.

II. OFFENSES AFFECTING MINISTERS.

SUMMARY—*Jurisdiction*, § 103.

§ 103. A prosecution for a crime committed upon the person of a public minister is not a case affecting such minister within the sense of the federal constitution. *United States v. Ortega*, § 104.

[NOTES.—See §§ 105-118.]

UNITED STATES *v.* ORTEGA.

(11 Wheaton, 467-469. 1826.)

Opinion by MR. JUSTICE WASHINGTON.

STATEMENT OF FACTS.—The defendant, Juan Gualberto de Ortega, was indicted in the circuit court of the United States for the eastern district of Pennsylvania, for infracting the law of nations by offering violence to the person of Hilario de Rivas y Salmon, the charge d'affaires of his Catholic majesty the king of Spain in the United States, contrary to the law of nations and to the act of the congress of the United States in such case provided. The jury having found a verdict of guilty; the defendant moved in arrest of judgment, and assigned for cause "that the circuit court has not jurisdiction of the matter charged in the indictment, inasmuch as it is a case affecting an ambassador or other public minister." The opinions of the judges of that court upon this point being opposed, the cause comes before this court upon a certificate of such disagreement.

§ 104. *A prosecution for an assault upon the person of a public minister is not within article 3, section 2, of the constitution, and the circuit court may have jurisdiction thereof.*

The questions to which the point certified by the court below gives rise are, first, whether this is a case affecting an ambassador or other public minister, within the meaning of the second section of the third article of the constitution of the United States. If it be, then the next question would be, whether the jurisdiction of the supreme court in such cases is not only original, but exclusive of the circuit courts, under the true construction of the above section and article.

The last question need not be decided in the present case, because the court

is clearly of opinion that this is not a case affecting a public minister, within the plain meaning of the constitution. It is that of a public prosecution, instituted and conducted by and in the name of the United States, for the purpose of vindicating the law of nations and that of the United States, offended, as the indictment charges, in the person of a public minister, by an assault committed on him by a private individual. It is a case, then, which affects the United States and the individual whom they seek to punish, but one in which the minister himself, although he was the person injured by the assault, has no concern, either in the event of the prosecution or in the costs attending it.

It is ordered to be certified to the circuit court for the eastern district of Pennsylvania that that court has jurisdiction of the matter charged in the indictment, the case not being one which affects an ambassador or other public minister.

Certificate accordingly.

§ 105. **Jurisdiction.**—The original jurisdiction vested by the federal constitution in the supreme court in cases affecting ambassadors, etc., does not preclude congress from conferring concurrent jurisdiction on inferior courts, and a motion to quash an indictment against a consul on the ground that the case was exclusively within the jurisdiction of the supreme court was overruled. *United States v. Ravara*, 2 Dal., 297. See §§ 47, 48.

§ 106. A consul is not a public minister within the meaning of the act of congress of April 30, 1790, in relation to "violence to the person of an ambassador or other public minister;" and the courts of the United States have no jurisdiction of a riot committed by a number of persons tumultuously assembled before the house of a foreign consul, requiring him to deliver up certain persons supposed to be resident with him, and insulting him with improper language. *Respect Due to Consuls*,* 1 Op. Att'y Gen'l, 41.

§ 107. **Self-defense.**—Though the person of a public minister is inviolable, yet he is not exempted from the law of self-defense; if he unlawfully assaults another, the attack may be repelled by as much force as will prevent its continuance or repetition. *United States v. Benner*, 1 Bald., 234.

§ 108. A foreign minister, by committing the first assault, so far loses his privilege that he cannot complain of an infraction of the law of nations, if in his turn he should be assaulted by the party aggrieved. *United States v. Ortega*, 4 Wash., 531.

§ 109. The law is the same in the case of a defendant charged with an assault upon a foreign minister as when charged with the same offense upon a citizen, and the same defense can be made. If the minister be the aggressor, the defendant will be excused for a subsequent battery. *United States v. Liddle*, 2 Wash., 205.

§ 110. **Knowledge of ministerial character.**—One who assaults another, knowing the person assaulted once to have been a foreign minister, acts at his peril, if it turns out that his character of minister still continues, or if the reverse is not proved. *United States v. Ortega*, 4 Wash., 531.

§ 111. It is no excuse of an assault upon the person of a foreign minister that his character was unknown to the assailant. *Ibid.*

§ 112. Under section 27 of the act of 1790, it is not necessary to conviction that the person arresting a minister be an officer. *United States v. Benner*, 1 Bald., 234.

§ 113. To render one guilty of the offense of insulting a foreign minister by injury to his house, etc., it must appear that the accused knew that it was the house, etc., of the minister. *United States v. Hand*, 2 Wash., 435. See §§ 51, 52.

III. CONSULAR COURTS.

SUMMARY — *Practice on appeals*, §§ 114-116.

§ 114. An appeal from the consular and ministerial courts of China and Japan to the circuit court for the district of California is subject to the same rules, regulations and restrictions as are prescribed in the case of writs of error from district courts, including those as to allowance of appeal, issuance and service of citation, and parties who may prosecute an appeal. *Steamer Spark v. Lee Choi Chum*, §§ 117-126; *Tazaymon v. Twombly*, §§ 127-129.

§ 115. *Quære*: Whether it is necessary to issue and serve a citation when the consular court has once adjourned after rendering a decree. *Ibid.*

§ 116. In an appeal from said consular courts, the transcript of the record should be a copy in chronological order of all the proceedings in the case as a single document, and should be certified at the end as being a full, true and correct copy of the pleadings and all other proceedings in the case. Separate, loose papers, wholly unauthenticated, do not constitute a record. *Tazaymon v. Twombly*, §§ 127-129.

[NOTES.—See §§ 180-186.]

STEAMER SPARK *v.* LEE CHOI CHUM.

(Circuit Court for California: 1 Sawyer, 718-721. 1872.)

Opinion by SAWYER, J.

STATEMENT OF FACTS.—This is an appeal from a judgment of the consular court of Canton, in the empire of China, in a proceeding in admiralty against the steamer Spark, for damages resulting from a collision with a Chinese junk owned by the petitioners, or libelants. The proceedings were had, and appeal taken, under the act of congress of June 22, 1860, and the amendatory act of July 1, 1870, giving to this court appellate jurisdiction in certain cases from the consular and ministerial courts of China and Japan. 12 U. S. Stat. at L., 72; and 16 U. S. Stat. at L., 183-4. The fifth section of the latter act is as follows, to wit: "Sec. 5. And be it further enacted, that where the matter in dispute, exclusive of costs, exceeds the sum of \$2,500, an appeal shall be allowed to the circuit court for the district of California; and, upon such appeal, a transcript of the libel, bill, answer, depositions, and all other proceedings in the cause shall be transmitted to the circuit court; and no new evidence shall be received on the hearing of the appeal; and the appeal shall be subject to the rules, regulations and restrictions prescribed in law for writs of error from district courts of the United States." A judgment having been entered by the consular court against the steamer Spark, for the sum of \$6,005.32, an appeal has been taken on behalf of the defendant.

§ 117. *The allowance of an appeal from certain consular courts must appear in the record.*

The appellees move to dismiss the appeal for numerous irregularities, only three or four of which will be noticed. It is objected that the record shows no order allowing the appeal, and no citation to the appellees. The section cited, it will be seen, provides that "appeals shall be subject to the rules, regulations and restrictions prescribed in law for writs of error from district courts of the United States." The twenty-second section of the judiciary act of 1789 provides that final decrees and judgments of the district courts in civil actions "may be re-examined, and reversed or affirmed in a circuit court, . . . upon a writ of error, whereto shall be annexed and returned therewith, at the day and place therein mentioned, an authenticated transcript of the record, assignment of errors and prayer for reversal, with a citation to the adverse party signed by the judge of such district court or a justice of the supreme court, the adverse party having at least twenty days' notice." 1 U. S. Stat. at L., 84. The same section has a similar provision for writs of error from the supreme to the circuit court to review the judgments and decrees of the latter. And the twenty-fifth section has provisions in similar language for reviewing the decisions of the highest state courts in certain cases by the supreme court of the United States. The construction of these latter provisions, and, consequently, the construction of the similar provision relative to writs of error from the circuit to the district courts, has been settled by the supreme court of the United States. Thus, in the very late case of *Gleason v. Florida*, 9 Wall,

783, the supreme court say: "But on looking into the record we find no allowance of the writ. And this has been repeatedly held to be essential to the exercise by this court of reviewing jurisdiction over final judgments or decrees by the courts of the states." So, in *Hartford Fire Ins. Co. v. Van Duzer*, the writ was dismissed because no allowance of the writ appeared in the record, the chief justice delivering the opinion of the court, "that such allowance was indispensable to the jurisdiction of the court in error to review the judgment of the highest court of the state." 9 Wall., 784, note. So an appeal from the supreme court of the District of Columbia was dismissed by the supreme court of the United States, because there was "no evidence in the record of any allowance of appeal; and without an allowance this court cannot acquire jurisdiction." *Pierce v. Cox*, 9 Wall., 787. See, also, *Edmonson v. Bloomshire*, 7 Wall., 312. This settles the construction of the act of congress relating to writs of error and appeals from the United States district courts, and as the same rules and regulations are made applicable to appeals from the consular courts of China, it settles the point in this case.

§ 118. *A citation is necessary if the appeal be not allowed in open court.*

The record shows no allowance of an appeal and no citation, the latter being necessary, also, if the order allowing an appeal is not made in open court. This is implied, at least, from the case of *Pierce v. Cox*, *supra*, if a citation is not waived by appearance of the appellee. And it is expressly required by the provisions of the statute quoted. It is claimed, also, that this appeal, if taken at all, must have been taken out of court, as the petition for an appeal bears date several days after the date of the judgment; and it is claimed that there are no terms in the consular court, under the statute, and that as soon as judgment is entered and the court for that occasion has adjourned, it is no longer an open court with reference to that case, and all subsequent allowances of appeals must necessarily be made out of court with respect to that case. Numerous authorities are cited to the point, but it is unnecessary now to determine it upon the view taken upon other objections. It will be the safer practice to issue and serve a citation.

§ 119. *No appeal or writ of error can be sustained in name of a steamer, or any other than a human being or corporation.*

Another formidable objection is, that no appeal has been taken in the case; that the appeal, if any there is, is taken in the name of *The Steamer Spark* — the only defendant in the case; and that no appeal can be taken in the name of an inanimate object — the *res* when the action is *in rem*. The supreme court of the United States, in the recent case of "*The Steamboat Burns*," held that a writ of error or appeal cannot be sustained in the name of a steamboat or any other than a human being, or some corporate or associated aggregation of persons. 9 Wall., 237-40. The writ of error was dismissed on the ground indicated. The petition for an appeal in this case is entitled, *Lee Choi Chum v. The Steamer Spark*, and it proceeds: "And now comes the said defendant in the above entitled cause, by George B. Dixwell, his agent, and files this petition on appeal, and sheweth that the said consular court did, on the 24th day of August, A. D. 1871, enter a judgment in the cause against the defendant, in favor of the plaintiff, for the sum of \$6,005.32, and the said defendant appeals from the judgment of the said consular court to the circuit court of the United States for the district of California, etc. . . . Wherefore the defendant prays that proceedings," etc. This is an appeal by, and in the name of, the ship, and nothing more. The ship purports to be the appellant, and it is in fact the

only defendant in the case. The case cited is conclusive on this question. The petition for an appeal is signed "Geo. Basil Dixwell, for self, and the firm of Augustine Heard & Co.," but this does not make either of these persons parties to the appeal, or even to the action. The body of the petition shows that it is "the defendant in the above entitled cause, by George B. Dixwell," that files the petition, but neither Dixwell nor Augustine Heard & Co. was a defendant.

§ 120. *Appeal taken in name of firm, all the members must be named.*

They were not sued, and they never put in a claim as owner, or otherwise, so far as the record shows, and never filed any pleading in the case by which they became parties. They do not purport to appeal, nor were they in a condition to entitle them to appeal. If they had been parties, and had appeared as such in the name of "Augustine Heard & Co.," they would still be met by another decision of the supreme court, that an appeal in that name, style and form would be nugatory. In the case of "The Protector," an "appeal was dismissed" because taken in the name of "William A. Freeborn & Co.," without setting out the names of the parties constituting the firm, the court holding that "no difference existed between writs of error and appeals, as to the manner in which the names of parties should be set forth," and that this defect had always been held fatal in cases of writs of error. 11 Wall., 82. But the appeal is not taken by these parties or any other, except "The Steamer Spark," the only defendant in the case.

§ 121. *One not a party to the record cannot appeal.*

In fact there is no other party to the record, and, consequently, none other who could take the appeal. A person who is not a party in some form cannot interfere by way of appeal, or otherwise. There was, in this case, no answer to the libel, or petition, as the parties designate the pleading filed by the complainants. There is no issue taken upon the allegations of the libel, or petition, and nothing to try except to ascertain the amount of damages. Neither Captain Brady, Mr. Orm, Mr. Dixwell, Augustine Heard & Co., nor any other person, presented himself in any such way as entitled him to be heard in the case, either in the court below or on appeal. They have not merely failed in form, but also in substance, to make themselves parties to the proceedings.

§ 122. *In a proceeding in rem in admiralty, a claim must be filed by the owner or his agent.*

It will be seen by reference to any reputable work on admiralty practice, that the first step in the defense in a proceeding in rem in instance causes, in courts exercising admiralty jurisdiction, is the interposition of a claim to the property libeled. The claim should be made by a party authorized to set up a defense — the owner, either in person or by his agent, or by the agent of a foreign government, whose subjects are interested in the property in question. Dunlap's Ad. Prac., 153; 2 Conkling's Ad. Pr., 543; Ben. Ad. Pr., sec. 461. "In such suits," observes Mr. Justice Story, "the claimant is an actor, and is entitled to come before the court in that character only, in virtue of his proprietary interest in the thing in controversy; this alone gives him a *persona standi in judicio*. It is necessary that he should establish his right to that character, as a preliminary to his admission as a party *ad litem*, capable of sustaining the litigation. He is, therefore, in the regular and proper course of practice, required, in the first instance, to put in his claim upon oath, averring in positive terms his proprietary interest. If he refuses to do so, it is sufficient reason for a rejection of his claim. If the claim be made through the inter-

vention of an agent, the agent is in like manner required to make oath to his belief of the verity of the claim; and if necessary, he may also be required to produce and prove his authority before he can be admitted to put in the claim. If this is not done, it furnishes matter of exception, and may be insisted upon by the ~~adverse party~~, for the dismissal of the claim." *United States v. 422 Casks of Wine*, 1 Pet., 549.

§ 123. — *what the claim filed must contain.*

The claim should state the facts showing the right of ~~the party to intervene~~, that is to say, the ownership of the property, in a direct and issuable form. In the language of Mr. Benedict: "No set form of words is necessary to form a claim. In this, as in other pleadings, the court looks to the substance, rather than the form.

"It must state that the party is the true and *bona fide* owner of the interest which he represents, and that no other person is the owner thereof. It must be verified by the oath of the party or his agent or consignee; when it is verified by the oath of an agent or consignee, he must also swear that he is authorized to do so by the owner, or if the property be, at the time of the arrest, in the possession of the master of a ship, that he is a lawful bailee thereof for the owner." Ben. Ad. Pr., sec. 461. The document coming nearest to a claim is a protest signed by George Brady. It does not purport to be a claim, and is not one, either in form or substance. It alleges nothing directly, or in an issuable form, as to the ownership of the vessel; but simply recites that, "whereas the said vessel was, on or about the 24th day of June, 1871, sold and transferred by the owner thereof unto the Hong Kong, Canton & Macao Steamship Company (limited), being a British joint stock company, duly incorporated," etc., and then, on behalf of said corporation, protests against the action and the exercise of jurisdiction by the consul, not on account of the insufficiency of the libel, but by reason of the said recitals.

§ 124. *The claim must be verified.*

The document, such as it is, is not verified. It is not a claim, in any sense, upon which the said corporation was entitled to defend, or be heard, had it attempted to do so. The owner of the ship in his own name, in person or by his agent, should have filed a claim in such a form that issue could be taken on it; then, if the facts had been admitted, or proved upon denial, the claimant would have been entitled to defend, and would have become a party to the action, and entitled to act as such in all subsequent proceedings. The mere putting in of a claim is not a defense to the action, but it gives the claimant the *status* of a party. This is its office. After putting the claim in, and thus becoming entitled to be heard for his interest, the claimant must put before the court the grounds of his defense, in suitable allegations, so that the court and the opposite party may be informed of the grounds of the defense. Ben. Ad. Pr., sec. 465 *et seq.*

§ 125. *In consular courts all jurisdictional facts must be alleged.*

The consular court is a court of limited jurisdiction, and all the jurisdictional facts must be alleged in the libel, petition or complaint, otherwise it will be insufficient. If the libel or petition fails to show the facts which authorize the court to take jurisdiction under the statute, or if, for any other reason, it fails to appear upon the facts stated in the libel or complaint that the party filing is not entitled to any relief, the claimant, after filing his claim and becoming a party to the proceeding, may file exceptions in the nature of a special demurrer, pointing out the particulars in which the libel or petition fails to show

jurisdiction or any ground for relief. Or if there is no defect in the libel or petition, and the matters showing a want of jurisdiction, or other defense, do not appear on the face of the libel, they must be set up by direct affirmative allegations in an issuable form, by way of plea or answer. The claims, exceptions and other matters of defense, however, may be united in the answer, at the option of the party intervening, for the protection of his own interest; but this is not the best practice. Ben. Ad. Pr., ch. XXVI; Dunlap's Ad. Pr., chs. VI and VIII; 2 Conkling's Ad. Pr., 577 *et seq.* I have been thus particular in referring briefly to the practice, and to the works where the proper practice in cases of this kind may be readily found, for the reason that the proceedings in this class of cases do not appear to be well understood by litigants at Canton, and the proceedings in this case have, consequently, been very irregular. This is probably owing to the scarcity of books, and the absence of members of the legal profession at Canton. By consulting some one or more of the works referred to, the mistakes that have occurred in this case may be avoided in the future. As the jurisdiction conferred upon consuls is highly important, the importance of procuring some reputable works on admiralty practice cannot be overestimated.

§ 126. — *libel insufficient as to jurisdictional facts.*

On the view taken, the court has not acquired jurisdiction of the case, and, of course, any inquiry into the merits is precluded. I feel it my duty, however, to suggest that the libel or petition itself appears to be defective, in not stating the facts necessary to give the consular court jurisdiction, under the acts of congress and the treaty between the United States and the empire of China. It is nowhere alleged in the petition or libel that The Steamer Spark is an American vessel, nor are any facts alleged by which it can be seen that the consular court has jurisdiction. The jurisdictional facts, as before mentioned, must all be distinctly averred.

It appears from what has been said, and from the authorities cited, that no claimant of the ship appears in the record in any form that entitles him to be heard; that there is no party defendant, other than the ship — the *rem* — and no appeal taken in any form by any party appearing to be entitled to appeal, or in any name other than that of the ship; also, that no appeal can be taken in the name of the ship alone. There is, therefore, no valid appeal, and the appeal must be dismissed. So, also, the record fails to show any allowance of an appeal, or any citation to the adverse party, and it is not suggested that there is any diminution of the record in these particulars. There being neither an allowance of the appeal, nor a citation disclosed by the record, the fact of the existence of the one cannot be inferred from the other. There are numerous other subordinate points made which I do not find it necessary to discuss. Let the appeal be dismissed, with costs.

TAZAYMON v. TWOMBLEY.

(Circuit Court for California: 5 Sawyer, 79-83. 1878.)

Opinion by SAWYER, J.

STATEMENT OF FACTS.—This case purports to be an appeal from the United States consular court at Hiogo, in the empire of Japan. The papers having been filed in this court, counsel appears on behalf of the appellee, and moves to dismiss the appeal on the grounds: 1. That no authenticated transcript of the libel, bill, answer, depositions and other proceedings has been transmitted

to or filed in this court, as required by section 4093 of the Revised Statutes; and, consequently, that there is no authentic record upon which the court can act. 2. That the papers filed show no allowance of an appeal. 3. That the papers do not show any citation to, or any service of citation upon, the appellee.

§ 127. *Separate, loose papers, wholly unauthenticated, do not constitute a record.*

The record filed consists of a mass of separate, loose papers, no one of which is certified to be a copy of any document on file in the court below; nor is it certified to be the original. Some would seem to be original documents, but they bear no marks or indorsements showing that they were ever filed in the consular court; others may be copies, but they are not certified to be copies of any part of the papers, records or proceedings of the consular court. The papers, so far as authentication is concerned, might just as well have been brought here, and filed by any resident of Japan, without ever having been in any court whatever. There is a personal letter, separate from the other papers, from the consul, addressed to the judge of this court, stating that he has transmitted a matter of appeal to this court. It would certainly be very unsafe, even if there was no statute upon the subject, for the court to assume jurisdiction and act upon such papers or such a record. But the statute prescribes what the record transmitted shall be, and that is, "a transcript of the libel, bill, answer, depositions and all other proceedings in the case."

§ 128. *What is a proper transcript of a judicial record.*

This transcript should be a copy in chronological order of all the proceedings in the case from the beginning to the end, as a single document, and this should be certified at the end as being a full, true and correct copy of the pleadings, depositions and all other proceedings in the case; and that the same constitute the transcript on appeal to the circuit court; and it should be authenticated by the official signature and seal of the consul. The papers used in the court below should remain there as parts of the record of that court. The record should also show an allowance of the appeal; and where the appeal is not taken in open court, at the time of the rendition of the judgment or decree, and before adjournment of the court, the record should show a citation to the appellee, and due service thereof to appear in this court. See *Steamer Spark v. Lee Choi Chum*, 1 Saw., 713 (§§ 117-126, *supra*).

§ 129. *What the record should show on appeal.*

In that case upon this point it is said: "It is objected that the record shows no order allowing the appeal and no citation to the appellees. The section cited, it will be seen, provides that 'appeals shall be subject to the rules, regulations and restrictions prescribed in law for writs of error from district courts of the United States.'

"The twenty-second section of the judiciary act of 1789 provides that final decrees and judgments of the district courts in civil actions 'may be re-examined and reversed or affirmed in a circuit court . . . upon a writ of error, whereto shall be annexed and returned therewith, at the day and place therein mentioned, an authenticated transcript of the record, assignment of errors and prayer for reversal, with a citation to the adverse party, signed by the judge of such district court or a justice of the supreme court, the adverse party having at least twenty days' notice.' 1 U. S. Stats. at Large, 84. The same section has a similar provision for writs of error from the supreme to the circuit court to review the judgments and decrees of the latter. And the twenty-fifth section has provisions in similar language for reviewing the decisions of the

highest state courts in certain cases by the supreme court of the United States. The construction of these latter provisions, and consequently the construction of the similar provisions relative to writs of error from the circuit to the district courts, has been settled by the supreme court of the United States. Thus in the very late case of *Gleason v. Florida*, 9 Wall., 783, the supreme court say: 'But on looking into the record we find no allowance of the writ. And this has been repeatedly held to be essential to the exercise by this court of reviewing jurisdiction over final judgments or decrees by the courts of the states.' So, in *Hartford Fire Ins. Co. v. Van Duzer*, the writ was dismissed because no allowance of the writ appeared in the record; the chief justice, delivering the opinion of the court, said: 'That such allowance was indispensable to the jurisdiction of the court in error to review the judgment of the highest court of the state.' 9 Wall., 784, note. So, an appeal from the supreme court of the District of Columbia was dismissed by the supreme court of the United States, because there was 'no evidence in the record of any allowance of appeal, and without an allowance this court cannot acquire jurisdiction.' *Pierce v. Cox*, 9 Wall., 787. See, also, *Edmonson v. Bloomshire*, 7 Wall., 312. This settles the construction of the act of congress relating to writs of error and appeals from the United States district courts, and as the same rules and regulations are made applicable to appeals from the consular courts of China and Japan, it settles the point in this case. The record shows no allowance of an appeal and no citation, the latter being necessary, also, if the order allowing an appeal is not made in open court. This is implied at least from the case of *Pierce v. Cox*, *supra*, if a citation is not waived by appearance of the appellee. And it is expressly required by the provisions of the statute quoted.

"It is claimed, also, that this appeal, if taken at all, must have been taken out of court, as the petition for an appeal bears date several days after the date of the judgment; and it is claimed that there are no terms in the consular court, under the statute, and that as soon as judgment is entered, and the court for that occasion has adjourned, it is no longer an open court with reference to that case, and all subsequent allowances of appeals must necessarily be made out of court with respect to that case. Numerous authorities are cited to the point, but it is unnecessary now to determine it, upon the view taken upon other objections. It will be the safer practice to issue and serve a citation."

I regret the necessity of dismissing the appeal in a case brought so far, but there is no record here upon which the court can take jurisdiction. Appeal dismissed, with costs.

§ 130. Consular courts in China and Japan.—Commissioners and consuls of the United States in China are invested with judicial authority over their fellow-citizens. Consuls have original jurisdiction in all cases of contract or the like, sounding in damages, arising between citizens of the United States, and of crimes committed by Americans. Commissioners have jurisdiction of appeals from consuls in civil and criminal cases. In controversies between citizens of the United States and China, the cause is triable by the courts of the nation of which the defendant is a subject, and so of controversies between citizens of the United States and a friendly power. The consular courts have no jurisdiction of a suit by the Chinese government for duties. In cases other than civil cases of contract or the like, sounding in damages, and criminal matters, the subject is left to be regulated by the commissioners and consuls. *United States Judicial Authority in China*,* 7 Op. Att'y Gen'l, 495. See §§ 1, 54-59.

§ 131. In actions in the consular courts in Japan, between citizens of the United States, the law of set-off applies. *Jurisdiction of Consular Courts in Japan*,* 11 Op. Att'y Gen'l, 474.

§ 132. In cases in the consular courts of China and Japan, where the matter in dispute exceeds \$500, and does not exceed \$2,500, an appeal lies to the minister; if less than \$500 be

in dispute, the decision of consular courts is final; if over \$2,500, exclusive of costs, the appeal lies to the circuit court for the district of California. *The Ping-on v. Blethen*, 11 Fed. R., 607.

§ 183. In an action by a Dutch citizen against a citizen of the United States in the United States consular courts in Japan, the court cannot entertain a plea of set-off to the extent of giving judgment against the plaintiff for the excess of the set-off beyond the plaintiff's cause of action. *Jurisdiction of Consular Courts in Japan*,* 11 Op. Att'y Gen'l, 474.

§ 184. Consular court at Honolulu.—Consular courts of the United States at Honolulu have the exclusive right to determine, as between citizens of the United States, who compose the crew of an American vessel. *Judicial Powers of United States Consuls in Sandwich Islands*,* 11 Op. Att'y Gen'l, 508.

§ 185. Sentence, extraterritorial.—Sentence of a criminal by consular court cannot, without legislative authority, be executed by imprisonment beyond the territorial jurisdiction of the court which pronounced it. *Imprisonment of Convicts of Consular Courts*,* 14 Op. Att'y Gen'l, 522.

§ 186. Foreign courts in the United States.—No foreign power can, of right, institute a court of judicature of any kind within the jurisdiction of the United States, except by virtue of treaty stipulations, and it was held that the admiralty jurisdiction theretofore exercised by French consuls in the United States was not so warranted. *Glass v. The Sloop Betsey*, 8 Dal., 6.

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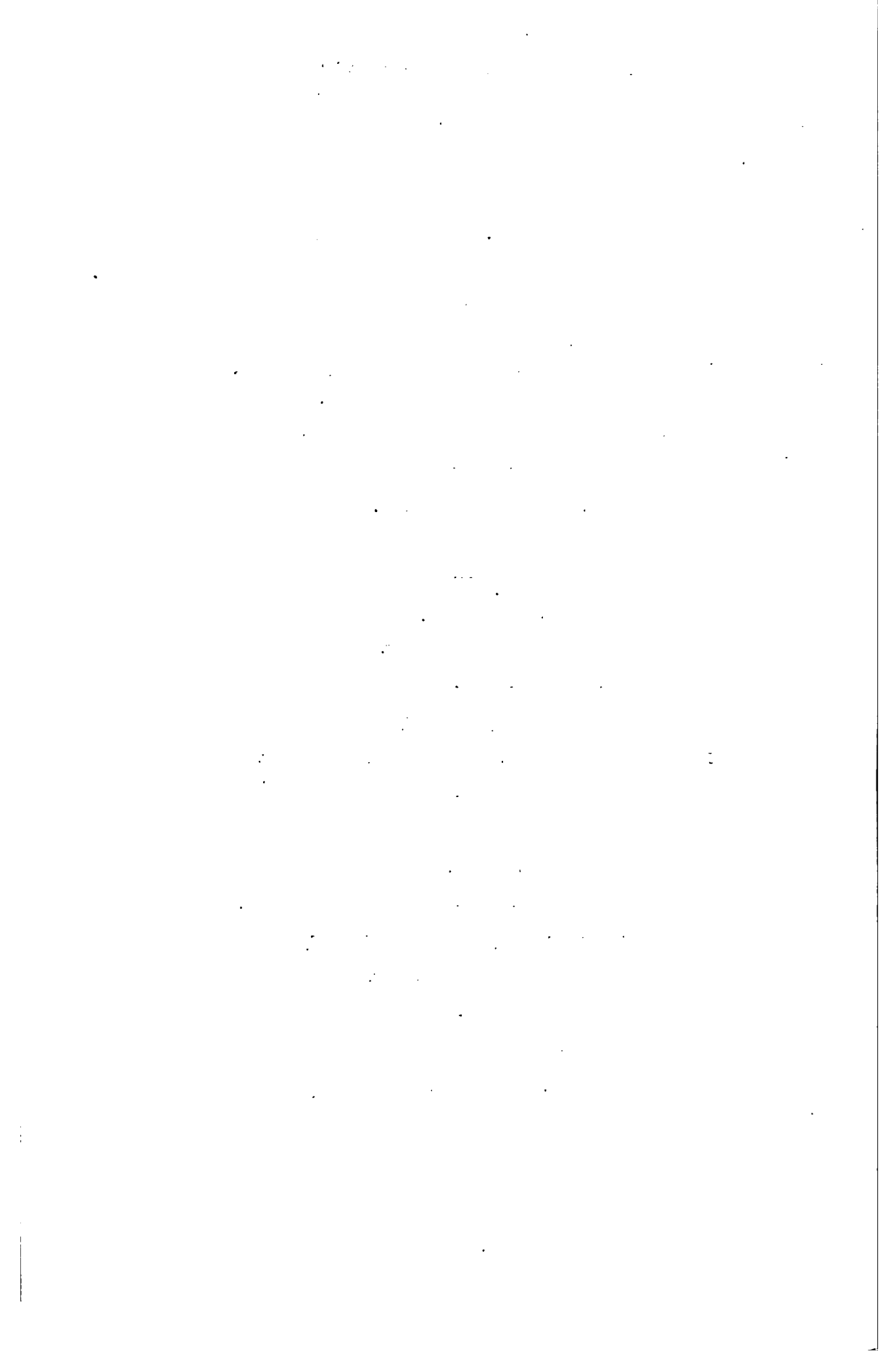


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 what laws congress may pass for. Const., § 181.
 does not place them in federal service. Const., § 183.
 actual service the test of national militia. Const., § 166.
 act of 1793 construed; applies to those "called forth" as well as in service. Const., § 184.
 is valid. Const., § 240.
- f. *War power of congress.*
 extends to domestic or civil war. Const., § 230.
 general or partial hostilities may be authorized. Const., § 231.
 ratification of president's unauthorized acts as to army and navy, valid. Const., § 232.
 confiscation act valid under war power. Const., § 236.
 suspension of statute of limitations in civil and criminal cases, applicable to federal and state courts, when service interrupted by the war, valid. Const., § 238.
 may authorize secretary of treasury to execute act regulating taking of goods into states in insurrection. Const., § 239.
 it seems that territory may be acquired by conquest or treaty. Const., § 248.
 act exempting persons engaged in putting down rebellion from liability therein, valid. Const., § 256.
 congress may create a bank, as incidental to the power of taxation, borrowing money, the war power, and the power to carry on the fiscal operations of the government. Const., §§ 365, 384-90.
 the fifth and sixth amendments do not restrict or apply to. Const., § 510.
- g. *Weights and measures.*
 making treasury notes legal tender does not violate this provision, not making them a standard of value. Const., § 235.
- h. *Money.* See *post*, a.
 treasury notes may be made legal tender, under peculiar condition of affairs. Const., §§ 233-35.
 it seems the power of congress is limited to coining and stamping money, and punishing its counterfeiting, and that it cannot punish the *passing* of counterfeit coin. Const., § 496.
 but held otherwise. Const., §§ 501-503.
 the constitution provides for a uniform standard of value throughout the country. Const., § 1951.
 as to analogy of bankrupt or insolvent and legal tender laws, see Const., §§ 1964, 1965, 1972, 1980, 1983.
- i. *Territorial government.*
 power of congress relates only to existing territory, and not to district ceded by foreign country; the "Missouri Compromise" act was therefore void. Const., § 241.

CONSTITUTION OF THE UNITED STATES, GENERAL LEGISLATIVE POWERS OF CONGRESS — *Continued.*

j. *Appointment of inferior officers.*

appointment of clerks may be vested in courts. Const., § 248.
deputy marshals and supervisors, for congressional elections, in federal courts. Const., §§ 244, 342.

k. *Making laws.*

resolution of one house coercing action of department, is void; so of joint resolution. Const., § 246.
joint, differs from act only in form. Const., § 247.

l. *Disposal of public property.*

sole power of, is in congress; may be leased or sold. Const., §§ 250-51.
purpose immaterial. Const., § 252.
as to public lands within state, how far congress is sovereign. Const., § 258.
congress cannot grant bed of navigable waters below high-water mark. Const., § 307.

m. *Patents and copyrights.*

the power is plenary and unrestrained. Const., § 259.
patent extended; retrospective act protecting patent in use is valid; state law making patent right conditional is void. Const., §§ 258, 260, 261.
state act making notes given for non-negotiable, is void. Const., § 262.
act of congress punishing the counterfeiting, or providing for registration and use of trade-marks, is void. Const., § 263.

n. *Police power.* See *Police Power; Regulation of Commerce*, 1, c.

congressional regulation of tests of inflammable oils is an exercise of, and void, except in places within its jurisdiction. Const., § 266.

o. *Congressional elections.*

statutes of 1870 and 1871, as to appointment of supervisors and marshals. Const., § 329.
are constitutional. Const., §§ 334-45, 349.
appointment of supervisors and deputy marshals may be lawfully vested in federal courts. Const., §§ 244, 322, 342.
this is not invalid as a non-judicial function. Const., § 360.
congress need not assume control of the whole subject, but may make any regulations it chooses. Const., §§ 823, 830.
nor need they be exclusive of state regulations. Const., § 331.
state and national regulations may be concurrent, the latter being paramount, if inconsistent. Const., § 333.
persons obstructing appointees, under acts of congress, may be punished. Const., § 334.
congress may enforce state laws as to. Const., §§ 335-36.
state officers may sustain a double liability — to the state and federal governments. Const., §§ 337-38.
acts of state officers with reference solely to local elections, not amenable to federal jurisdiction. Const., § 339, p. 112.
government officers may keep the peace at elections. Const., § 340.
congress may provide for punishment of voters at, who violate state registration laws. *U. S. v. Quinn*, 8 Blatch., 48. Const., vol. 6, p. 116; §§ 354-55.
general discussion of congressional power over, by Field, J., in a dissenting opinion in *Ex parte Clarke*. Const., §§ 344-48.
what necessary to holding of; regulation of. Const., §§ 351, 352.
deputy marshal may arrest for intoxication and boisterous conduct, or for distributing fraudulent tickets. Const., §§ 325, 353.
reason of constitutional provision is the preservation of the government. Const., § 352.
voters at may be protected. Const., §§ 356-58.
section 3520, to prevent conspiracies to intimidate voters at, is valid. Const., § 359.
not necessary under civil rights act that voter be actually prevented from voting; interference with right sufficient. Const., § 362.
civil rights act construed. Const., § 363.
under section 2, what is a refusal or omission to furnish opportunity for registration, etc. Const., § 364.

p. *Power to tax.* See *Taxation*.

the power of taxation is concurrent in the states and the Union. Const., §§ 392, 393.

q. *Postoffices and post-roads.*

includes power to carry mails, punish crimes against mail service, etc. Const., § 338.
act of 1866 as to telegraphs not confined to; what are post-roads. Const., §§ 1041, 1046.
powers of congress; condemnation for post-roads. Const., §§ 1047-48.
bill for establishing postal routes not one for raising revenue. Const., § 3684.

CONSTITUTION OF THE UNITED STATES, GENERAL LEGISLATIVE POWERS OF CONGRESS — *Continued.*

- r. *Power to borrow money.*
stock issued for government loans not taxable. Const., §§ 387, 400.
the states cannot, directly or indirectly, retard or burden this power, by taxing a government bank, or bank capital partly composed of government bonds. Const., §§ 388-89, 399-416. See *Taxation*.
or tax bank capital, which is invested in United States stock. Const., § 416.
banking law of 1838 considered. Const., § 414.
 - s. *Bills of credit.* As to issue by states, see *post*, 5, e.
congress may supply a currency for the whole country. Const., § 428.
and may regulate and restrain all other. Const., §§ 871, 429.
 - t. *Internal revenue, duties and imposts.* See *Regulation of Commerce*, 7.
bill for establishing postage rates not one for raising revenue. Const., § 2684.
 - u. *Political assessments.*
act forbidding contributions by certain officers and employees to each other, is valid, as promoting efficiency in the public service; many like acts referred to. Const., §§ 471, 472.
 - v. *Naturalization.*
state tax on immigrants, except to exclude paupers, etc., is void. Const., § 1811.
passage of laws as to admission of aliens belongs exclusively to congress. Const., § 1844.
4. RESTRICTIONS ON THE GOVERNMENT. See *Bills of Attainder; Ex Post Facto Laws; Privileges and Immunities of Citizens.*
- a. *In general.*
the first eleven amendments are, and not on the states. Const., §§ 64, 67; 208, p. 86; 497.
 - b. *Immigration.* See *Immigration; Regulation of Commerce*.
of the Chinese, see *post*, 18.
 - c. *Suspension of writ of habeas corpus.* See *Habeas Corpus*.
not to be suspended unless required by the public safety in cases of rebellion or invasion; but in such cases congress is sole judge of the necessity. Const., § 287.
 - d. *Grand jury.*
no crime is "infamous" unless so declared by congress. Const., § 507.
all offenses not capital or infamous are prosecuted by indictment or information, as before. Const., § 508.
the object of the fourth and fifth amendments was to secure the same mode of trial as that practiced in the states; they do not restrict or apply to the war power. Const., §§ 509-10.
 - e. *Speedy trial.*
this provision applies only to offenses committed within a state. Otherwise congress may designate the place of trial. Const., § 511.
the district must have been ascertained before crime committed. Const., § 512.
treason committed in Georgia, during the civil war, could not be punished in Pennsylvania; but latter state might exact security for good behavior and to keep the peace. Const., § 513.
 - f. *Right of assembly.*
existed long before the constitution and was not given or guaranteed thereby. Const., §§ 862, 900.
this provision not intended to limit power of states as to their own citizens. Const., § 901.
operates on the government alone. *Id.*
federal power extends only to punishing prevention of right of assembly to petition congress for redress of grievances. Const., § 902.
congress cannot punish for conspiracy falsely to imprison, murder, or intimidate within a state, or deprive persons of this right. Const., §§ 862, 904.
nor punish the disturbance of public assemblies under this provision. Const., § 108.
 - g. *Bearing arms.*
not a right granted by the constitution, but simply a restriction on the government. Const., § 903.
congress cannot punish conspiracy to deprive persons of this right. Const., §§ 862, 904.
nor punish the disturbance of public assemblies under this provision. Const., § 108.
 - h. *Criminal prosecutions; criminal accusations, etc.*
accused entitled to be informed of nature and cause of the accusation under sixth amendment. Const., § 911.
indictment must set forth offense with clearness; general terms not enough; it must state particulars. *Id.*; § 950.
means used or proposed must be stated. *Id.*; § 950.

CONSTITUTION OF THE UNITED STATES, RESTRICTIONS ON THE GOVERNMENT, *Criminal prosecutions; criminal accusations, etc.—Continued.*

what deemed a criminal prosecution within this provision. Const., §§ 2582-83, 2585.

a law authorizing a conviction for a higher offense than that mentioned in the complaint is void. Const., § 2584.

charge must contain enough to show the appropriate punishment. Const., § 2586. the compulsory examination of books, etc., of revenue officers, upheld. Const., §§ 82, 514.

i. *Taxes on exports.* See *Regulation of Commerce.*

an act requiring exported tobacco to be stamped, merely to distinguish it, and prevent its taxation, is valid. Const., § 1581.

j. *Excessive fines, and cruel punishments.*

second sentence, after payment of fine, held illegal. Const., § 109.

capital punishment by shooting for homicide, legal. Const., § 87.

5. RESTRICTIONS ON THE STATES. See *Bills of Attainder; Due Process of Law; Ex Post Facto Laws; Equal Protection of the Laws.*

a, b. *In general;* federal constitution does not prevent state exercise of judicial functions, or impairing vested rights. Const., § 78.

constitutional prohibition to impair rights implies power to support them. Const., § 275.

the first eleven amendments are not, but are restrictions on the government. Const., §§ 64, 67; 208, p. 86; 497.

how restrained. Const., § 2255.

c. *Conferring powers on general government.* See *post.*

are not exclusive of similar state powers, unless expressly so made. Const., § 176. or unless the grant is unqualified, and state power would conflict. Const., § 299.

state laws must yield in cases of concurrent authority. Const., § 177.

d. *Restrictions operating only after congressional action.* See *supra.*

after congressional legislation on authorized subject, states cannot make independent laws thereon. Const., §§ 161-175, 301.

but they may enforce such legislation. *Id.* See §§ 181-190.

this applies to the militia; the jurisdiction of federal and state courts martial may be concurrent. Const., §§ 172-75.

when states and congress have concurrent powers, states can act only when congress has not acted. Const., §§ 168, 297, 300. *Contra*, 3 Wash., 313. *Id.*

held that states cannot pass bankrupt laws even if congress does not. Const., § 818.

see as to state power to regulate commerce, in case of the non-action of congress, *Regulation of Commerce*, 1, c.

authorities cited and reviewed as to what subjects the states may act on, in case of congressional non-action. Const., §§ 1485, 1498.

e. *Bills of credit.*

issues of state banks are not. Const., §§ 481, 483.

the term comprehends the issue of any paper medium for the purpose of common circulation. Const., §§ 516, 525.

its meaning historically considered. Const., §§ 525, 534, 539, 547, 549-50.

Missouri loan-certificates, bearing interest, receivable for taxes and state or municipal debts, and fees of officers, in denominations from ten dollars to fifty cents, are. Const., §§ 517, 526, 563.

need not be legal tender, to be prohibited. Const., §§ 527, 534, 552.

laws authorizing, as well as the bills themselves, are void. Const., § 582.

the states may borrow money. Const., §§ 533, 536; and establish banks. Const., § 542.

paper money meant by. Const., § 584.

simple promises to pay, bonds, or other securities, are not. Const., §§ 537, 559.

defined, in their commercial sense. Const., §§ 539, 548.

must be issued by the state, on its own faith, and designed to circulate as money. Const., §§ 543. See §§ 548-49.

notes issued by a bank, in which the state is the sole stockholder, whose capital is not wholly derived from the state, are not. Const., §§ 518-20, 544, 546.

were issued by the colony of Maryland, in 1769, through commissioners. Const., § 544.

issued by the colonies, considered. Const., § 550.

by federal congress, considered. Const., § 551.

express promise to pay on demand or on a future day, not necessary to make. Const., § 553.

issue of, by individuals, banks or corporations, not prohibited. Const., § 558.

Confederate treasury notes are not, but void as in aid of rebellion. Const., § 560.

notes of the State Bank of Alabama, held not, though credit of the state pledged therefor. Const., § 562.

bills of Bank of Arkansas are not, though receivable for state debts, and the state is its sole shareholder. Const., § 561.

CONSTITUTION OF THE UNITED STATES, RESTRICTIONS ON THE STATES—*Continued.*

- f. *Coining money.*
a state cannot coin money, nor establish a corporation and authorize it to do so. Const., § 542.
 - g. "Or make anything but gold," etc., a tender.
state law making bank notes legal tender, is void, but will not affect the bank itself. Const., § 541.
 - h. *Slavery or involuntary servitude.*
exercise of police power of state by regulating slaughter-houses does not infringe this provision. Const., § 759.
this provision was adopted solely for the benefit of the colored race. Const., §§ 760, 1590.
but slavery cannot exist among any race. Const., § 765.
history of thirteenth amendment. Const., §§ 761, 957, 1588.
terms defined. Const., § 779.
this provision does not warrant § 5519, R. S., punishing conspiracies to deprive persons of equal protection of the laws. Const., § 917.
the thirteenth amendment will be so construed as to suppress the whole mischief. Const., § 1587.
does not annul the act of 1803, prohibiting the importation of colored persons. Const., § 1589.
nor does the civil rights bill of 1866. *Id.*
a contract of warranty of a slave was not broken by. Const., § 1591.
contracts relating to slaves not impaired by. Const., §§ 1592-93. See § 1594.
laws of apprenticeship of Maryland, discriminating against colored apprentices, void. Const., §§ 1599, 1660.
the slave trade. Const., § 1640.
 - i. *Suffrage.* See *Suffrage.*
origin of fifteenth amendment. Const., § 763.
the fifteenth amendment abrogated constitutional provisions of Delaware, confining juries and voters to white persons. Const., §§ 968-69.
6. EXECUTIVE POWER.
- a. *In general.*
unauthorized acts of president may be ratified by congress. Const., § 232.
power and duty of the president in calling out and governing the militia. Const., § 164.
the recognition of a state government by, and by congress, binds the judiciary. Const., § 1553.
as to approving laws, see *Statutes*, 3.
 - b. *The president as commander of the army.*
could institute temporary governments in rebellious states. Const., § 151.
 - c. *The pardoning power.*
the power of the president to pardon is unlimited; a pardon releases the punishment and effaces the guilt. Const., §§ 624-25.
but a pardon does not restore offices forfeited or property divested by the conviction and judgment. Const., § 626.
the rules of the common law apply to. Const., § 8108.
 - d. *Independence of various departments.*
affirmed; but *mandamus* to postmaster-general lies to enforce ministerial duty. Const., § 6.
president may be vested with discretionary power to call out militia. Const., § 96.
 - e. *Republican form of state governments.*
this is a political, not a judicial, question; congress has sole power to decide it. Const., § 94.
this provision does not secure right of suffrage to women. Const., § 95.
 - f. *Encroachments on power of congress.*
accounting officers cannot add condition to statute. Const., § 8.
no officer can grant public property. Const., § 4.
 - g. *Encroachments on executive power.*
act of July 12, 1870, as to claims of pardoned persons, void. Const., § 8.
on judicial power, see *post*, 7.
7. JUDICIAL POWER. See *Jurisdiction; Removal of Causes; Territorial Courts.*
- a. *In general.*
a rebellious state could not sue before reconstruction. Const., §§ 141, 147.
as to constitutional law respecting the removal of cases, see *Removal of Causes.*
jurisdiction not exclusive unless expressly so made. Const., § 170.
circuit and district courts have no jurisdiction over military offenses. Const., § 173.
supreme court cannot declare law in conflict with state statute. Const., §§ 207a, 697.
federal constitution does not prohibit state legislature from exercising. Const., §§ 302, 1634.

CONSTITUTION OF THE UNITED STATES, JUDICIAL POWER, *In General — Continued.*

- congress may empower federal courts to appoint deputy marshals and supervisors of elections. Const., § 342.
- but can give them, in general, no power not judicial, as examining pension claims, or claims of war sufferers. *Id.*
- supreme court cannot relieve against state taxation not trenching on federal authority. Const., §§ 435, 697.
- nor declare a law void, conflicting with state constitution. Const., §§ 552, 591, 697, 897, 1845, 2118.
- nor correct error of state courts. Const., §§ 697; 700, p. 320.
- nor revise state laws as to justice, policy, etc. Const., § 2584.
- state courts may exercise so far as federal power is concerned. Const., §§ 603-607.
- generally implies parties, pleadings, judge, contest and regular trial. Const., § 680.
- auditing accounts of receiver of public money, and collecting same by distress warrant, not an exercise of. Const., § 681.
- that action of auditor may be reviewed does not make his action judicial. Const., § 684.
- does not extend to all cases of redress, such as recaption of goods, abatement of nuisance, etc. Const., § 685.
- state legislation cannot enlarge nor limit. Const., § 2506.
- does not extend to crimes against the state alone. Const., § 940.
- over crimes committed within a state. Const., § 975.
- the recognition by congress and the president of a state government is conclusive. Const., § 1553.
- object of the provision for federal courts in a state. Const., § 1995.
- none of crimes against state authority. Const., § 2492.
- question of the proof of laws a judicial one. Const., § 2688.
- congress may empower the courts to alter forms of process. Const., § 2436.
- or to adopt state laws. Const., § 2437.
- does not extend to seizure of American vessel in a foreign port. Const., § 2448.
- nor to breaches of treaties, nor to questions arising as to their voluntary validity. Const., §§ 2444-45.
- it is otherwise as to their *necessary* validity. *Id.*
- cannot be conferred on state courts. Const., § 2447.
- but it may be optional with them to exercise it. Const., § 2448.
- does not extend to suits between citizens of same state. Const., § 2450.
- extends to civil and criminal cases. Const., § 2475.
- cases arising under the laws of the United States are such as grow out of the legislation of congress, directly or indirectly. Const., § 2476.
- murder, justified as in self-defense when carrying out official duty. Const., § 2469.
- power of congress over the courts*; extends to organization and division of power among them. Const., § 2409.
- may establish inferior courts. Const., § 2410.
- the act prohibiting actions by assignee of chose in action, not maintainable by assignor, is valid. Const., § 2411.
- may limit admiralty jurisdiction of supreme court to questions of record. Const., § 2412.
- its expression of opinion is not binding. Const., § 2413.
- act conferring on judges the power to hear and decide pension claims, is invalid. Const., 2414.
- so of an act imposing on circuit courts duties not judicial. Const., § 2415.
- may submit a case to the court of claims and limit the recovery thereon. Const., § 2416.
- may pass limitation laws. Const., § 2418.
- cannot change its sphere, but may or may not bring many matters within its cognizance. Const., § 686.
- b. *Encroachments on judicial power***; by act giving secretary of war exclusive power to discharge minor from service. Const., § 5.
- treasury agents not judges. Const., § 7.
- act of July 12, 1870, as to claims of pardoned persons, void. Const., § 8.
- congress may submit a case to the court of claims and limit the recovery thereon. Const., § 2416.
- the executive must necessarily construe the law he carries into effect, and his construction is followed by the courts. Const., § 2424.
- but the courts will relieve a wrong thereby done an individual. Const., § 2425.
- in matters of discretion his action is final. Const., § 2426.
- power as to voidable treaty. Const., § 2427.
- congress may construe statutes as to the future, when. Const., §§ 2428-29.
- private rights must not be invaded. Const., § 2430.
- may provide for the execution of judgments. Const., §§ 2431-32.
- appeal from land commissioners held valid. Const., § 2433.
- claims of Spaniards growing out of the cession of Florida were properly referred to certain judges. Const., § 2434.
- an accounting officer may be required to state an account, with his opinion thereon. Const., § 2435.

CONSTITUTION OF THE UNITED STATES, JUDICIAL POWER—*Continued.*c. *Federal questions.* See *Jurisdiction.*

whether state law or constitution conflicts with federal constitution or law is a Const., § 294.

"final judgment or decree" includes a judgment of the highest court of a state upon a writ of prohibition. Const., § 399.

it is only necessary that the record should clearly involve a federal question, and need not state it in express terms. Const., §§ 523, 531, 1174, 1854-56.

arise when state court so construes a state statute that it conflicts with the federal constitution. Const., §§ 1149, 1854, 2308.

and when a state court passes on an exemption under the federal constitution. Const., § 1265.

or when constitutionality of state law in question. Const., § 1630.

when right under federal constitution is denied by state court. Const., § 1813.

not necessary that state court be in error. Const., § 1814.

do not arise when state court dismisses for want of jurisdiction. Const., § 1897.

constitutional provision need not be pleaded in the state court. Const., § 2087.

when jurisdiction arises. Const., § 2325.

how state judgments re-examined. Const., § 2494.

the validity of a statute; question as to note, the consideration of which is a state loan certificate, affects. Const., vol. 6, p. 216; § 531.

in favor of its validity; decision in favor of one claiming under state law is. Const., §§ 524, 2093.

dismissal of the bill sufficient, either when validity of act, or its construction, is in question. Const., §§ 2088-89.

8. TREASON.

the third section of the fourteenth amendment, imposing official disability for, not self-executing. Const., § 1555.

its prohibitions are general; it did not vacate offices *ipso facto*; judicial acts of guilty person were valid until congressional action. Const., §§ 1548, 1557-58, 1566.

effect of a literal construction; purpose of. Const., §§ 1559-60.

its object was mainly punishment; whether it remitted all other penalties, *quære*. Const., § 1562.

and to exclude officers by appropriate legislation. Const., § 1564.

is construed with the fifth section. Const., § 1565.

by a citizen of a loyal state extending aid to rebellion. Const., § 139.

committed in Georgia during the civil war, is not punishable in any other state. Const., § 518.

9. RELATIONS OF THE STATES TO THE UNION. See *supra*, 2.

for rules as to states in their private or *quasi* public character, see *States*.

a. *In general.*

the states are sovereign to a certain extent, limited by the federal constitution; they and the government are distinct sovereignties within their respective spheres. Const., § 136, p. 32; §§ 343, 385, 1163, 1168.

sovereignty defined. Const., § 3147.

each is an independent sovereignty, within its own field. Const., §§ 238, 384, 385, 418.

state judicial process cannot reach sphere of the government. *Id.*

are sovereign as to all powers not surrendered. Const., § 292.

a qualified allegiance is due by their citizens. Const., § 137.

are supreme as to powers reserved, or delegated to them. Const., § 138.

as to private rights, obligations, *status*, property, transfers, etc., etc. Const., §§ 309, 310.

laying highway through public lands. Const., § 311.

may suppress insurrections, and for that purpose declare martial law. Const., § 319.

both state and nation may be sovereign in that both may punish the same offense. Const., §§ 334-39.

sovereignty stops with their boundaries; and does not extend over means and agencies employed by congress to execute its powers. Const., §§ 395, 401.

it extends to everything existing by its authority or introduced by its permission. Const., § 401.

power of taxation limited to persons, property and business within its limits; bonds of resident corporation held by non-resident not taxable. Const., §§ 438, 440.

over their own tide waters within their jurisdiction, and the fish in them. Const., § 821.

over the regulation of the admission of persons to professions, etc. Const., §§ 745, 818.

the possible abuse of state power is no proof that it does not exist. Const., § 1169.

cannot pass acts tending to impede the processes of the government. Const., §§ 880-98, 1270-72.

CONSTITUTION OF THE UNITED STATES, RELATIONS OF THE STATES TO THE UNION, *In General—Continued.*

the states; may use all appropriate means to an end within their power. Const., § 1277.

their general powers and duties. Const., § 1278.

state laws conflicting with federal do not always yield. Const., § 1286.

withdrawing criminal cases involving federal questions from state courts does not invade state sovereignty. Const., § 2478.

the incorporation of a company to improve river navigation not incompatible with state sovereignty. Const., § 3146.

nor is the withdrawal of certain objects from taxation. Const., § 3148.

general reserved power of the states, see *Eminent Domain; Ferries; Navigable Waters; supra*, 5, c; *Regulation of Commerce*, 1, c.

may charter banks of issue. Const., § 430.

retained all powers of legislation not delegated to the United States. Const., §§ 582, 608, 1350.

may determine qualifications for office within its territory. Const., § 608.

the union of the states; its perpetuity and indissolubility. Const., §§ 144-45.
the ordinances of secession were void, and the states remained in the Union. Const., § 146.

general prerogative powers as *parens patriæ* belong to the states. Const., § 291.
when the nature of the provision requires the control of one will, congress is supreme. Const., § 298.

their sovereignty was not affected by secession; but their right to sue in the federal courts, and relations with the government, were suspended. Const., §§ 146, 147.
definition of word state, as used in the constitution. Const., § 142.

the president, during the war, could institute temporary governments in rebellious states. Const., § 151.

criminal jurisdiction cannot be delegated to state courts. Const., § 187.

people of, may surrender any of its sovereign character. Const., §§ 131, 200.

congress cannot impose a duty on state officers. Const., § 257.

its sovereignty over public lands in states. Const., § 253.

a state cannot tax a government bank. Const., § 393.

states as holders of government bonds, see *Bonds; States*.

Ohio could not impose toll on passengers in mail coaches, as in conflict with compact ceding territory. Const., § 255.

are not foreign to each other. Const., § 278.

jurisdiction over public quay in Louisiana, dedicated before the cession to the United States, is in the state. Const., § 239.

where a power in the states would tend to destroy or defeat the powers or supremacy of the government, it cannot exist. Const., § 393.

reconstruction; power of, derived from guaranty of republican form of government. Const., § 148.

relative powers of state and nation. Const., § 1166.

states cannot exclude representatives of foreign powers. Const., § 1822.

there must be an actual collision between a state law and a power vested in congress to make it void. Const., §§ 1503, 1506.

instances of concurrent state and national authority. Const., § 332.

states may regulate elections so far as congress does not do so. Const., §§ 333-34.

the same act may be an offense against both sovereignties. Const., § 338.

argument against such concurrent authority, based on expediency. Const., § 339.

the states have power to punish passing of counterfeit coin. Const., § 496.

held that congress may do so. Const., §§ 501-503.

state court cannot review decisions of federal district courts. Const., § 506.

they may borrow money, but not issue bills of credit. Const., § 533.

they cannot do indirectly what they are directly prohibited from doing. Const., § 554.

b. Admission and rights of new states.

acts of admission cannot impair their special sovereignty. Const., §§ 132, 209.

Mississippi might improve the Mississippi river, though declared free by act of admission. Const., § 209.

unusual restrictions on municipal power of, by congress, are void. Const., § 267.

are governed by the common law as modified by our own institutions. Const., § 268.

rights of Alabama as successor to Georgia. Const., § 269.

have jurisdiction over former military or naval reservation. Const., § 270.

old system of laws of Texas abrogated on admission, so far as conflicting with laws of United States. Const., § 271.

old limitation laws on judgments, not annulled. Const., § 272.

effect of admission of Florida on judicial system. Const., § 273.

act admitting new state (West Virginia) a ratification of compact between her and Virginia, as to division. Const., § 274.

so as to Virginia and Kentucky compact. Const., §§ 180, 199.

effect of act submitting instructions to Louisiana for a constitution. Const., § 476.

what is meant by admitting a state on equal footing. Const., § 3149.

CONSTITUTION OF THE UNITED STATES, RELATIONS OF THE STATES TO THE UNION — Continued.

- c. *Republican form of government.*
guaranty of, is the foundation for the reconstruction of the seceding states. Const., §§ 123, 148.
discretion as to choice of means is implied. Const., § 150.
this power is legislative, and resides in congress. Const., §§ 123, 152.
guaranty of, does not secure suffrage to women. Const., §§ 95, 813.
- d. *Protecting states from domestic violence.*
congress must determine proper means for; vesting discretion in president to call out militia makes him the sole judge of the necessity. Const., § 96.
10. RELATION OF THE STATES TO EACH OTHER. See *Judicial Power; Jurisdiction.*
 - a. *In general.*
the fundamental condition of the confederation was that there should be equality of right between new and old states. Const., § 287.
for national purposes they are one; but in other respects are foreign to each other. Const., §§ 280, 285.
no state can place restrictions between the states. Const., § 281.
are of equal dignity and authority; the laws of each are confined to its own territory. Const., §§ 283-84.
 - b. *Compacts between states prohibited.*
Virginia and Kentucky compact, see *Constitutional Law*, 4.
a compact between states, with implied consent of congress, is valid. Const., §§ 130, 199.
so as to compact of division between Virginia and West Virginia. Const., § 274.
effect of admission by a state in such a compact, that certain lands are not within it. Const., § 282.
if individual injured by compact made with consent of congress, he must look to the state for his remedy. Const., § 320.
assented to by congress, do not restrict its power to regulate commerce. Const., § 1209.
11. RELATIONS OF THE STATES TO CITIZENS OF OTHER STATES. See *Jurisdiction.*
 - a. *In general.*
right to sue in federal courts suspended during rebellion of 1861. Const., § 147.
restored by reconstruction. Const., § 153.
 - b. *Suits against states; prohibited; suit against governor, to restrain grant under void law, permitted.* Const., § 116.
so of like suit to restrain state officers. Const., § 117.
case of *Chisholm v. Georgia*, 2 Dal., 419, led to the adoption of the amendment. Const., § 544.
the amendment operated on pending actions. Const., § 2406.
only possible in cases of boundary, under the Articles of Confederation. *Id.*
suit against bank in which state sole shareholder, may be brought. Const., § 545.
the prohibition applies only where the state is a party to the record. Const., § 2064.
state officers may be sued when the state interested. Const., § 2374.
they are the real parties in interest. Const., § 2381.
do not lie for proceeds of slave seized by a state. Const., § 2405.
state officers cannot, by injunction, be compelled to carry out a state contract; this is, in effect, a suit against the state. Const., § 2407.
state may be a *plaintiff*, when. Const., § 2403.
 - c. *Extradition.*
act of congress declaring duty of governors can be only declaratory and not obligatory. Const., §§ 257, 954.
the clause applies to all forbidden or punishable acts; the right to "demand" the fugitive is absolute. Const., § 286.
duty of state executive. Const., § 287.
mandamus from federal courts will not lie, to governor. Const., § 954.
12. RELATIONS BETWEEN CITIZENS OF DIFFERENT STATES. See *Privileges and Immunities of Citizens.*
13. "FULL FAITH AND CREDIT."
judgment conclusive everywhere, except as to jurisdiction and notice to defendant. Const., § 88.
act prohibiting action on foreign judgment, if original cause of action barred, void. Const., § 90.
plea bad in court of state where rendered, bad in federal court. Const., § 91.
this provision does not apply to foreign judgments as precedents. Const., § 93.
this provision is not applicable to marriage. Const., § 895.
public acts, records, etc.; fraudulent marriage not recognized in other states. Const., § 89.
doubtful whether a marriage certificate is within this provision. Const., § 895.
limitation acts as to foreign judgments, valid. Const., § 93.
immaterial that this may give no time to sue in particular case. *Id.*

CONSTITUTION OF THE UNITED STATES — *Continued.*

14. AMENDMENTS.

first ten are restrictions on federal government. Const., § 64.
 and not on the states. Const., §§ 67, 2502.
 are not limited or controlled by prior laws or constitutions. Const., § 65.
 rules for construing. Const., § 1561.
 construction of by congressional action. Const., § 66.
 first ten designed as limitations on federal power. Const., § 203, p. 86.
 history of thirteenth, fourteenth and fifteenth. Const., §§ 761-64.
 of the fifteenth. Const., § 1583.
 purpose of recent, not to destroy or change the main features of the general system of state and national government. Const., § 775.
 history and object of. Const., §§ 798, 956-57.
 the third section of the fourteenth, as to the disability of disloyal persons to hold office, is not self-executing. Const., § 1555.
 it is presumed that they tend to improve, and not weaken, the general spirit of the constitution. Const., § 1583.
 meaning of the word "state" in the. Const., § 1585.

15. "SUPREME LAW OF THE LAND."

constitutional laws bind all the people. Const., § 53.
 treaties are: conflicting state law void. Const., §§ 113, 228.
 but law violating, not therefore unconstitutional. Const., § 54.
 power to repeal charters not to be means of violating treaty or constitution: Const., § 114.
 state law that maritime lien should be ineffectual within the state, void. Const., § 218.
 city ordinance conflicting with act of congress is void. Const., § 254.
 a congressional appropriation to a person is not to be questioned or reduced. Const., § 264.
 conflict between state and federal law must be direct and positive to avoid former. Const., § 295.
 a state can have no power tending to defeat purposes for which the government was founded. Const., § 296.
 the laws may be enforced and the peace kept throughout the country. Const., § 340.
 if state law conflicts with federal, the former is void. Const., § 341.
 a state cannot tax a government bank or exercise sovereignty over, or obstruct the means adopted by congress to execute its powers. Const., §§ 393-96.

16. CIVIL RIGHTS. See *Equal Protection of the Laws; Privileges and Immunities of Citizens; Suffrage.*

17. EMANCIPATION.

proclamation of, and its effect; confirmed by amendment of 1865. Const., § 149.

18. TREATIES.

are supreme law of the land. Const., §§ 113, 228, 990.
 as affecting consuls and ministers, see *Consuls and Ministers*.
 prior or subsequent state statutes are void. *Id.*; Const., § 229.
 laws so construed as to harmonize with. Const., § 2764.
 power to make, as to Indians within a state. Const., § 227.
 not so construed as to impair property rights. Const., § 3230.
 territory may be acquired by treaty. Const., § 248.
 power to make, was surrendered to general government. Const., § 946.
 authorities reviewed as to protection of aliens by. Const., § 1005.
 act for inspection and registration of foreign immigrants does not violate. Const., § 1280.
 but an act requiring master to pay certain sum for each one, and giving him a right to collect same from them, violates the treaty of 1794 as to admitting personal effects of English emigrants free of duty. Const., § 1295, p. 664; § 1296, p. 666; § 1297.
 state liquor license laws do not violate. Const., § 1515.
 are within the political, not the judicial, power. Const., § 2444.
 voluntary validity of, not a judicial question. Const., § 1245.
 otherwise as to their necessary validity. *Id.*
Chinese; rights under Burlingame treaty. Const., §§ 315-318, 932, 998-1001.
 restrictions on their following trades, working on streets, etc. Const., §§ 315, 317, 995.
 not violated by act prohibiting exhumation or carrying body, without health permit. Const., § 316.
 general police powers may be exercised, and immigration of infected or mischievous persons may be thereby prohibited. Const., §§ 316, 318.
 act forbidding corporations to employ them, void. Cannot be upheld as an exercise of "reserved power" over corporations, nor as a police regulation. Const., §§ 982-991, 994.
 such act a denial of equal protection of the laws. *Id.*
 right does not depend on citizenship, but merely on residence. Const., §§ 1001, 1002.
 remedy against immigration of, is with government. Const., § 1006.
 rights under fourteenth amendment. Const., § 1007.

CONSTITUTION OF THE UNITED STATES, TREATIES — *Continued.*

Chinese; may sue in federal courts to protect rights secured by treaty. Const., § 1015.
state law excluding, except on bond by master against their becoming paupers, void. Const., § 1016.

so of city ordinance providing for cutting of hair of. Const., § 1017.

so of law prohibiting their fishing in rivers. Const., § 1019.

state law forbidding exhuming bodies, valid, being without discrimination. Const., § 1018.

19. THE GOVERNMENT AND THE STATES IN THEIR QUASI PRIVATE CAPACITY.

as a purchaser of lands to secure a debt is not a sovereign, but a private proprietor. Const., § 249.

officers of, made parties in suit to foreclose mortgage on such lands. Const., § 249.

may sue in state court like any other corporation, subject in all respects to the state laws. Const., § 276.

as a corporator or shareholder in a corporation, acts only as an individual. Const., § 544.

when a state is sole shareholder in a bank, a suit against the bank is not against the state. Const., § 544, p. 240.

it thereby imparts none of the attributes of sovereignty to the bank. Const., § 545.

CONSTITUTIONS OF THE STATES. See *Constitution of the United States; Construction of Constitutions; Statutes*, 14.

1. IN GENERAL.

are not special grants of power, but full grants with express restrictions. Const., § 28.
act of attainder and confiscation in Georgia, in 1822, held valid. Const., § 2575. See *Missouri*.

acts permitting the waiver of constitutional exceptions are void. Const., § 2609.
guardians may be authorized to invest property of non-resident wards. Const., §§ 2610-11.

municipal bonds to aid railroad may be authorized. Const., § 2614.

taxation districts and their number, etc., are entirely under legislative control. Const., § 2615.

construction of provision as to limit of state debt. Const., § 2616.

2. AMENDMENT.

takes effect on the day of the vote adopting it, when. Const., § 2560.

a provision requiring a revised or amended act to be set out, applies to repeal by implication as well as amendments. Const., § 2587.

a statute cannot be amended thereunder by repealing a part of it. Const., § 2588.

3. CONSTRUCTION AND INTERPRETATION OF. See *Construction of Constitutions*.CONSTRUCTION AND INTERPRETATION. See *Construction of Constitutions; Construction of Statutes; Corporations*, 4.CONSTRUCTION OF CONSTITUTIONS. See *Construction of Statutes; Statutes*.

1. IN GENERAL.

federal constitution confined to broad and general principles. Const., § 9.

not presumed that any provision not intended to have effect. Const., § 12.

general rules stated. Const., § 18.

meaning of words determined from act in which used. Const., § 19.

exceptions in grants of power imply that powers not excepted are granted. Const., § 290.

a similar rule applies to exceptions in prohibitions. *Id.*

principles of construing federal constitution stated. *Gibbons v. Ogden*. Const., § 1192.

interpreted by the condition of the states when it was formed, their object in forming it, etc. Const., § 1315.

effect of inconvenience. Const., § 1558.

provisions should not be transposed for the purpose of. Const., § 1954.

construction of provision as to assessment according to benefits. Const., § 2598.

2. PROVISIONS PARTLY VOID. See *Statutes*, 14.

upheld so far as valid. Const., § 1423.

3. PROSPECTIVE OPERATION.

retrospective operation not presumed. Const., § 20.

of amendments to federal constitution, valid. Const., § 21.

4. IMPLICATIONS.

negative implied from affirmative words, when intention promoted. Const., § 27.

5. PROVISIONS ADOPTED FROM OTHER STATES.

are adopted with construction there settled. Const., § 2561.

6. OBJECT TO BE ATTAINED.

considering, in connection with history, furnishes safer rule. Const., § 10.

evident purpose subserved. Const., § 16.

prevails over other reasonable interpretation. Const., § 25.

when this is such that the provision should be controlled by a single will, congress is supreme. Const., § 293.

CONSTRUCTION OF CONSTITUTIONS — *Continued.*

7. CONTEMPORANEOUS AND PRACTICAL; HISTORICAL. See *Construction of Statutes*.
important in doubtful cases. Const., § 17.
meaning of terms when used governs. Const., § 23.
situation and history of country, and contemporaneous exposition, considered. Const., § 23.
early and long continued, national and state, important. Const., § 24.
grant of power not necessarily construed by then existing conditions; the fair import of the words may control. Const., § 214.
of restriction as to direct taxes, by congress in passing acts. Const., §§ 422-23.
of the term "bills of credit" by the history of the colonies. Const., §§ 525, 534, 539, 547, 549-50.
of term "*ex post facto* laws" from definition in state constitutions and contemporaneous exposition. Const., §§ 582-599.
8. UNJUST PROVISIONS.
are valid. Const., § 18.
9. DOUBTFUL CASES. See *Statutes*, 14.
10. PROVISIONS THAT ACTS MUST CONTAIN BUT ONE SUBJECT, EXPRESSED IN TITLE.
only the general purpose need be stated. Const., § 2562.
statement of *object*, act may contain all lawful means thereto. Const., § 2563.
do not apply to acts incorporating cities. Const., § 2564.
purpose resulting from subject stated, enough. Const., § 2565.
one subject, what. Const., §§ 2567, 2571, 2572, 2574.
in Oregon, acts are void only so far as relate to a subject not stated. Const., § 2568.
so, in general. Const., § 2578.
act purporting in title to secure a *just* distribution of property, not void because the distribution may be *unjust*. Const., § 2569.
purpose of act may be wholly different from that intended. *Id.*
where the subject expressed is to distribute an insolvent debtor's property, the act may include the dissolution of attachments. Const., § 2570.
11. DIRECTORY AND MANDATORY PROVISIONS.
of Mississippi constitution, prohibiting introduction of slaves after a certain date, directory. Const., § 56.
12. SELF-EXECUTING PROVISIONS.
when provision points to something more to be done, it is not self-executing. Const., § 58.
third section of fourteenth amendment, not. Const., § 1555.
13. CONSTRUCTION FROM THE CONTEXT.
of term "*ex post facto*," from its connection in the constitution with term "obligation of contracts." Const., § 597.
14. SPECIAL LEGISLATION.
provision prohibiting "special acts conferring corporate powers," applies to all corporations. Const., § 2577.
valid in Illinois. Const., § 2578.
law establishing school in municipality making the best appropriation therefor, a general one. Const., § 2579.
where the legislature is to determine what is. Const., § 2580.
what is not "forming a corporation." Const., § 2581.
act authorizing special election in a city is. Const., § 2582.

CONSTRUCTION OF STATUTES. See *Construction of Constitutions; Definitions; Statutes*, sub-title "UNCONSTITUTIONAL LAWS."

1. IN GENERAL.
unqualified grant of power not restrained by inference. Const., § 60.
legislative construction, see *Legislative Power*.
federal statute referring generally to a court, means a federal court. Const., § 185.
courts have nothing to do with their injustice or hardship. Const., § 2156.
when words clear, contrary construction excluded. Const., § 202.
all their provisions should be given effect. Const., § 1577.
transposition of the provisions of a law for purposes of construction. Const., § 1954.
law authorizing court to grant ferry and bridge charters does not authorize the creation of exclusive rights. Const., § 2969.
government not affected by the use of general words. Const., §§ 2629, 2631, 2640.
the rule that the king was not bound by statutes had many exceptions. Const., § 2630.
acts diminishing powers, rights, etc., of the United States, not construed to include it. Const., § 2632.
not affected by state insolvent laws. Const., § 2633.
nor exemption laws. Const., § 2634.
laws of process and remedy, except limitation laws, apply to. Const., §§ 2635-36, 2638.
nor laws giving probate courts exclusive jurisdiction of claims against estates. Const., § 2637.

CONSTRUCTION OF STATUTES, IN GENERAL—*Continued.*

- discharge of surety on bond of public officer binds the government. Const., § 2639.
- territorial act as to implied trusts in lands does not affect the United States. Const., § 2640.
- recital of fact in preamble is evidence thereof. Const., § 2624.
- special appropriation not construed permanent. Const., § 2625.
- construction of re-enactment in Maryland, by reference to its title, of a statute forbidding acts in England and Wales. Const., § 2958.
- extraneous evidence to explain charter only admissible when ordinary rules fail. Const., § 2894.
- equitable, not to divest estate. Const., § 2861.
- parties claiming under statute in derogation of the common rule must show a strict compliance with its terms. Const., § 2652.
- unjust and absurd conclusions avoided. Const., § 2963.
- laws tending to accomplish their purpose not declared inappropriate. Const., § 2741.
- the courts do not consider the wisdom or policy of statutes. Const., § 2742.
- the question of the immoral tendency of laws is for the legislature. Const., § 2743.
- ignorance not imputed to the legislature. Const., § 2744.
- construction of appropriation bills containing general legislation. Const., §§ 2977-78.
- judicial legislation—courts are to declare only what the law is. Const., § 2749.
- all parts construed together. Const., §§ 2756-57. See *post*, 13.
- construction of charters. Const., § 2980.
- same provisions are not to operate differently. Const., §§ 2759-60.
- implications are as much within the law as if expressed. Const., § 2761.
- not allowed to lead to absurdity. Const., § 2762.
- acts in fraud of the law violate it. Const., § 2976.
- should be construed so as to harmonize with treaties. Const., § 2764.
- omissions not judicially supplied. Const., § 2766. See *Statutes*, 11.
- explicit words include everything fairly within them. Const., § 2778.
- a construction changing the rules of evidence is to be avoided. Const., § 2807.
- not construed so as to violate the law of nations. Const., § 2349.
- forfeitures not favored. Const., § 2850.
- in cases of doubt, is in favor of the citizen. Const., § 2859.
- and in favor of good faith, when. Const., § 2860.
- special and general laws on same subject, both stand. Const., § 2966.

2. INTENTION OF THE LEGISLATURE. See *Statutes*, 2.a. *In general.*

- positive provisions not restrained or altered by implication. Const., §§ 2737, 2740.
- possible evils not to be avoided by forced construction. Const., § 2738.
- when intent doubtful the consequences of the laws are to be considered, but with caution. Const., § 2745.
- words taken in the sense evidently intended. Const., §§ 2781, 2838-40, 2177.
- to be carried out. Const., §§ 2835, 2845.
- rules and maxims are designed to discover. Const., § 2836.
- same at law and in equity. Const., § 2837.
- is to be gained from the words used. Const., §§ 2838-41.
- sweeping changes are to be carried out, if clearly intended. Const., § 2842.
- whole act considered. Const., § 2843.
- court is not to speculate on. Const., § 2846.
- may be inferred from subsequent. Const., § 2847.
- of two constructions, that is preferred which is most consistent with the. Const., § 2858.
- determined from effect. Const., § 2876.
- of ancient statutes. Const., § 2964.

b. *Reference to title.*

- resorted to, to remove ambiguities. Const., §§ 2074, 2909.
- influence of statement of purpose of act in. Const., § 2760.
- of little weight in explaining doubtful provisions. Const., § 2906.
- seldom resorted to. Const., § 2907.
- when of some consideration, in construction. Const., § 2908.

c. — *preamble.*

- cannot control enacting part, but resorted to to explain intent. Const., §§ 2897-98.
- *exceptions.*
- construction of second section of act, as. Const., § 2620.
- those who set up, must bring them within reason and words of statute. Const., § 2621.

d. — *provisos.*

- office of, is to except something, qualify, restrain or prevent misinterpretation. Const., §§ 2618, 2965.
- are strictly construed. Const., § 2619.
- inconsistent act, control it. Const., § 2622.
- to construe, the mischief is to be looked at. Const., § 2623.
- though repealed, may explain act still in force. Const., § 2895.
- proviso in revenue statute construed. Const., § 2895.
- it is not its office to declare a general rule or law. Const., § 2965.

CONSTRUCTION OF STATUTES, INTENTION OF THE LEGISLATURE, *Continued.*

- e. — *journals.*
are consulted as to enactment, see *Statutes*, 2.
when act badly worded, are consulted to show intent of congress. Const., § 2899.
 - f. — *subject-matter.*
applicability of act tested by, and not by convenience. Const., § 2877.
a law expressly applied to particular actions not extended to other like actions. Const., § 2968.
general phrases in repealing act are limited by the. Const., § 3006.
 - g. — *mischief to be reached.* See *supra*, d.
not of importance, unless fit words for the purpose be used. Const., § 2748.
if the language be capable of two meanings, that in harmony with the purpose of the act controls. Const., §§ 2806, 2869.
extent of act depends on, even if penal. Const., § 2843.
construction contrary to object of law avoided. Const., § 2857.
given case within the, is included, if language general enough. Const., § 2867.
when private act construed to reach claims of individuals. Const., § 2868.
considered when ordinary rules fail. Const., § 2870.
qualifies the strict letter of the law. Const., §§ 2871-72.
settled policy of government considered. Const., §§ 2873, 2875.
when of little weight. Const., § 2874.
 - h. — *circumstances of enactment.*
the court should place itself in the position of the legislature, if possible. Const., § 2844.
doubtful provisions construed with reference to condition of things at passage. Const., § 2883.
inoperative law may show existing condition. Const., § 2884.
circumstances considered in construing acts fixing pay of consuls. Const., § 2885.
reference to what was said and done by legislators, proper. Const., §§ 2891-93.
not to explain meaning of words, but to ascertain object of act and mischief to be reached. Const., § 2892.
 - i. — *opinion of legislators.*
cannot be received to alter meaning of words of acts; but the carefully expressed opinions of a conference committee may be referred to to show the understanding of congress. Const., §§ 2888-90.
are entitled to same weight as of other persons of same learning and ability. Const., § 2889.
 - j. — *public opinion.*
not resorted to, unless act ambiguous. Const., §§ 2900, 2901.
3. ACTS IN PARI MATERIA.
are construed together. Const., § 1644.
it is dangerous to resort to other acts when one only is to be interpreted. Const., § 2739.
supply meaning of mercantile terms. Const., § 2775.
special meaning of words in prior act assists interpretation of words of later one. Const., § 2777.
subsequent clauses of same act, or other acts, resorted to to show the meaning of words. Const., § 2943.
all the revenue acts considered as. Const., § 2944.
so as to the public lands acts. Const., § 2945.
passed at same session are, and are construed together. Const., § 2979.
4. BY USAGE.
doubtful words aided by, but not plain enactment; acts presumed to be passed with relation to. Const., §§ 2902-2905.
revenue terms construed by. Const., § 2937.
5. CONTEMPORANEOUS AND HISTORICAL.
construction long acquiesced in presumed correct. Const., § 2878.
contemporaneous, preferred to later. Const., §§ 2880-82.
history of the country referred to. Const., §§ 2886-87.
the practical construction of statutes by the departments which they affect is entitled to much weight, especially if of long standing, but will be disregarded, if erroneous. Const., §§ 2915-20; Consuls, § 28.
also by congress. Consuls, § 28.
6. GRAMMATICAL — WORDS, PUNCTUATION, ETC. See *Definitions.*
when words taken in sense opposed to their seeming meaning. Const., § 2754.
when language plain, there is no room for interpretation. Const., § 2755.
general words restricted by particular ones; but this rule not applied to defeat legislative intention. Const., §§ 2767-68.
the particular words must apply to the whole subject-matter. Const., § 2769.
so limited as not to lead to injustice, etc. Const., § 2770.
not restrained by limitations not called for by the sense, object or mischief. Const., § 2771.

CONSTRUCTION OF STATUTES, GRAMMATICAL — WORDS, PUNCTUATION, ETC.— *Continued.*

words in a grant not a condition precedent, when. Const., § 2803.
 words are to be taken in the ordinary sense. Const., § 2772.
 as to the meaning of particular words, see *Definitions*.
 mercantile terms interpreted as intended, rather than from their technical sense, when. Const., § 2775.
 testimony of dealers rather than merchants taken. Const., § 2776.
 special meaning given words of act, words of later one construed therefrom. Const., § 2777.
 of general law and charter mean the same. Const., § 2779.
 meaning of particular words supplied by context. Const., § 2780.
 words having acquired an established meaning by judicial interpretation. Const., § 2782.
 words may be added to complete the sense. Const., § 2793.
 the spirit of the act is to be gathered from the words. Const., §§ 2833-39.
 words may be omitted if general intent preserved, and such words are unmeaning. Const., § 2840.
 new words may be added, when. Const., § 2862.
 punctuation may be considered, but is a most fallible standard of interpretation. Const., §§ 2910-14.

7. DIRECTORY AND MANDATORY PROVISIONS.

are mandatory if public interested, or thing to be done is essential, or words are peremptory. Const., §§ 2859-61.
 for direction of public officers, construed mandatory; otherwise where administrative discretion permitted. Const., §§ 2862-65.
 constitutional requirement as to style of bills, directory. Const., § 2882.
 directing a particular way of doing a thing excludes any other. Const., § 2967.

8. LIBERAL INTERPRETATION.

tax redemption laws. Const., §§ 2821-22.
 patent laws. Const., § 2823.
 remedial statutes. Const., § 2825.
 bankruptcy laws. Const., § 2826.
 laborers' lien laws. Const., § 2827.
 statutes having reference to the public good. Const., § 2828.
 act giving priority to the United States in case of assignment of insolvent. Const., § 2829.
 acts in favor of settlers on the public lands. Const., § 2830.
 statutes for the benefit of married women. Const., § 2831.
 acts conferring bounty, and having ambiguous words. Const., § 2881.
 statute requiring act to be done by a person to obtain public money. Const., § 2833.
 statutes of frauds, to suppress fraud. Const., § 2834.

9. STRICT OR LITERAL INTERPRETATION. See *post*, 14.

of provisos, see *supra*, 2, d.
 acts for municipal aid to corporations. Const., § 2804.
 acts derogatory to individual rights. Const., § 2805.
 acts for taking testimony by deposition. Const., § 2808.
 acts conferring limited jurisdiction. Const., § 2809.
 retrospective laws. Const., § 2810.
 act restricting officer's fees. Const., § 2811.⁴
 acts levying taxes; doubts resolved in favor of citizen. Const., § 2812.
 doubtful words in *public* grants taken most strongly against the grantee. Const., §§ 2813, 2815.
 private acts of congress construed against person benefited. Const., § 2814.
 grants of money must be clearly expressed. Const., § 2816.
 of charters, in favor of the public. Const., §§ 2171, 2261, 2271.
 laws giving liens on vessels. Const., § 2817.
 "laws of the several states" limited to statutes, in judiciary act. Const., § 2818.
 act permitting gaming. Const., § 2819.
 act declaring a heavy forfeiture. Const., § 2820.
 forfeitures not favored. Const., § 2850.
 nor acts violating security to property. Const., § 2851.
 grants of monopolies. Const., § 2213.

10. REVENUE LAWS.

penalties of, do not make them penal laws, so as to be construed strictly. Const., §§ 2936, 2938.
 are neither construed strictly as penal laws, nor liberally, as remedial. Const., § 2937.
 their words are to be given their obvious and natural import. Const., § 2938.
 construed to carry out the legislative intent, and, in doubtful cases, in favor of the citizen. Const., §§ 2940-41.
 articles grouped together, deemed kindred in their nature. Const., § 2942.
 are all *in pari materia*. Const., § 2944.
 repeals of, by implication, are not favored. Const., §§ 2983, 2992.
 specific duties on particular article, not repealed by general words of later act. Const., § 3010.

CONSTRUCTION OF STATUTES — *Continued.*

11. REVISED STATUTES.

the presumption is against an intention to change the law by; but if change is made it must be given its full effect. Const., § 2951.
in cases of doubt, the old law is considered, otherwise not. Const., § 2952.
of 1874, construed. Const., § 2953.

12. ADOPTION OF PREVIOUS JUDICIAL CONSTRUCTION. See *State Decisions*.

statutes re-enacted presumed to include former judicial construction. Const., § 2954.
otherwise of the construction by an officer or department. Const., § 2955.
the settled construction of British statutes was adopted by their re-enactment here. Const., §§ 2956-57.

13. REPUGNANT PROVISIONS.

certain revenue laws held consistent. Const., § 2641.
are to be harmonized if possible; all provisions considered. Const., §§ 2750-52.
the change of language necessary to harmonize should be as slight as possible. Const., § 2753.

14. PENAL LAWS.

the rule of strict construction has some qualification; cases considered. Const., § 1581. See § 1570.
not necessary that each section should contain its penalty. Const., § 2626.
courts do not execute those of other countries. Const., § 2627.
should be explicit. Const., § 2628.
are permissive as to penalty, when. Const., § 2658.
the words used are particularly important in interpreting. Const., § 2772.
"officer of election" does not include state governor. Const., § 2773.
not construed to give double penalty. Const., § 2864.
offenses not clearly within them are not included; those within the mischief are not included unless clearly intended. Const., §§ 2921-24.
meaning of rule of strict construction; legislative intention governs. Const., §§ 2925-26.
offenses within the spirit, not the letter, excluded. Const., § 2527.
statutes making corporate officers liable for corporate debts on their failure to do certain things, are. Const., § 2929.
otherwise of statutes making stockholders liable until stock paid in. Const., § 2980.
Civil Rights Act of March 1, 1875, a penal act. Const., § 2981.
it is not necessary to give words of known interpretation their most restricted sense. Const., § 2982.
when penalties in different sections held cumulative. Const., § 2984.
rule of strict construction, in general. Const., §§ 2921-35, 2946.

15. INFLUENCE OF THE COMMON LAW.

its rules are to be applied, in construction. Const., § 2758.
in the absence of state decisions, federal courts follow the rules of. Const., § 3028.
and as it would be construed by the state courts. Const., § 3029.

16. CONSTRUCTION CAUSING INCONVENIENCE.

clear language not restrained by considerations of hardship; but in construction, such considerations are entitled to great weight. Const., §§ 2746-47.
never preferred to a harmless one. Const., §§ 2852-54.
one taking from the government a power tending to the general good, not preferred. Const., § 2854.
one leading to injustice, avoided. Const., § 2855.
act prohibiting stoppage of mails not construed to shield carrier from arrest. Const., § 2856.

17. PRACTICAL, BY THE PARTIES. See *supra*, 5.

will be followed, if reasonable. Const., § 2979.

18. GOVERNMENT CONTRACTS.

relation of the parties considered; the strict rules of construction not applied. Const., § 2947.
are construed as statutes and not as contracts. Const., § 2948; but see §§ 2949-50.
a release by a legislature of its title to lands, construed as a grant. Const., § 2975.

19. LIMITATION LAWS. See *Obligation of Contracts*, 7; *Statutes of Limitation*.

construed to carry out their object of securing titles and quieting possession. Const., § 2959.
has same effect as other statutes; legislative intent followed; exception of foreign creditors not allowed. Const., §§ 2961-63.

20. CONSTRUCTION OF AMENDMENTS.

of two constructions, that most in harmony with the act amended is preferred. Const., § 2970.
the old law, the mischief and the supposed remedy are considered. Const., § 2971.
they become incorporated into the law amended. Const., §§ 2972-78.

CONSULAR COURTS. See *Consuls and Ministers*, 8.

CONSULS AND MINISTERS.

1. IN GENERAL.

the federal district courts cannot pronounce on the validity of the proceedings of a Prussian consul, under the treaty of May 1, 1828. Consuls, §§ 4, 16-19.
 a great distinction is to be made between consuls to Mohammedan and Christian countries, both as to powers and duties. Consuls, §§ 5, 20-24.
 who are ambassadors and public ministers. Consuls, § 35.
 how recognized; must be by political, not by judicial, authorities. Consuls, §§ 36, 37.
 a minister plenipotentiary to one power from the United States cannot accept similar commission from another power, without. Consuls, § 39.
 consular agents are officers, and represent consuls. Consuls, § 101.

2. OFFENSES AFFECTING MINISTERS.

a prosecution for a crime against a public minister is not a case affecting him within the federal constitution. Consuls, §§ 103, 104; Const., § 977.
 congress may give inferior courts jurisdiction of cases affecting ambassadors. Consuls, § 105.
 consul not a public minister under act of 1790. Consuls, § 106.
 a person attacked by a minister may defend himself. Consuls, § 107.
 how far they lose their privilege by committing first assault. Consuls, § 108.
 the law is the same as to assaults on, as in ordinary cases. Consuls, § 109.
 if the assailant knows that the person assailed was once a minister he acts at his peril. Consuls, § 110.
 it is not an excuse that he did not know his official character. Consuls, § 111.
 a person arresting a minister is liable under the act of 1790, though not an officer. Consuls, § 112.
 knowledge of character of house of, when essential. Consuls, § 113.

3. CONSULAR COURTS.

appeals from to federal circuit court in California are subject to same rules as in case of writs of error to district courts. Consuls, §§ 114, 127-129.
 allowance of, must appear of record. Consuls, § 117.
 citation necessary when. Consuls, § 118.
 what the transcript of the record should show, and how made. Consuls, §§ 116, 127-29.
 all jurisdictional facts must be alleged. Consuls, § 125.
 libel held insufficient. Consuls, § 126.
 admiralty proceedings in. Consuls, §§ 122-24.
quære, whether it is necessary to issue and serve a citation when the court has once adjourned after decree. Consuls, §§ 115, 118.
 jurisdiction and powers of, in China and Japan. Consuls, §§ 130-33.
 in Honolulu. Consuls, § 134.
 sentence of, cannot have extraterritorial operation, beyond its jurisdiction. Consuls, § 135.
 can have no power or existence except by consent of the local nation. Consuls, § 136.

4. RIGHTS AND POWERS. See *supra*, 3.

judicial power is not incident to the office of consul, but depends on treaties and the laws of his state. Consuls, §§ 1, 10-15, 56, 130-36.
 courts do not take judicial notice of. Consuls, §§ 2, 15.
 of United States consuls in Turkey, under treaty and laws. Consuls, §§ 12-14.
 Prussian consuls have sole jurisdiction of controversies between master and seamen of a Prussian ship. Consuls, §§ 3, 16-19.
 French consuls have none of offenses on French vessels in our ports by French subjects. Consuls, § 57.
 of United States consuls in Egypt, civil and criminal, over our subjects, under treaty. Consuls, § 58.
 in Turkey, is criminal only. Consuls, § 59.
 compensation; a consul to Algiers after it became subject to France not entitled to salary. Consuls, §§ 6, 20-24.
 of minister to a foreign power. Consuls, § 41.
 foreign money received as, is reckoned at its commercial value in United States coin. Consuls, § 42.
 premium on drafts used as, chargeable to recipient as. Consuls, § 43.
 one acting as representative is entitled to, though never actually appointed. Consuls, § 44.
 consul not entitled to commission for witnessing payment to seamen. Consuls, § 93.
 nor to any for acting in charge of legation. Consuls, § 94.
 pay ceases after sixty days' absence. Consuls, § 95.
 of deputy and vice-consuls and consular and commercial agents. Consuls, § 100.
 prosecution of assailants of ambassadors, is not a "case affecting them." Const., § 977.
 the constitutional grant of jurisdiction, in suits affecting ambassadors, does not exclude jurisdiction of federal courts in cases against consuls and vice-consuls, under act of 1789. Consuls, §§ 8, 25-29.
 authorities reviewed. Consuls, § 26.
 seaman must get sanction of his country's representative, when. Consuls, § 99.

CONSULS AND MINISTERS, RIGHTS AND POWERS — *Continued.*

power of ministers to certify proceedings, etc. Consuls, § 40.

United States minister has no, that the United States would pay a certain claim. Consuls, § 38.

none to hire slave. Consuls, § 50.

depends on course of trade and the law of nations, treaties, and the rule of reciprocity. Consuls, §§ 54, 55.

of consul, to put in claims for his government. Consuls, § 60.

vice-consul, to defend rights of individuals of his nation. Consuls, § 61.

none when his nation has a resident ambassador or minister. Consuls, § 62.

may claim captured ship, when. Consuls, § 63.

vice-consul may petition a court to order its officers to perform their duty as to sale of property. Consuls, § 64.

of the United States, to perform notarial act; but a certificate of official character is not notarial act. Consuls, § 65.

how far certificates of, are evidence. Consuls, §§ 89-92.

not to administer oaths, in general. Consuls, § 66.

nor to order American seaman imprisoned. Consuls, §§ 67, 68.

to detain ship's papers, when. Consuls, § 70.

to discharge seamen abroad. Consuls, §§ 71-75.

cannot exempt enemy's vessel from capture. Consuls, § 69.

may bring suit in state court. Consuls, § 84.

of consular clerks. Consuls, § 102.

5. PRIVILEGES AND IMMUNITIES. See *supra*, 2.

foreign ministers are exempt from arrest. Const., § 8181.

consuls are not entitled to the, by international law, of ambassadors or public ministers.

Consuls, §§ 7, 25-29.

ambassador is not liable to answer, civilly or criminally, before any court of the nation to which he is sent. Consuls, § 45.

a secretary of legation held amenable only to the law of nations. Consuls, § 46.

so of minister's servant. Consuls, § 47.

how, when he is an inhabitant of the United States, and has contracted debts before becoming such. Consuls, § 48.

consuls have not those of ministers. Consuls, § 76.

consul-general not exempt from legal process. Consuls, § 77.

of consuls generally. Consuls, §§ 78, 79.

insults or attacks on, are, it seems, punishable by acts of congress. Consuls, § 52.

a minister not recognized has none, except of transit, by courtesy only. Consuls, § 49.

the persons and personal effects of ambassadors and their attachés protected. Consuls, § 51.

minister's house, equipage, etc. Consuls, § 52.

cannot be waived. Consuls, § 53. See §§ 81-83.

6. DUTIES AND LIABILITIES.

as to federal jurisdiction in actions against consuls and vice-consuls, see *supra*, 4.

Consuls, §§ 25-29; Const., § 2377.

foreign consuls may be sued in federal courts by citizens of the nation they represent, though it may be necessary to pass on the proper exercise of their duties. Consuls, §§ 9, 30-34. See §§ 80-88.

state court has no jurisdiction of an action of debt against a consul. Consuls, § 80. See § 81.

when federal courts have jurisdiction of cross suit in action in which consul a party. Consuls, § 85.

in general, of actions against consuls. Consuls, § 87. See § 88.

duty of consul, to send home a minor fleeing on ship-board. Consuls, § 96.

responsibility of sureties of consul. Consuls, § 97.

consul-general not liable for bills drawn on behalf of his government. Consuls, § 98.

CONTEMPORANEOUS CONSTRUCTION. See *Construction of Constitutions; Construction of Statutes.*CONTRACTS. See *Obligation of Contracts; Specific Performance.*

void when made, cannot be validated. Const., § 8178.

1. CONSTITUTIONAL LAW. See *Obligation of Contracts; Vested Rights.*

a contract as to commerce not affected by subsequent regulation of commerce by congress, making it more onerous. Const., §§ 1060-61.

2. ILLEGALITY OF OBJECT.

transfer of bonds by state, to aid rebellion, void. Const., §§ 126, 157.

a good consideration cannot validate an illegal contract. Const., § 532.

to forego a trial by a lawful tribunal, void. Const., § 2505.

for a private contract held void as against the duty of the government as a neutral, see *Law of Nations*.

3. CONSIDERATION.

in Confederate money, how far valid. Const., §§ 1693-1701.

CONTRACTS—*Continued.*

4. CONSTRUCTION.

to accomplish the intention of the parties. Const., § 2095.
 strict, of a charter as a contract. Const., §§ 2061, 2095.
 of government contracts, see *Construction of Statutes*, 18.

CONTRACTS BY THE STATE. See *Obligation of Contracts*, 2.

CONVEYANCES. See *Deeds; Eminent Domain*.

COPYRIGHT. See *Constitution of the United States*, 3, m.

CORPORATIONS. See *Foreign Corporations; Obligation of Contracts*, 4; *Shareholders; Stock*.

1. IN GENERAL.

congress may create, under its implied powers. Const., §§ 884–85.
 are means of attaining desired objects, but are not in themselves ends. Const., § 885.
 capital of, what, see *Banks*.
 creation of, a sovereign power. Const., §§ 884–85.
 not “citizens” under article IV or the fourteenth amendment, but held to be “persons” under act passed under the latter. Const., §§ 887–40, 1052–53.
 created by a state, how far may exist in another sovereignty. Const., § 1049.
 nature and powers of. Const., §§ 2108, 2109.
 public and private, see *Obligation of Contracts*, 4, b.
 nature and powers of eleemosynary. Const., § 2110.
 organized under general laws, have same powers as if specially chartered. Const., § 2128.

2. REGULATION AND CONTROL. See *Obligation of Contracts*, 4, c.

power to amend charter not made the means of violating treaty or constitution. Const., § 114.
 power under California constitution; reserved power and its extent. Const., §§ 982–84.
 does not include power to deny Chinese the right to be employees of corporations. Const., §§ 985, 987.
 inviolable corporate rights. Const., §§ 985–86.
quære, as to effect of general corporation law on existing companies. Const., § 988.
 general reserved power no more effective than reservation in special charter. Const., § 989.
 cannot operate to support laws violating the federal constitution. Const., § 1005.
 construction of provision that grants of franchises shall not be revoked except in such a way that does not injure creditors or corporators. Const., § 2145.
 a state is not estopped from fixing rates by voting as a shareholder. Const., § 2148.
 appointing a commission to fix rates not a delegation of legislative power. Const., § 2149.
 declaring schedule of rates to be conclusive as to reasonableness does not take away jury trial. Const., § 2151.
 regulating rates not taking property for public use. Const., § 2153.
 nor is it a denial of impartial justice, or taking without due process, or tending to want of uniformity. Const., §§ 2154–55.
 what objects may be taxed as corporate property. Const., § 2282.
 shares may be taxed at the locality of the corporation if the contract so provides. Const., § 2335.
 by-laws do not abrogate common law. Const., § 2657.
 laws as to entail in Ohio held inapplicable to. Const., § 2654.

3. CONSTITUTIONAL LAW. See *Obligation of Contracts*, 4; see *supra*, 2.

congress cannot authorize attorney-general to sue cause of action of corporation. Const., § 242.
 property and business may be taxed by the states, but not their debts, held by non-residents. Const., § 439.

4. CONSTRUCTION OF POWERS. See *Obligation of Contracts*, 4.

ambiguity in charter construed against the corporation. Const., §§ 2061, 2095.

5. CONSOLIDATION.

effect on reserved power, of, with a foreign company. Const., §§ 2184, 2144.
 effect on exemptions from taxation of former companies. Const., §§ 2223, 2273–75.
 extinguishes old companies and forms a new one. Const., § 2317.
 the new companies hold by virtue of the consolidation act. Const., § 2318.
 construction of acts for. Const., § 2331.

6. CITIZENSHIP.

is a citizen of the state granting its charter, for judicial purposes. Const., § 2507.

7. DISSOLUTION.

merger of two educational corporations, held not a. Const., § 2123.

COUNTERCLAIM. See *Set-off*.

COUNTERFEIT MONEY.

punishment for passing by the states, see *Crimes*. Const., §§ 496–98.

COUNTERFEITING. See *Counterfeit Money; Crimes*.

COURTS. See *Consuls and Ministers; Constitution of the United States, 7; Courts Martial; Jurisdiction; State Decisions; Territorial Courts*.
federal, how far bound by rules of process in state courts. Const., §§ 1650, 1658.

COURTS MARTIAL.

how composed. Const., § 163.

of states, may be empowered to enforce laws of congress. Const., §§ 169, 172.

act of 1795 refers to federal. Const., § 188.

CRIMES. See *Bills of Attainder; Courts Martial; Constitution of the United States, 3, c; Equal Protection of the Laws; Ex Post Facto Laws; Trial by Jury*.

congress may, in general, provide penalties for violation of laws which it has express or implied power to pass. Const., §§ 384-88, 483, 494, 2491.

its implied power to punish. Const., § 488.

it may punish pension frauds. Const., §§ 480, 486-88, 489-495.

construction of pension embezzlement act. Const., § 486.

the states may punish passing of counterfeit coin. Const., §§ 481, 496-500.

and it seems the government cannot do so. Const., § 496. *Contra*, §§ 501-503.

power to punish counterfeiting is in congress. Const., § 499.

quare whether, when offense against two sovereigns, a conviction by one would bar a prosecution by the other. Const., § 498.

congress may regulate charges of pension agents, and enforce same by punishment. Const., § 504.

it cannot punish crimes on Indian reservations within a state. Const., § 505.

state courts cannot review decisions of district courts. Const., § 506.

as to restrictions on proceeding, except upon presentment of grand jury, and as to speedy trial, see *Constitution of the United States, 4, d, e*.

as to provisions common in all constitutions, such as self-accusation, twice in jeopardy, see *Protection to Personal Liberty*.

ex post facto laws relate solely to. Const., §§ 568, 592, 596, 597, 599, 602, 650.

federal courts cannot be authorized to try crimes against the states. Const., § 940.

effect of sentence by *de facto* court. Const., § 1567.

may be against both federal and state governments. Const., § 2488.

federal classified. Const., § 2493. See § 2469.

difficulties attending trial of state crimes, in federal courts. Const., § 2498.

a law authorizing the seizure of property, its forfeiture on trial, and fining owner for opposing forfeiture, is criminal in its nature. Const., § 2532.

offenses affecting consuls and ministers, see *Consuls and Ministers, 2*.

CRIMINAL PLEADING.

in federal courts, accused must be informed of nature and cause of accusation. Const., § 911.

See *Constitution of the United States, 4, h*.

requisites of a valid indictment. Const., §§ 950, 1574, 1579.

sufficient to follow words of statute. Const., § 1578.

rules for determining sufficiency of indictments. Const., § 1580.

CRUEL AND UNUSUAL PUNISHMENTS. See *Constitution of the United States, 4, j; Ex Post Facto Laws*.

CURRENCY. See *Constitution of the United States, 3, s; Taxation*.

D.

DAMS. See *Regulation of Commerce, 2, i*.

DARTMOUTH COLLEGE. See *Obligation of Contracts, 4*.
case of. Const., §§ 2099-2117.

DEBT.

constitutional provision limiting amount of state debt construed. Const., § 2616.

DECISIONS. See *Judicial Power; State Decisions*.

DECLARATORY STATUTES. See *Legislative Power, 5; Statutes*.

DEEDS.

territorial act validating deed, void because wife could not convey by attorney, upheld. Const., § 79.

executed without due formality, may be legalized. Const., §§ 1749-50, 1849-51.

DEFINITIONS.

"and" means *or*, when. Const., § 2788.

when not. Const., § 2799.

"at" and "from." Const., § 2790.

"annually" means every year, when. Const., § 2796.

DEFINITIONS — *Continued.*

- "any person," in the fourteenth amendment. Const., § 801.
- "blood" includes half blood, when. Const., § 2795.
- "call forth," in federal constitution. Const., § 183.
- "case" and "cause" are synonymous. Const., § 978.
- "commerce," see *Regulation of Commerce*, 1, d, h.
- "citizen of the United States," in the fourteenth amendment. Const., § 801.
- "correct description" of land, in lien law. Const., § 1647.
- "contract," see *Obligation of Contracts*, 1, b; 2, b; 4, b.
- "employed in service," in federal constitution. Const., § 183.
- "crew" may include officers as well as seamen. Const., § 2932.
- "corporate purpose" of laws as to municipal bonds. Const., § 2808.
- "from" and "at." Const., § 2790.
- "gift, descent or devise" means direct transmission, and not through others. Const., § 8081.
- "going off large" means having wind free on either tack. Const., § 2783.
- "goods, chattels and effects" includes notes. Const., § 2177.
- "inhabitants" means voters, when. Const., § 2800.
- "involuntary servitude." Const., § 779.
- "impost" may be a tax on passengers as well as on goods. Const., § 1309.
but see *Regulation of Commerce*.
- "knowingly and wilfully" means both. Const., § 2799.
- "law of the land" means due process of law. Const., § 2529.
- "liberty" is freedom from all restraints except such as are imposed by law. Const., § 800.
- "laws of the several states" means statutes, in the judiciary act. Const., § 2819.
- "life" includes all the means and faculties of its enjoyment. Const., § 1359, p. 729.
- "may," when construed shall. Const., § 2786.
- "month," means a calendar month. Const., § 2791.
- "monopoly." Const., §§ 786, 2071-73.
- "necessary," in the federal constitution. Const., § 387.
- "or," and means or, when. Const., § 2788.
cannot mean and, when. Const., § 2789.
- "officer of election" excludes state governor, when. Const., § 2773.
- "obligation," see *Obligation of Contracts*, 1, e.
- "persons" includes corporations, when. Const., § 2794.
- "permanently," in act establishing county seat. Const., § 1804.
in grants; residence, etc. *Id.*
- "property" includes railway rolling stock, real estate, and franchise. Const., § 2304.
- "property used for schools," "property for school purposes." Const., § 2810.
- "prosecution," in the Removal Act. Const., § 2497. See § 2469.
- "such" generally refers to last antecedent. Const., § 2784.
- "sovereignty." Const., § 3147. See *Constitution of the United States*, 2, 9.
- "shall" and "may," how construed. Const., §§ 1906, 2785-87.
- "state." Const., §§ 142, 1585.
- "transport" in any wagon, etc., or otherwise, does not include driving on foot. Const., § 2802.
- "tonnage" is the internal capacity of a vessel, each ton being one hundred cubic feet. Const., § 1418.
- "white person" excludes Mongolian. Const., § 2774.
- "will" and "shall" have no fixed meaning. Const., § 2787.
- "wilfully" means with a wrong and criminal intent. Const., § 2797.
knowingly and wilfully means both. Const., § 2799.
- "year" means official year, when. Const., § 2792.

DELAWARE.

- constitutional provisions as to suffrage and jury duty. Const., §§ 966-67.
were abrogated by the fifteenth amendment. Const., §§ 968-69.

DELEGATION OF POWER. See *Legislative Power*, 7.DEPARTMENTS. See *Constitution of United States*, 6, d.

DEPOSITIONS.

- acts for taking, strictly construed, as in derogation of common law. Const., § 2808.

DEPUTY MARSHAL. See *Constitution of United States*, 3, o.

- appointment may be vested in federal courts for congressional elections. Const., §§ 244, 342.

DESECRATION OF THE SABBATH. See *Sabbath*.DIRECTORY STATUTES. See *Construction of Statutes*, 7; *Statutes*.
constitutional provisions. Const., § 56.

DISCUSSION AND PETITION.

- provision as to, does not authorize congress to punish disturbance of assemblies. Const., § 108.

DISSOLUTION. See *Corporations*, 7.

DISTILLERS.

for taxation of, see *Constitution of United States*, 8, t.

DISTRICT OF COLUMBIA.

federal power of taxation in, derived from general grants of the constitution; direct taxes are according to population. Const., § 467.
validity of Maryland laws in. Const., § 2522.
common law in force in. Const., § 3093.

DISTURBING ASSEMBLIES.

congress cannot punish under first amendment. Const., § 108.

DOMESTIC VIOLENCE. See *Constitution of United States*, 9, d.

DOUBTFUL QUESTIONS. See *Construction of Constitutions; Statutes*, 14.

DOWER.

deeds in which wife joined, but not executed with due formality, may be legalized. Const., §§ 1749-50.

DUE PROCESS OF LAW. See *Trial by Jury*.

1. IN GENERAL.

action by attorney-general on cause of action belonging to a corporation, prohibited. Const., § 242.
a disability to hold office is a penalty; "life," "liberty" and "property" may include injury to feelings or degradation. Const., § 611.
in the "pursuit of happiness" all avocations, honors and positions are open to all. Const., § 612.
auditing accounts of receiver of public money, and collecting same by distress warrant, not an exercise of "judicial power." Const., § 681.
the fifth amendment restricts the United States; the fourteenth the states. Const., §§ 695, 718-16.
the provision extends to all state action through any department. Const., § 716.
construction of this provision. Const., § 959.
rights of property cannot be taken away without; but the law may be changed at the legislative will or whim. Const., § 1858.
meaning of, in Michigan constitution. Const., § 2618.
extradition under treaty has no relation to. Const., § 88.
such provisions are liberally construed. Const., § 1864.
a state may authorize the sale of land conveyed by it, for debts due it by the grantee. Const., §§ 1835-42.
means the same thing as law of the land. Const., § 2529.

2. WHAT IS DUE PROCESS OF LAW; WHAT IS NOT.

intended to convey same idea as "law of the land" in *Magna Charta*. Const., §§ 664, 676, 691, 701.
refers to the settled modes of proceeding of the common law, as modified by statute existing prior to the Revolution. Const., §§ 664, 677; p. 815, vol. 6; 715.
but the term has never been satisfactorily defined. Const., §§ 665, 702, 705.
within the states, is regulated by the existing law of the states. Const., §§ 666, 690-92.
summary methods to collect debts due the government are ancient and universal, and are valid. Const., §§ 668, 678-79, 687, 728-29.
generally implies parties, pleadings, judge, contention and regular trial; but this is not universally true. Const., § 680.
auditing accounts of collector and collecting them by distress, valid. Const., §§ 687, 728-29.
process for, not a search warrant; need not be sworn to. Const., § 688.
trial without a jury, under the constitution and laws of a state, is. Const., §§ 669, 690-92, 694.
does not necessarily imply delay. Const., §§ 670, 698.
rule on incumbent of office, to show cause within twenty-four hours, tried at once without jury, appeal to be within one day, valid. Const., §§ 671, 693-94.
taxation by a state, though unjust, is not taking property without due process of law. Const., §§ 672, 698-700, 710-12.
the general system of collection of taxes is. Const., §§ 696, 706, 727.
a state cannot make anything it chooses due process. Const., § 708.
does not imply a regular proceeding in court. Const., §§ 675, 704, 710.
where fixing of assessment is submitted to court, with notice to owner and right to contest, this is due process. Const., § 707.
legal remedy is not denied by imposition of security. Const., § 712.
trial by *de facto* judge is. Const., § 717.
statute declaring that a judicial determination that a man is dead, made in his absence, and without notice to him or process, shall be final, is void. Const., § 718.
property may be taken, on just compensation, for public use. Const., § 719.
condemnation proceedings are. Const., § 720.
quare, whether law forbidding sale of liquor owned at time of passage of act is valid. Const., § 721.

- DUE PROCESS OF LAW: WHAT IS DUE PROCESS OF LAW: WHAT IS NOT—** *Continued.*
controlling use of street by railroad. Const., § 722.
sale to satisfy state lien, valid. Const., § 723.
property devoted to public use is subject to public regulation. Const., § 724.
seizure and sale of vessel without notice, for violating the "oyster law," are valid. Const., § 725.
production of books before revenue commissioner, by attachment, valid. Const., § 726.
law putting the landing and slaughtering of animals in a large city into the hands of a corporation exclusively is valid. Const., §§ 731-39, 750-51, 752-801.
grant of exclusive corporate privileges, valid. Const., § 773.
women may be deprived of right to vote. Const., § 814.
this provision secures the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private right. Const., §§ 905, 2522-25.
regulating warehouse charges for storing grain not within the provision. Const., §§ 1352, 2159.
the thirteenth amendment did not abrogate prior contracts as to slaves; to so hold would be within this provision. Const., § 1593.
betterment acts, giving lien for improvements in ejectment, valid. Const., § 1711.
a law providing for the seizure of liquors, and summary proceedings thereon, held void. Const., §§ 2529, 2576.
summary process as to seizing vessels violating the "oyster law" of Maryland, valid. Const., § 2617.
3. **WHAT ARE "LIFE, LIBERTY OR PROPERTY."**
may include injury to feelings, or degradation. Const., § 611.
by "life" is meant all those limbs, and those faculties, by which it is enjoyed. Const., § 1363, p. 729.
"liberty" is more than freedom from restraint. *Id.*; § 800.
"property" is everything having an exchangeable value, including labor. Const., § 800.

DUTIES AND IMPOSTS. See *Regulation of Commerce*, 7.

DUTIES ON TONNAGE. See *Regulation of Commerce*, 6.

E.

ELECTIONS. See *Constitution of the United States*, 3, o; *Suffrage*.

ELEEMOSYNARY CORPORATIONS.

nature, powers, etc. Const., § 2110.

EMBARGO.

of 1807, was constitutional. Const., § 1228.

EMIGRANTS. See *Regulation of Commerce*, 1, a, b, c.

EMINENT DOMAIN. See *Constitution of the United States*, 9; *Taxation*.

1. IN GENERAL.

- one street railway may take right of former company. Const., § 68.
fee may be taken for a boom. Const., § 69.
right of, over shores and bed of navigable rivers is in the state. Const., § 305.
was a right reserved to the states. Const., § 306.
congress cannot grant bed below high-water mark, in a state. Const., § 307.
state right to license ferries a reserved power. Const., § 308.
state may lay highway through public lands. Const., § 311.
of congress, in respect to post-roads. Const., §§ 1047-48.
power of, superior to private vested rights. Const., § 2188.
franchises may be resumed or extinguished. Const., § 2190.
railroad may be empowered to cross prior road without impairing any contract. Const., § 2214.

2. WHAT IS A TAKING.

regulation of railroad rates is not, nor improvement of harbor by special assessment. Const., §§ 70, 71.

3. WHEN TITLE VESTS.

under charter providing that, on payment or tender, the company "shall be entitled," etc., not until payment or tender. Const., § 603.

4. WHAT IS "PROPERTY." See *Definitions; Due Process of Law*.

the flooding of land is a taking of property. Const., § 1364.
franchises may be resumed or extinguished. Const., § 2190.

ENACTMENT OF LAWS. See *Statutes*, 2.

ENFORCEMENT ACT. See *Due Process of Law; Suffrage*.

requisites for indictment under; must show offense against federal constitution or laws. Const., § 898.

ENUMERATED POWERS. See *Constitution of the United States*, 2.

EQUAL PROTECTION OF THE LAWS. See *Privileges and Immunities of Citizens*.

1. IN GENERAL.

citizenship is unnecessary to the protection; residence enough. Const., §§ 1001, 1002.
 grant of exclusive corporate privileges, valid. Const., § 774.
 this provision was aimed at state discrimination against the blacks. *Id.*
quære whether it applies to any other race. *Id.*
 this provision gives legal equality to all. Const., § 800.
 the subject of marriage, and its regulation, is exclusively within state control. Const., §§ 857-59, 880-895.
 meaning of this provision. Const., §§ 961, 1009.
 a state may abridge the privileges of its own citizens. Const., § 885.
 congress simply has power to see that the states impair no one's rights. Const., § 907.
 the provision is simply a guaranty, and the power to enforce it is the only one conferred. Const., § 907.
 the fifteenth amendment does not protect persons in the enjoyment of equal privileges. Const., § 914.
 the fourteenth amendment does not protect against acts of persons, but of states. Const., §§ 915, 921, 945, 1008.
 is to be liberally construed, to secure equal civil rights to the colored race. Const., §§ 869, 920-21.
 contains prohibitions, and not creations of rights; congress has, therefore, no general power of legislation under it. Const., §§ 838-39.
 but express power is given to enforce it by appropriate legislation; act for removal of causes is valid. Const., §§ 873, 927, 941-62, 1010.
 causes which led to its adoption. Const., § 958.
 grants equal protection but not equal privileges. Const., § 890.
 act of 1863 abrogates state laws excluding testimony of colored persons. Const., § 979.
 such provisions are liberally construed. Const., § 1364.

3. WHAT IS A VIOLATION OF THIS PROVISION; WHAT IS NOT.

laws prohibiting marriage between white and black races, and punishing the white alone, are valid. Const., §§ 857, 880-81, 884.
 state laws attempting to compel interstate carrier, enrolled as a coasting vessel of the United States, to extend equal privileges to colored and white persons, are void, as interfering with interstate commerce. Const., §§ 1111, 1140-63.
 laws punishing adultery between white and colored persons more severely than in other cases, but not discriminating against either race, valid. Const., §§ 858, 882.
 state laws denying to the blacks, on account of their color, the right to sit on juries, are void. Const., §§ 963-64.
 a marriage contracted out of a state, for the purpose of violating its laws, not protected. Const., § 894.
 the colored people have no right to be educated in the same schools, but simply to have equal facilities for education; separate schools may be established. Const., §§ 861, 896-97. See §§ 1154-55.
 children may be classified as to age and sex. *Id.*
 conspiracies to prevent persons from voting are not punishable, unless they are on account of their race and color. Const., §§ 908, 909. See § 1011.
 section 5519, R. S. U. S., providing punishment of conspiracies to deprive any one of the equal protection of the laws, is void; the constitution does not prohibit acts of persons, but of states. Const., § 916.
 such act punishes acts of whites against whites, or blacks against blacks, as well as white against black, and is *ultra vires* of congress. Const., § 917.
 state laws confining the selection of jurors to the white race are void as to the colored race. Const., §§ 869, 922-24, 961.
 may discriminate in prescribing qualifications, but not against race or color. Const., § 925.
 the colored man is not entitled to a mixed jury, but only that the laws shall not confine its selection to the white race. Const., §§ 870, 920, 925, 929.
 a violation of the amendment by discriminations on the trial, or by officers in selecting jury, may be reached by removal of the record. Const., § 934. See § 1013.
 the fact that a statute is applied only to large cities does not bring it within the provision. Const., § 1359.
 the fourteenth and fifteenth amendments abrogated all conflicting provisions of state constitutions and statutes. Const., §§ 968, 969.
 if the laws of a state discriminate, or if its officers do so under equal laws, this is a denial of rights under this provision. Const., §§ 875, 965, 970, 1013.
 what facts show discrimination. Const., § 973.
 purposely excluding colored persons, for their color, from juries, by the summoning officers, sufficient. Const., § 971.
 refusal of a state to redress wrongs of its citizens amounts to a denial of right. Const., § 974.
 Maryland laws discriminating against colored apprentices, held void. Const., §§ 1599, 1600.

EQUAL PROTECTION OF THE LAWS: WHAT IS A VIOLATION OF THIS PROVISION; WHAT IS NOT — Continued.

though colored persons are not allowed to testify, yet a prosecution of a white person for a crime witnessed by them is not within the provision. Const., §§ 878, 975. See § 1022.

even though the crime was the murder of a negro, and negroes only witnessed it. *Id.* but a denial to colored persons of right to testify is. Const., § 980.

a state law forbidding corporations employing natives of a particular country, is void. Const., §§ 879, 982-991.

such act discriminating against Chinese is in violation of the Burlingame treaty. *Id.*; §§ 1003-4.

citizenship unnecessary; residence sufficient. Const., §§ 1001-2.

city ordinance regulating the operation of one of several corporations, is valid. Const., § 2160.

a state may lawfully establish separate tribunal for part of its territory and limit appeals thereto. Const., § 1014.

demanding bond on landing Chinese; cutting their hair and prohibiting their fishing in state waters, void. Const., §§ 1016-17, 1019.

but an act forbidding exhumation, applied to all classes, valid. Const., § 1018.

city may exclude railroad from certain street, where it does not appear that other roads use it. Const., § 1020.

warehouse charges may lawfully be regulated. Const., § 1021.

8. REMOVAL OF CAUSES.

under the express power to enforce the fourteenth amendment by appropriate legislation, congress may provide for, from state courts. Const., § 927.

right of, extends to all cases of infringement of the amendment. Const., § 828.

if the state law infringes the amendment, the removal may be before trial, under R. S., § 641; if the law be valid, but discrimination be made by officers, or on the trial, the record may be removed for revision. Const., § 934. See §§ 876, 937-38, 965, 970.

4. PROCEDURE.

indictment under enforcement act must show offense under constitution or laws. Const., § 898.

and show that the acts were on account of race and color. Const., § 906.

indictments showing only a breach of the peace do not make a case of federal jurisdiction. Const., § 910.

the uncontradicted affidavit of a colored person, showing the exclusion of his race from juries, is sufficient to quash indictment against him. Const., §§ 877, 972.

EQUITY. See Jurisdiction, 9; State Decisions; Trial by Jury.

having jurisdiction to decree specific performance, if that cannot be effected will grant alternative relief. Const., § 1182.

ESTOPPEL.

to assert act to be unconstitutional. Const., §§ 46, 47.

dismissal of bill without prejudice is not an. Const., § 1181.

of party, to object to order obtained by himself. Const., § 1886.

a state may fix railway rates though it votes as a stockholder in the corporation. Const., § 2148.

EVIDENCE.

1. IN GENERAL.

self-accusation, see *Constitution of the United States*, 4, h.

recital of fact in preamble of statute is evidence thereof. Const., § 2624.

of answers in equity, of one defendant against another. Const., § 2357.

admissibility of foreign laws, see *Foreign Laws*.

certificates of consuls. Consuls, §§ 65, 89-92.

what is necessary of foreign laws. Const., §§ 8123-8135.

concerning statutes, see *Statutes*, 18.

seals of nation, not recognized by the political power of the government, are not received by the courts as authentic. Const., § 2446.

2. PRESUMPTIONS.

laws presumed valid. Const., § 29.

from passage of act, that condition precedent existed. Const., § 50.

from levy on land, that there were no chattels. Const., § 689.

that bank notes properly issued. Const., § 1818.

3. JUDICIAL NOTICE.

federal courts notice general statutes of a state. Const., § 530.

so of federal statutes. Const., § 2699.

and of time of taking effect and construction. Const., §§ 2701-2703.

none taken of the jurisdiction of consuls. Consuls, §§ 2, 15.

of state laws by federal courts. Const., § 8032.

4. CONSTITUTIONAL LAW.

an act so changing burden of proof as to make proof impossible is void, as impairing contract obligation. Const., § 1709.

5. PAROL TO VARY WRITTEN.

dates of contracts may be contradicted. Const., § 2700.

EXCESSIVE FINES. See *Constitution of the United States*, 4, j.

EXECUTIONS.

levy on land *prima facie* evidence that there were no chattels. Const., § 689.

EXECUTIVE POWER. See *Constitution of the United States*, 6; *Legislative Power*, 2.

EXEMPTION FROM TAXATION. See *Obligation of Contracts*, 5.

EXEMPTIONS.

laws as to do not apply to the government. Const., § 2634.

EXHIBITION. See *Protection to Property*, 1; *Show*.

EXPATRIATION.

is a right given by international law, though denied by the common law. Const., § 3231.

EXPORTS. See *Constitution of the United States*, 4, i; *Regulation of Commerce*, 7.

EX POST FACTO LAWS. See *Bills of Attainder*; *Legislative Power*.

IN GENERAL.

laws changing place of trial are not. Const., §§ 567, 580.

render an act punishable which was not punishable when committed. Const., §§ 581, 587.

literal meaning of the term. Const., § 586.

relate only to crimes. Const., § 592. And pains and penalties, §§ 596-97, 599, 602, 650.

history of, in England; causes which led to the prohibition on the states. Const., § 585.

whether annulling a state executed grant is an. Const., § 1810.

laws making acts innocent when done, criminal; aggravating a former crime; increasing punishment for previous crime; or altering rule of evidence as to crime, are, and are void. Const., §§ 588, 609, 617; 618, p. 285; 634, 651.

other laws of retroactive application are retrospective laws. Const., § 589.

defined in various constitutions. Const., § 596.

laws or constitutional provisions requiring oath of past loyalty as a condition of holding office or practicing law, in effect increase the punishment for past offenses, and are void. Const., §§ 573-74, 576-78, 610-11, 616, 619, 621.

laws forfeiting estate of grantee for crime of grantor, void. Const., § 652.

laws imposing taxes according to previous assessments, not. Const., § 653.

the constitution applies as well to proceedings to enforce penalties or forfeitures as to crimes. Const., § 654.

law authorizing district courts to require production of books and papers in revenue cases, under pain of conviction, void. *Id.*

the convention of extradition between United States and Italy not *ex post facto*. Const., § 655.

the general intent of the provision is to prevent arbitrary legislation. Const., § 1961.

imposing penalty for not having paid additional revenue tax. Const., § 2711.

as to retrospective laws, see *Legislative Power*; *Vested Rights*.

setting aside probate decree and granting new trial, not. Const., § 590.

act passed after citizen's death, requiring his executor to pay tax on property of his estate of legatees not in the state, is not. Const., §§ 570, 600-602.

EXTRADITION. See *Constitution of the United States*, 11, c; *Law of Nations*.

has no relation to "searches and seizures" or "due process of law." Const., § 83.

F.

FAITH AND CREDIT. See *Constitution of the United States*, 13.

FEDERAL COURTS. See *Constitution of the United States*, 7; *Courts*; *Courts Martial*; *Jurisdiction*; *State Decisions*.

FEDERAL QUESTIONS. See *Constitution of the United States*, 7, c.

FERRIES. See *Obligation of Contracts*, 4, b.

right of states to license, a reserved power. Const., § 308.

fully considered. Const., § 2076.

right to be authorized by states over the Mississippi not affected by the ordinance of 1787. Const., § 3170.

FIFTEENTH AMENDMENT. See *Equal Protection of the Laws*; *Suffrage*.

FINES. See *Constitution of United States*, 4, j.

FISH.

states own, within jurisdiction. Const., § 321.

FISHERY.

rights of, discussed. Const., § 2170.
regulation of rights of. Const., §§ 2172-78.

FLORIDA.

effect of her admission, on judicial system. Const., § 278.

FOREIGN COMMERCE. See *Regulation of Commerce*, 1, c.

FOREIGN CORPORATIONS. See *Removal of Causes*.

are not citizens within federal constitution; state may exclude. Const., §§ 1048, 1052-59.
powers in state other than that of their creation; must be with its consent. Const., § 1049-50.
are exercised only by comity. Const., §§ 1056-57.
states may impose conditions on, as to doing business in it, revoke their licenses, etc., without giving any reason. Const., §§ 2512-14.
may be taxed higher than domestic, under constitutional rule of uniformity. Const., § 2506.

FOREIGNERS. See *Aliens; Law of Nations*.

FOREIGN LAWS. See *Conflict of Laws*.

how far recognized by comity. Const., §§ 8112-14.
are noticed by courts of admiralty. Const., §§ 8117-18.
are not presumed the same as those of this country. Const., § 3119.
in the absence of proof of the *lex loci*, the maritime law prevails as to contract for services of sailing master. Const., § 8120.
foreign marriage not presumed valid without proof of. Const., § 8121.
the construction sanctioned by the foreign courts must be given in cases of doubt. Const., § 8122.
how proved; by the laws or statutes themselves, or parol evidence thereof. Const., § 8123. See § 8127.
statute law is to be proved by itself; the customary law by parol. Const., §§ 8124, 8129.
this rule may be varied by statute. Const., § 8129.
must be pleaded and proved as a fact. Const., § 8125.
what degree of proof required. Const., § 8126.
parol evidence not admissible, when it is presumed that the subject would be regulated by statute. Const., § 8127.
nor to show a commercial regulation, without proof that a copy of the law could not be obtained. Const., § 8128.
an exemplified copy of a statute is *prima facie* evidence that it has been passed. Const., § 8130.
printed English statutes, from the queen's printer, are admissible. Const., § 8131.
must be by the best evidence the case admits of. Const., § 8132.
edicts of Portugal, certified to be copies of originals by the American consul at Lisbon, who was not sworn, are not evidence. Const., § 8132.
a certificate of a foreign minister, transmitted to this country through the office of secretary of state, admissible. Const., § 8133.
how unwritten law of England proved. Const., § 8134.
one admitted to practice in a foreign country is a competent witness. Const., § 8135.
must be pleaded specially. Consuls, § 15; Const., § 8125.

FOURTEENTH AMENDMENT. See *Due Process of Law; Equal Protection of the Laws; Obligation of Contracts; Suffrage*.

FRANCHISES. See *Corporations; Obligation of Contracts*, 4.

granted by states, *quere* whether taxable by congress. Const., § 425.
construction of grants from the sovereign. Const., §§ 2065-68, 2068-70.
Charles River and Warren bridges. Const., §§ 2058-82.

CONSTITUTIONAL LAW. See *Obligation of Contracts*, 4, b.

the time for their exercise may be limited. Const., § 1853.

FUGITIVES FROM JUSTICE.

as to state power to exclude foreign, see *Regulation of Commerce*, 1, c.

FUGITIVE SLAVE LAW. See *Constitutional Law*, 9.

FULL FAITH AND CREDIT. See *Constitution of the United States*, 18.

G.

GEORGIA.

constitutional provision construed. Const., §§ 854-55.
increasing exemptions of debtor held void as to existing liens. Const., §§ 1859-60.
adopted under reconstruction acts, were not dictated by congress, and cannot impair contract obligations. Const., § 1742.
common law in force in. Const., §§ 8095-97.
proclamation by king of Great Britain of 1763 did not alter boundaries of. Const., § 1811.

GOVERNMENT. See *Constitution of the United States*, 2, 9; *Law of Nations*.
laws affecting the, see *Statutes*, 1.

GOVERNMENT CONTRACTS. See *Construction of Statutes*, 18.

GRAND JURY. See *Constitution of the United States*, 4, d.

H.

HABEAS CORPUS.

federal supreme court may exercise appellate jurisdiction in. Const., § 326.
cannot be used as a writ of error, except; generally reaches only want of jurisdiction.

Const., §§ 327, 349.

lies, if act under which imprisonment made is unconstitutional. Const., § 328.

how writ allowed by federal supreme court. Const., § 343, p. 118.

writ from federal to state court not granted as a matter of course, but only when the
petition shows a violation of the federal constitution or laws. Const., § 383.

when federal supreme court has jurisdiction of. Const., §§ 341-42, 349.

suspension of writ. Const., § 287.

HARBOR REGULATIONS. See *Regulation of Commerce*, 2, j.

HEALTH. See *Police Power*.

HIGH SEAS. See *Law of Nations; Regulation of Commerce*.

I.

ILLINOIS.

constitutional provision as to uniformity of taxation construed. Const., §§ 2595, 2597.

IMMIGRANTS.

relative powers of states and congress as to, see *Regulation of Commerce*, 1, a, b, c.

clause of the federal constitution concerning, construed. Const., § 1327.

IMMUNITIES. See *Privileges and Immunities of Citizens*.

of consuls, see *Consuls and Ministers*.

IMPAIRING CONTRACTS. See *Obligation of Contracts*.

IMPEACHMENT. See *Constitution of the United States*, 3, d.

IMPLICATION. See *Construction of Statutes*.

IMPORTS. See *Regulation of Commerce*, 7.

IMPOSTS. See *Regulation of Commerce*, 7.

IMPRISONMENT FOR DEBT. See *Obligation of Contracts*.

law abolishing, affects pending actions. Const., § 2733.

INDIANA.

construction of constitutional provision as to distribution of school funds. Const.,
§ 2608.

INDIAN RESERVATIONS.

within the states, congress cannot punish crimes on. Const., § 505.

INDIANS. See *Regulation of Commerce*, 1, 1.

title of, does not prevent seizin in fee in the state. Const., § 1812.

INDICTMENT. See *Constitution of the United States*, 4, h; *Criminal Pleading*.

INFERIOR OFFICERS.

appointment of, see *Constitution of the United States*, 3, j.

INJUNCTIONS.

acts cannot be enjoined as violations of the constitution unless some act done or
threatened. Const., § 115.

how courts act as to. Const., § 3160.

disobedience of, not punished where act enjoined afterwards adjudged to be authorized
by act of congress. Const., § 1212.

agent restrained from paying over to principal beyond process. Const., § 2372.

to prevent transfer of article, which, if transferred, will be lost to owner. Const.,
§ 2373.

right to, need not be first established at law. Const., § 3153.

principles on which granted. Const., § 3159.

what must be shown in order to be entitled to. Const., § 3162.

INSOLVENT LAWS. See *Bankruptcy; Obligation of Contracts*, 3.

INSPECTION LAWS. See *Regulation of Commerce*, 7, 1.

INTENTION OF THE LEGISLATURE. See *Construction of Statutes*, 2.

INTEREST.

not allowed on money while its use is restrained by injunction. Const., § 2369.
rate cannot be lessened, except in Virginia. Const., § 1733.

INTERNAL REVENUE. See *Constitution of the United States*, 3, t; *Regulation of Commerce*, 7.

INTERNATIONAL LAW. See *Law of Nations*.

INTERPRETATION. See *Construction of Statutes; Construction of Constitutions*.

INTERSTATE COMMERCE. See *Regulation of Commerce*.

INTOXICATING DRINKS. See *Liquors*.

INVOLUNTARY SERVITUDE. See *Constitution of the United States*, 5, h.

IOWA.

how far ordinance of 1787 in force in. Const., § 3187.

IRREPEALABLE LAWS. See *Legislative Power*, 4; *Obligation of Contracts*, 4, c.

J.

JOINT RESOLUTIONS. See *Constitution of the United States*, 3, k.

JOURNALS OF THE LEGISLATURE. See *Construction of Statutes*, 2, c; *Legislative Journals*.

JUDGMENTS.

full faith and credit, see *Constitution of the United States*, 13.
dismissal of bill without prejudice, not an adjudication. Const., § 1181.
validity determined by local practice as to its amount, when. Const., § 2002.

CONSTITUTIONAL LAW.

there are no vested rights in, so as to prevent rehearing. Const., § 77.
lien may be limited; set-off obtained after judgment may be made valid. Const., §§ 1761-62.

JUDICIAL DECISIONS. See *State Decisions*.

JUDICIAL NOTICE. See *Evidence*, 3.

JUDICIAL POWER. See *Constitution of the United States*, 7; *Legislative Power*, 3.
federal constitution does not prevent exercise by state legislature. Const., § 78.
of consuls and ministers, see *Consuls and Ministers*, 3, 4.

JURISDICTION. See *Constitution of the United States*, 7; *Habeas Corpus; Removal of Causes; Territorial Courts*.

1. IN GENERAL.

congress cannot confer on state courts. Const., § 171.
but states may authorize their own courts to enforce laws of congress. Const., § 172.
See §§ 189-90.

of consuls, etc., see *Consuls and Ministers*.

when concurrent, sentence of either court pleaded in bar in the other. Const., § 175.

absence of federal, of offenses against the United States, does not give states jurisdiction of them. Const., § 188.

criminal of United States cannot be delegated to state tribunals. Const., § 187.

personal jurisdiction cannot be gained except by service within the state, or voluntary appearance. Const., § 715.

"case" and "cause" are synonymous. Const., § 978.

grant of, to a court, does not signify that it is exclusive. Consuls, § 23.

federal court may restrain state officer from acting under unconstitutional law. Const., § 2370.

whenever it depends on the party, it is the party named in the record. Const., § 2390.

in proceedings against state officers, they are the real parties in interest. Const., § 2381.

is commensurate with rights and duties created by the federal constitution. Const., § 2388.

none exists of a common, on lands ceded by Spanish treaty, since the government is not one of general powers. Const., § 2339.

is determined ultimately by the federal supreme court. Const., § 2390.

congress cannot withdraw judicial matters, nor subject matters not judicial to the jurisdiction. Const., § 2392.

JURISDICTION, IN GENERAL — *Continued.*

Congress may give federal courts jurisdiction by removal or otherwise of federal questions affected by state legislation. Const., § 2393.

may be made exclusive by congress; if not so made, the state courts have concurrent. Const., § 2403.

Courts cannot interfere to enforce state bonds unless authorized thereto by the state. Const., § 2449.

as to the constitutional law of removal of cases to the federal courts, see *Removal of Causes*.

an agreement beforehand to forego the right of trial by a lawful tribunal is void; courts cannot be so ousted of jurisdiction. Const., § 2505.

orders made without are absolutely void, and confer no right to detain property. Const., § 2538.

district courts have none over proceedings of foreign ministers under treaties. Consuls, §§ 4, 16-19.

not affected by state laws. Const., § 2419.

state cannot enlarge the powers of the federal courts. Const., § 2420.

nor confer federal jurisdiction. Const., §§ 2421-23.

2. OF SUPREME COURT.

a. *In general.*

cannot give an abstract opinion on the constitutionality of a state law. Const., § 2399.

b. *Original.*

prosecution of a person for assaulting an ambassador not a cause affecting the latter. Const., § 977.

is limited and special; its acts beyond it are null. Const., § 2394.

is only that enumerated in the constitution; all other is appellate. Const., § 2395.

act for issuing *mandamus* in cases not within, void. Const., § 2400.

suits against foreign ministers. Const., § 2377. See *Consuls and Ministers*.

c. *Appellate.*

may be exercised in *habeas corpus*. Const., § 326.

where judgment of conviction attacked as founded on an unconstitutional law. Const., § 328.

in suits affecting a state, exists whenever the state is not directly a party to the record. Const., §§ 2063-64.

in suits in state supreme courts, when the construction of federal law is in question. Const., § 2336.

certificate of division, need not state that it was granted at the request of either party. Const., § 312.

practice on. *Id.*

3. OF CIRCUIT COURTS.

have exclusive jurisdiction of offenses under the federal laws, and concurrent with district courts of offenses there cognizable. Const., § 482.

had, of actions respecting the United States Bank. Const., §§ 2357, 2363, 2365.

Congress may confer on, whenever a federal question is involved. Const., § 2364.

an act of congress is necessary before they can take. Const., § 2391.

4. CONTROVERSIES BETWEEN STATES.

the jurisdiction discussed. Const., § 2375.

to determine boundary, United States may intervene. Const., § 2397.

5. — BETWEEN A STATE AND THE CITIZENS OF ANOTHER STATE.

jurisdiction discussed. Const., § 2376.

exists when. Const., § 2404.

the eleventh amendment does not prevent a state being a *plaintiff*. Const., § 2403.

6. — TO WHICH THE UNITED STATES IS A PARTY.

jurisdiction discussed. Const., § 2378.

7. — BETWEEN CITIZENS OF DIFFERENT STATES.

jurisdiction discussed. Const., § 2379.

8. BETWEEN A STATE, ETC., AND FOREIGN STATES, CITIZENS OR SUBJECTS.

Cherokee nation not a "foreign state." Const., § 2398.

9. CHANCERY JURISDICTION. See *Equity*.

federal, cannot be abridged or modified by the states. Const., § 2401.

is that conferred by congress, and exercised by the high court of chancery of England. Const., § 2402.

10. ADMIRALTY JURISDICTION.

does not extend to all cases within the jurisdiction of the British courts at the adoption of the constitution. Const., § 2431.

is determined by the laws of congress, decisions of supreme court, and local usage. *Id.*

cases of, are not ones arising under the constitution and laws of the United States. Const., § 2452.

not subject to state law. Const., §§ 2453, 2454, 2462.

the judiciary is to determine its limits. Const., § 2455.

JURISDICTION, ADMIRALTY JURISDICTION — Continued.

does not depend on the regulation of commerce. Const., § 2456.
 extends to rivers navigable to the sea, though above tide water. Const., § 2457.
 but not to contracts for shipments on the great lakes between ports of same state.
 Const., § 2458.
 nor on rivers wholly within a state. Const., § 2459.
 otherwise as to certain cases on the great lakes and rivers flowing into them, under
 the act of 1845. Const., § 2460.
 the act of 1789, giving the district courts exclusive, saving to suitors the common law
 remedy, is valid. Const., § 2461.
 all state legislation as to, except as to the common law remedy, is void. Const., § 2463.
 the states may provide for liens in respect to supplies for domestic vessels, furnished
 within the state, if not a regulation of commerce, and within the common law
 remedy. Const., §§ 2464-66.
 certain act of Alabama held void. Const., § 2467.
 a state law giving an action for death by the negligence of a carrier, is valid. Const.,
 § 2468.

11. CONCURRENT JURISDICTION.

with the state courts, when. Const., § 2403.

12. SUITS BETWEEN ALIENS. Consuls, §§ 9, 30-32.**JURY. See Trial by Jury.**

statutes confining selection of jurors to one race, to the exclusion of another, are void
 as to the latter. Const., §§ 869, 924-25.
 but persons of one race are not entitled to a mixed jury. Const., §§ 870, 929-40.
See Equal Protection of the Laws.
 discriminations in selecting may be made, but not against race or color. Const., § 925.
 selection of, a ministerial, not a judicial, act. Const., § 947.

JUST COMPENSATION. See Eminent Domain.**JUSTICES OF THE PEACE.**

may be authorized to try offenses, but it must not impair the right to a jury trial.
 Const., § 2539.
 must have jurisdiction of subject-matter and person. Const., § 2540.

K.**KENTUCKY.**

Virginia and Kentucky compact, see *Constitutional Law*, 4.
 acts of, violating this compact, are void. Const., §§ 193, 193.
 Bank of the Commonwealth of Kentucky, nature of. Const., §§ 544, 546, 555.

L.**LAND.**

right to, includes what; rights of restored disseees. Const., §§ 194-95.
 public, disposal of and sovereignty over by congress, see *Constitution of the United
 States*, 3, 1.
 law of the, see *Due Process of Law*.
 laws directing sale of, see *Legislative Power*, 6.

LAW OF NATIONS. See Conflict of Laws; Consuls and Ministers; Foreign Laws.**1. IN GENERAL.**

as to treaties, see *Constitution of the United States*, 18.
 a sovereign is exempt from arrest in a foreign territory. Const., § 3180.
 also foreign troops passing through the country by permission. Const., § 3182.
 such passing is a quasi act of war, and entitles them to war privileges only.
 Const., § 3183.
 but ships of war are not subject to this rule. Const., § 3184.
 is the law of nature; applies to states. Const., §§ 3187-88.
 the common is not one of the sources of. Const., § 3189.
 governs all nations; is part of the law of the land; may be modified by a single power
 as to its own subjects only. Const., §§ 3190-93.
 duties of states as to preservation of peace. Const., § 3209.
 reprisals are not allowed by the, except. Const., § 3214.
 duration of authority of public agent. Const., § 3219.
 in boundary questions, the decisions of the political department are followed by the
 judiciary. Const., § 3220.
 the right of expatriation is given by the, and not by the common law. Const., § 3221.
 aliens may voluntarily enlist by the. Const., § 3222.
 the bad faith of the sovereign does not affect subjects. Const., § 3223.
 who are not alien enemies. Const., § 3224.

LAW OF NATIONS, IN GENERAL — *Continued.*

has no common tribunal. Const., § 8235.
 debts due those who remained American citizens after the Revolution remained in force. Const., § 8236.
 a citizen of one government can obtain redress against a foreign state only through his own government. Const., § 8229.
 the decisions of nations fixing their boundaries bind their subjects and the world. Const., § 8231.
 power of a government to deny right of action on the contracts of its subjects. Const., § 8232.
 the courts cannot recognize a foreign nation until the political power has done so. Const., § 2446.

2. DUTIES OF NEUTRALS.

the government owes to every other friendly nation the duty to compel its citizens to abstain from encouragement of rebellion. Const., §§ 8173, 8175.
 a contract to convey land in Texas, in consideration of money loaned to assist in establishing her independence, before her independence was here acknowledged, is void. Const., §§ 8173, 8177.
 the subsequent acknowledgment of her independence did not validate the contract. Const., § 8178.
 has the constitutional power to control intercourse with other nations, and bind its citizens thereby. Const., § 8178.
 the federal courts had no jurisdiction over a foreign armed vessel of a friendly power putting into a federal port by stress of weather, though her ownership is asserted by American citizens. Const., §§ 8174, 8184-85.
 no inquiry should be made as to the title to the vessel. Const., § 8188.
 the government was not liable for refusing a clearance certificate to a Prussian vessel from New Orleans during the civil war. Const., § 8204.
 required of the United States strict neutrality between Spain and Buenos Ayres during the war between them. Const., § 8210.
 sale of war ship by belligerent to neutral, void. Const., § 8211.
 ship of one belligerent cannot be libeled by the other, in a federal court. Const., § 8212.
 rules of. Const., § 8216.

3. RIGHTS OF BELLIGERENTS.

one may confiscate the property of the other. Const., § 8218.
 the enemy's goods, found on a friendly vessel, are prize of war. Const., § 8215.
 stated. Const., § 8216.
 the colony of Virginia had the right to confiscate debts due by its citizens to British subjects, after the Declaration of Independence. Const., § 8227.
 effect of the treaty of peace, to reinstate such debts. Const., § 8228.

4. INTERNATIONAL OWNERSHIP OR AUTHORITY ON FOREIGN SOIL. See *supra*.

no nation is bound to recognize in its own territory the right of another to its slaves. Const., § 8194.
 when it may interfere on behalf of its subjects. Const., § 8198.
 no nation has any rights whatever in a foreign country. Const., §§ 8200, 8202.
 an officer has no right to enter foreign territory to take property. Const., § 8201.
 a sovereign is exempt from arrest in a foreign country. Const., § 8180.
 also foreign troops passing through by permission. Const., § 8182.

5. NATIONAL SOVEREIGNTY AND PROPRIETORSHIP. See *Constitution of the United States*, 2, 9.

each nation has exclusive jurisdiction within its own limits. Const., § 8195.
 foreigners are subject to local laws, and certain disabilities. Const., §§ 8197, 8199.
 the municipal law of other countries cannot control. Const., § 8196.
 extend to annexed territory. Const., §§ 8205-6.
 rule as to ceded territory. Const., §§ 8207-8.
 is destroyed by conquest. Const., §§ 8217-18.

6. RIGHTS ON THE HIGH SEAS.

each nation has a community of jurisdiction on. Const., § 8195.

LAW OF THE LAND. See *Constitution of the United States*, 15; *Due Process of Law*. means "due process of law." Const., § 2529.

LAWS, ENACTMENT OF. See *Statutes*.

LEGISLATIVE JOURNALS. See *Construction of Statutes*, 2.

consulted by the courts, when. Const., §§ 2686-90.

LEGISLATIVE POWER. See *Bills of Attainder*; *Constitution of United States*, 8; *Ex Post Facto Laws*; *Statutes*.

1. IN GENERAL.

passage of act affords presumption that condition precedent existed. Const., § 80.
 what territory shall be included in a city is a question of. Const., § 303.
 as to general power of the state, see *Constitution of the United States*, 9.

LEGISLATIVE POWER, IN GENERAL — *Continued.*

in exercise of police power may confer same power on private corporation as on municipal corporation. Const., § 757.

exclusive privileges may be granted to persons or corporations. Const., § 758.

when the legislative power exists, the legislature is sole judge of matters of expediency. Const., § 1354.

motives of legislators not inquired into in a private contest. Const., § 1806.

a grant of, confers all powers to accomplish the end. Const., § 2150.

future legislature cannot be bound, except so far as is implied in the power to make contracts which are inviolable. Const., § 2258.

nor as to taxation. Const., §§ 2264, 2336.

Congress may empower the courts to alter form of process, etc. Const., § 2486.

2. ENCROACHMENTS ON EXECUTIVE.

act submitting claims against the United States to the solicitor of the treasury, upheld. Const., § 2423.

3. COMPARED WITH JUDICIAL POWER.

inherent powers and natural limitations of, what. Const., § 584.

Connecticut legislature has always granted new trials. Const., § 594.

granting new trial wholly judicial. Const., § 595.

valid acts; for settling accounts of state debtor, without notice, and providing for lien on his property. Const., § 103.

when the powers of government are not clearly separated, the legislature may exercise judicial power. Const., § 1888.

void acts.

quare, whether act correcting decision of court is valid. Const., § 588.

4. IRREPEALABLE LAWS. See *Obligation of Contracts*, 4, c.

act cannot bind subsequent legislature. Const., § 57.

5. DECLARATORY LAWS.

construction of existing statute void as to the past, but valid as to the future. Const., §§ 97, 98.

act declaring former law unconstitutional, of no effect. Const., § 99.

law declaring that a certain act did not repeal another is an exercise of judicial power. Const., §§ 2996, 3012.

6. LAWS DIRECTING SALE OF LAND.

private act authorizing sale by order of court, to pay debts, valid. Const., § 103.

see *Ward v. New Eng., etc., Co.*, 1 Cliff. 565. Const., § 2803.

an act directing such a sale for a debt due the state, upheld. Const., §§ 1835-44.

act authorizing trustee to sell, held valid. Const., § 2417.

federal courts do not follow the decisions of state courts under such laws. Const., § 3064.

7. DELEGATION OF.

railroad commission to fix rates may be appointed. Const., §§ 104, 2149.

8. RETROSPECTIVE LAWS. See *Ex Post Facto Laws; Vested Rights*.

void deed or grant may be confirmed. Const., § 100.

so of void sale by foreign or domestic executor. Const., §§ 101, 102.

distinction between, and *ex post facto* laws. Const., §§ 588, 589.

laws setting aside probate decree and ordering re-trial are. Const., § 590.

Connecticut legislature has always exercised power to grant new trials. Const., § 594.

in form, but applying only to future cases, are not. Const., §§ 599, 601.

the only limitation on state power to pass, is that they shall not be *ex post facto* or impair contracts. Const., §§ 571, 603-7, 639, 640, 641.

extreme provisions of Missouri constitution as to disloyalty commented on. Const., vol. 6, pp. 278, 279.

are not void unless made so by constitutional provision; retrospective provision of constitution, valid. Const., § 638.

are laws impairing vested rights, creating new obligations, duties or disabilities in respect to past transactions. Const., § 642.

void in New Hampshire by the constitution. Const., § 644.

law supplying defects of registry of deeds, valid. Const., § 645.

law seeking to defeat rights acquired between its passage and approval, void. Const., § 646.

exempting territory from debts contracted before its annexation, valid. Const., § 647.

laws directing municipalities to pay just claims not legally binding through informality, valid. Const., § 648.

allowing unsuccessful defendant in ejectment his improvements, are. Const., § 649.

LIBERTY. See *Due Process of Law*.LICENSE. See *Liquors*.

the power to, includes power to prohibit. Const., § 1501.

LICENSE FEES. See *Regulation of Commerce*, 5.

of non-residents, higher than required of residents, void. Const., § 825.

LIEN. See *Obligation of Contracts*, 1.

law giving, for work done prior to its passage, is valid. Const., §§ 1645-46.
 what a "correct description" of land; notice of, when sufficient; how lost. Const., §§ 1647-49.
 acts pledging revenue of public works to payment of bonds create a. Const., § 1709.

LIFE. See *Due Process of Law*, 8.**LIMITATIONS.** See *Construction of Statutes*, 19; *Obligation of Contracts*, 7; *Statute of Limitations*.**LIQUORS.**

states may regulate sale of. Const., § 802.
 and a city may tax sale of that not there manufactured. Const., § 851.
 taxation of sale of, not unconstitutional, unless confined to those brought from other states. Const., § 1894.
 liquor licenses or taxes are valid, if there be no discrimination in favor of local products. Const., §§ 1402, 1408.
 if congress authorizes importation of, no state can prohibit it. Const., § 1483.
 the states can prohibit the sale at retail of imported, without a license. Const., §§ 1456, 1481-1518.
 when congress has not directly acted, a state may prohibit the sale, in the original package, of liquor imported from another state. Const., §§ 1485-86.
 and on the ground that it is not an "import," and that a state may tax, without discriminating, the products of other states. Const., §§ 1493-94.
 state laws regulating sale of, are purely regulations of internal commerce. Const., §§ 1505, 1507.

LITERAL CONSTRUCTION. See *Construction of Statutes*.**LOCAL OPTION LAWS.**

states may regulate sale of liquors. Const., § 802.
 laws giving municipalities the discretion to prohibit such sale are valid. Const., § 1496.

LOCAL SELF-GOVERNMENT. See *Constitution of the United States*.**LOTTERIES.**

a franchise to raise public money by, may be limited as to the time of its exercise. Const., § 1853.
 charter of lottery company is not a contract, and may be repealed. Const., § 2164.
Contra, § 2215.

LOUISIANA.

jurisdiction over certain public quay in, is in state. Const., § 289.
 effect of acts of admission. Const., § 476.
 ordinance of 1787 was superseded by the state constitution. Const., § 477.

M.**MANDAMUS.**

to postmaster-general, lies to enforce ministerial duty. Const., § 6.
 lies from federal supreme to district court, to return prisoners to state authorities. Const., § 936.
 to compel municipal corporation to pay judgment. Const., §§ 1863, 1882.
 tax may be ordered paid in lawful money. Const., § 1594.

MANDATORY STATUTES. See *Construction of Statutes; Statutes*.**MARINERS.** See *Regulation of Commerce*, 2, f.**MARITIME LAW.** See *Admiralty Jurisdiction; Regulation of Commerce*.

master of foreign ship in American ports is the representative of the vessel and its owners. Consuls, § 16.
 acts of congress as to papers of foreign ships. Consuls, § 33.
 act of 17 and 18 Vict., ch. 104, § 279. Consuls, § 34.
 as to powers of consuls, etc., over seamen and ships, see *Consuls and Ministers*, 4.

MARRIAGE.

between whites and blacks, may be prohibited. Const., §§ 854-55.
 See *Equal Protection of the Laws*.
 not within the provision as to "full faith and credit." Const., § 895.
 in one state, made expressly to violate penal laws of another, void in the latter. Const., § 895.
 foreign, not presumed valid, when no proof of foreign law. Const., § 3121.

MARTIAL LAW. See *Courts Martial*.**MARYLAND.**

constitution or laws do not deny equal privileges to colored persons. Const., § 853.

MASSACHUSETTS.

legislature has power to grant exclusive bridge franchise. Const., § 2078.

MASTER. See *Maritime Law; Regulation of Commerce.*

MICHIGAN.

construction of constitutional provisions of. Const., §§ 2612-13.

MIGRATION OF PERSONS.

clause historically considered and construed. Const., § 1327.

MILITIA. See *Constitution of the United States*, 3, c; 4.

MINISTERS. See *Consuls and Ministers.*

MISCEGENATION. See *Marriage.*

MISSISSIPPI.

provision of constitution as to non-introduction of slaves held directory. Const., § 56.
act of admission construed. Const., § 209.

MISSOURI.

territory now occupied by, formerly governed by the civil law, as modified by Spain. Const., § 529, p. 224.

"Cottey Act" in conflict with federal constitution. Const., § 1677.

construction of constitutional provision for release of lien on railroad. Const., §§ 2600-2602.

for sale of railroad. Const., § 2601.

for establishment of schools. Const., § 2599.

as to changing town to city. Const., § 2603.

as to aiding railways. Const., §§ 2604-5.

MISSOURI COMPROMISE."

grounds on which held void. Const., § 241.

MONEY. See *Constitution of the United States*, 3, h, r; 5, f, g.

MONOPOLIES.

defined; grants of, void. Const., §§ 785-86, 2071-73.

history of; common law doctrine. Const., § 787.

MORTGAGES.

do not pass the title, but only a lien; so in Pennsylvania. Const., §§ 442-43.

have no situs except at their owner's domicile. Const., § 444.

law forbidding sale on for less than two-thirds of appraisal, and extending period of redemption, void. Const., §§ 1622-23, 1630-55.

pass legal title, at common law, but in trust for payment; upon payment a trust to the mortgagor results. Const., § 1658.

MUNICIPAL BONDS. See *Obligation of Contracts*, 2.

the power of taxation cannot be withdrawn until bonds are paid. Const., § 1881.

MUNICIPAL CORPORATIONS.

1. **IN GENERAL.**

division of, no effect on liability. Const., § 110.

a state legislature may determine what territory shall be included in a city, so that it shall pay city taxes. Const., § 693.

after judgment against, *mandamus* lies to compel taxation, when. Const., § 1863.

2. **CONSTITUTIONAL LAW.** See *Obligation of Contracts*, 1, 2.

act distributing, among tax-payers, property exacted from them by taxation, is valid. Const., § 118.

limitations on power to tax. Const., §§ 1859-61.

provisions as to uniformity of taxation do not apply to municipal taxation. Const., § 2591.

nor to special assessments, when. Const., § 2590.

3. **ORDINANCES AND BY-LAWS.**

conflicting with act of congress, void; if not conflicting, such act does not affect penalty of ordinance. Const., § 234.

N.

NATIONAL BANKS. See *Constitution of the United States*, 3, s; *Taxation.*

NATURALIZATION. See *Constitution of the United States*, 3, v.

NAVIGABLE WATERS. See *Regulation of Commerce*, 2.

what not a navigable river leading into the Mississippi. Const., § 209.

right of eminent domain of state in shores and bed, as to public and other lands. Const., §§ 305-306.

NAVIGABLE WATERS — *Continued.*

right of navigation on internal state stream wholly under legislative control. Const., § 1208.
 constitutional provision as to free rivers construed. Const., §§ 1224, 2607.
 when rivers considered; how navigability proved. Const., §§ 2153-54.
 effect of natural falls on river above them. Const., § 2152.

NAVIGATION. See *Regulation of Commerce*, 2.

NEGROES. See *Equal Protection of the Laws; Privileges and Immunities of Citizens; Suffrage*.

NEUTRAL. See *Law of Nations*.

NEW STATES.

admission of, see *Constitution of the United States*, 9, b.

NEW TRIALS.

laws granting, not *ex post facto*. Const., §§ 568, 582-99.
 Connecticut legislature has always granted. Const., § 594.
 granting, is wholly a judicial power. Const., § 595.

NULLIFICATION.

the Virginia and Kentucky resolutions; assertions of Madison; proclamation of President Jackson. Const., § 128, p. 35.

NUISANCE.

public, enjoined when irreparable injury to individual interests will follow. Const., § 1164.
 private action for special damage lies. Const., § 1205.
 decree for abatement of, cannot be executed after nuisance legalized. Const., § 1206.
 private citizen cannot himself prosecute for a public, except when it is a private nuisance to him. Const., § 2161.

O.

OBLIGATION OF CONTRACTS. See *Legislative Power; Vested Rights*.

1. IN GENERAL.
2. CONTRACTS BY THE STATE.
3. STATE INSOLVENT LAWS.
4. LAWS AFFECTING CORPORATIONS.
5. EXEMPTION FROM TAXATION.
6. CHANGING REMEDIES.
7. LIMITATION LAWS.

1. IN GENERAL.

a. *Miscellaneous.*

division of city has no effect on private contracts. Const., § 110.
 duty of court to avoid law impairing, is imperative. Const., § 204.
 congress cannot authorize action by attorney-general on cause of action belonging to a corporation. Const., § 242.
 the prohibition affects only the states, and not congress. Const., § 1680. See § 1706.
 effect of admission by a state in a compact with another. Const., § 282.
 state cannot impair implied contract with non-resident bondholders by taxing the bonds. Const., § 444.
 no political change in a government annuls a compact with another power or with individuals. Const., § 2143.
 marriage is not within this provision. Const., §§ 892, 1723-25.
 contracts relating to slaves not impaired by the thirteenth amendment. Const., §§ 1591-92. See §§ 1594, 1640.
 and cannot be impaired by legislation. Const., §§ 1694-95.
 laws requiring the payment of taxes on antecedent contracts are void. Const., § 1642.
 a law forbidding sales under prior mortgages for less than two-thirds of appraised value, and creating or extending the period of redemption, is void. Const., §§ 1622-23, 1650-55, 1667, 1754-56, 1758.
 so of a law as to antecedent judgments. Const., §§ 1624, 1656-58.
 but a law forbidding sale within *one year* unless a certain price be obtained, valid. Const., § 1757.
 congress may repeal a resolution referring claims to certain officer, his decision having no binding force. Const., § 1909.
 a state constitutional provision increasing debtor's exemptions, so as to affect existing judgment lien or contract, void. Const., §§ 1625, 1628-29, 1659-63, 1664-71.
 immaterial that such constitution was sanctioned by congress. Const., § 1626.
 act for payment of taxes in gold, formerly payable in lawful money, valid. Const., § 1752.

OBLIGATION OF CONTRACTS, IN GENERAL, *Miscellaneous—Continued.*

- imprisonment for debt may be abolished; it is not a remedy, but a punishment. Const., § 1668, 2008-10.
- history of the contract clause. Const., § 1670.
- laws validating void contracts are not unconstitutional. Const., §§ 1616, 1630-35. See §§ 1732, 1749-50.
- informal conveyances may be legalized. Const., §§ 1749-50, 1848-51.
- a law that the estoppel to deny a landlord's title should apply to lands held to be without the rule, held valid. *Id.*
- as to retroactive laws, see *Vested Rights*.
- law discriminating against taxes levied to pay judgments on bonds, void. Const., § 1696.
- law of congress limiting canal tolls, thereby affecting bondholders' rights, void. Const., § 1697.
- Confederate money contracts; constitution impairing, void. Const., §§ 1698, 1700. but the contract may be void for illegal consideration. Const., § 1699.
- judgment by default on contract for, may be corrected. Const., § 1701.
- Virginia act confirming rights to church property, valid. Const., § 1747.
- laws in force before the contract is made are valid. Const., § 1738.
- constitutional provision throwing burden of proof on plaintiff in actions on bills, to show that they were not used in aid of rebellion, held void, as impossible. Const., § 1705.
- degree of impairment immaterial. Const., §§ 1735-36.
- one test is whether the value of the contract has been lessened. Const., § 1737.
- act of congress making treasury notes legal tender is valid. Const., § 1706.
- a lien may be divested by provisions of the very law creating it. Const., § 1707.
- a penalty or forfeiture may be remitted. Const., § 1710.
- betterment acts giving defendant in ejectment a lien for his improvements, are valid. Const., § 1711.
- act for summary removal of trespassers on Indian lands held valid. Const., § 1712.
- confiscation by Confederate States of debts due from state to United States citizens, void. Const., § 1714.
- appropriation of assets of insolvent bank, in violation of pledges as to the setting apart of the capital, void. Const., §§ 1715, 1717.
- railway aid by municipalities may be authorized. Const., § 1726.
- when there is a "contract" between a county and a railway. Const., § 1737.
- authorizing insolvent to convey clear title, void as to mortgagees. Const., § 1731.
- action on bills of association not authorized to issue them may be given. Const., § 1732.
- in Virginia, by ancient practice, interest on existing contracts may be lessened. Const., § 1733.
- acts prior to constitution, valid. Const., § 1739.
- act allowing bankrupts the exemptions allowed by state laws, valid. Const., § 1746.
- act of Dominion of Canada, lowering rate of interest on bonds payable in New York, though impairing the obligation of the contract, is yet valid, as a bankruptcy law and as a foreign law. Const., § 1753.
- act providing that judgment debtor may set off claim obtained since rendition of judgment, valid. Const., § 1762.
- bills of review of judgments obtained by forgery may be authorized. Const., § 1763.
- contracts may be affected in many ways, and their value, so long as the obligation of performance remains. Const., § 1821.
- the laws of an independent republic, like Texas before her admission, are not within this provision. Const., §§ 1775, 1833, 1834.
- impairing the *obligation* is forbidden, but not impairing the contract itself. Const., § 1948.
- a law forming part of the obligation of a contract is capable of repeal; but such contract is not affected. Const., § 1947.
- this provision compared with the legal tender clause. Const., § 1955.
- contracts may be modified by legal construction. Const., § 1962.
- the Revolution did not affect contracts and property rights. Const., § 2116.
- analogy of insolvent laws. Const., § 2184.
- cases illustrating the prohibition considered. Const., § 2186.
- in the exercise of eminent domain franchises may be extinguished. Const., § 2190.
- b. *What are contracts; what not.* See post, 2, b; 4, b.
- contracts between states. Const., §§ 205-6, 1729-30.
- those affecting property, or some object of value, only. Const., § 1672.
- or legal rights, enforceable in the courts. Const., § 2099.
- defined. Const., §§ 1673, 1933, 1982.
- how far judgments are. Const., § 1708.
- an act making award in condemnation of lands conclusive, not a contract; act giving appeal, valid. Const., § 1704.
- liens under the maritime law are. Const., § 1708.
- acts pledging the revenue of public works to the payment of bonds, are. Const., § 1709.

- OBLIGATION OF CONTRACTS, IN GENERAL.** *What are contracts; what not — Continued.*
 act requiring officers of bank to collect its assets and devote them to certain purposes, creates a. Const., §§ 1716-17.
 trustees may be discharged, unless vested rights affected. Const., § 1718.
 whether ordinary debts protected. Const., § 1722.
 marriage is not a, but a *status*. Const., § 1725.
 after municipal vote to aid railway, but before subscription, none. Const., § 1727.
 the right to an office in a college is a, and removal void. Const., § 1728. See *post*, 2, c.
 municipal aid law for tax to be levied on all property, not a; taxation may be confined to real estate. Const., § 1784.
 a summary proceeding affecting only the possession cannot be said to affect a contract relating to the title, when. Const., § 1745.
 laws for issuing executions, selling under mortgages, etc., are part of the contract. Const., §§ 1622-23, 1650-55, 1667, 1754-60.
 laws are part of. Const., § 1877.
 cannot consist in a proviso of an unconstitutional law. Const., § 55.
 what are contracts by the state, see *post*, 2, b.
 distinction between an office and a contract. Const., § 1830.
 the debt is deemed created at the time the contract is made. Const., § 1838.
 those made for the benefit of others as well as the promisee included. Const., § 2114.
 contracts affecting other than property in the strict sense included. Const., § 2115.
 sovereign political power not made the subject of. Const., § 2265.
 how far contracts of exemption from taxation can be made by the state with corporations, see *post*, 5.
 they may be either executed or executory. Const., § 2276.
 characteristics of laws which are. Const., § 2287.
- c. A "law," *what*.
 Arkansas constitution of 1868, forbidding suits on contracts for sales of slaves, void. Const., § 1636.
 Georgia constitutional provision, increasing exemptions, void. Const., § 1661.
 any state constitution. Const., §§ 1740, 1910.
 including those adopted under reconstruction acts. Const., §§ 1742-43.
 is one made subsequent to the contract. Const., § 1970.
 it is the effect, not the terms, of the law that is material. Const., § 1976.
- d. "Obligation," *what*.
 is the law which binds the parties to perform. Const., §§ 1648, 1673, 1675, 1879, 1904, 1933, 1969, 1977, 1982.
 applies to the essentials, and not to the form. Const., § 1656.
 the existing remedy is part of. Const., §§ 1639, 1664-66, 1671.
 is the means of enforcement; any law tending to weaken this, is void. Const., § 1674.
 the judicial construction of statutes becomes a part of. Const., §§ 1685-86, 1687-93.
 what law is meant, as part of the obligation; conflict of laws. Const., §§ 1944-45.
 is the municipal *lex loci contractus*. Const., §§ 1945-46, 1967, 1978.
 is the legal right each vests in the other by making the contract. Const., § 1959.
 remains the same everywhere, but the remedy varies. Const., § 1960.
 is the legal and civil, not the moral, obligation. Const., § 1968.
 the contract may have only a qualified obligation, by pre-existing law. Const., § 1979.
 whether the law becomes part of the contract. Const., § 1989.
 not identical with remedy. Const., § 1992.
 includes the value of the contract. Const., § 2183.
- e. *Impairing, what*.
 state law declaring void contract valid, not. Const., § 1632.
 impairing a contract, and impairing its obligation, distinguished. Const., § 1942.
 state insolvent laws not, see *post*, 3, § 2184.
 nor abolishing imprisonment for debt. Const., §§ 1668, 2008-10.
 diminishing the value of contracts by legislation, is. Const., § 2183.
- 2. CONTRACTS BY THE STATE.**
- a. *In general*.
 a state has inherent power to make contracts. Const., §§ 2250, 2256.
 a state may by law make a contract which subsequent laws cannot impair. Const., §§ 1764, 1799, 1824, 1907-8.
 but where the law is a public one, involving public rights and welfare, it may be repealed. Const., §§ 1766, 1800.
 see *post*, 4, b.
 a law requiring tax title claimant to give notice to possessor, passed after tax sale under a law providing for a deed in three years without notice, is valid. Const., §§ 1771, 1821.
 a state legislature may authorize the sale of land, conveyed by the state, to satisfy a state debt. Const., §§ 1776-77, 1837-44.
 in an act giving a lien to the state, there is no contract that only judicial remedies will be resorted to. Const., §§ 1777, 1839.

OBLIGATION OF CONTRACTS, CONTRACTS BY THE STATE, *In general—Continued.*

- deeds not formally executed may be cured, though a void conveyance be made valid. Const., §§ 1849-51, 1749-50.
- where a license to raise money for public purposes by a lottery has become obsolete by non-user. an act limiting its exercise to a certain period is valid. Const., §§ 1781, 1852-53.
- a city cannot tax its own debts, so as to retain part of the stipulated interest. Const., §§ 1782-83, 1854-61.
- the power of state taxation exists only after such interest has been paid, when it is like other property, taxable. Const., §§ 1859-61.
- authorities examined. Const., § 1861.
- provision in funding law, that no bonds not held valid by state supreme court should be funded, is valid. Const., §§ 1784, 1862.
- all laws so limiting municipal taxing power as to impair contracts are invalid. Const., §§ 1864, 1876-1882.
- the prohibition applies to state, municipal and individual contracts. Const., §§ 1796, 1867.
- a refunding plan, by which lots are drawn as to whether payment is to be made in one or fifty years, is void. Const., §§ 1865, 1875.
- the power of taxation to pay municipal bonds cannot be withdrawn until they are paid. Const., §§ 1788, 1877-82.
- territory added to a city after a contract is made, and not benefited thereby, may be exempted from taxation. Const., §§ 1789, 1883-87.
- if a contractor is induced to lay out large sums on the faith of an unconstitutional law, this is a consideration for a subsequent law amounting to a contract. Const., §§ 1790, 1889-94.
- after *mandamus* issues to collect debt, the repeal of the law authorizing it is void. *Id.*
- a law authorizing the state to be sued, not being a contract, a subsequent law may make the right conditional. Const., §§ 1792, 1895-97.
- such a law, providing no means to enforce the judgment, may be repealed. Const., §§ 1798, 1898-99.
- so of a law providing remedy by payment on treasurer's warrant. Const., § 1911.
- the right to sue a county on warrants in the federal courts cannot be taken away or injuriously affected. Const., §§ 1797, 1903-4.
- congress may repeal a resolution referring claims to the secretary of war, his award having no binding force. Const., § 1909.
- contracts of rebellious states, made before rebellion, are binding after peace. Const., § 1912.
- state law imposing toll on government vehicles, contrary to state stipulation, void. Const., § 1915.
- the Louisiana funding act was void. Const., § 1917.
- a law making coupons receivable for taxes not affected by act that taxes on the bonds must be first paid. Const., § 1925.
- illegal seizure of land held by patent, held not technically a violation of a contract. Const., § 1926.
- California statute as to reclaiming swamp lands held valid. Const., §§ 1931-32.
- state act releasing its interest in escheated lands, construed. Const., § 1933.
- b. What are state contracts.**
- an act establishing a county seat is a public law, not a contract. Const., §§ 1767, 1800, 1802.
- legislative grants of lands are executed contracts, and cannot be rescinded after reconveyance, though procured by corruption. Const., §§ 1768-69, 1805-12.
- provision in bank charter that its notes are receivable for taxes, and attaches to the notes acquired after a repealing act. Const., §§ 1770, 1813-20.
- a law permitting buyers of void tax titles to recover back the money paid is, and an officer cannot be vested with discretion to refuse it; but quitclaim deeds may be required. Const., §§ 1772, 1822-26.
- only those contracts which vest certain and perfect property rights, and not measures having in view the public good, are within the provision. Const., §§ 1765, 1827-29.
- act appointing state canal commissioners not a contract with them. *Id.*
- none implied in a state grant that the grantee shall enjoy the land without further legislative regulations. Const., §§ 1778, 1845-48.
- law making priority of record priority of right, valid. *Id.*
- though the title derived from the state was thereby defeated. Const., §§ 1779, 1848.
- an act authorizing a tax to pay city bonds is a. Const., § 1869.
- laws are part of. Const., § 1877.
- the debt arises when the contract is made, though larger expenditures afterwards made. Const., § 1883.
- a law authorizing a suit against a state, not. Const., § 1895.
- grants of patent rights, not, that they will be renewed. Const., § 1914.
- stipulation of state as to toll on Cumberland road, is a. Const., § 1915.
- grants of land for railway, accepted and acted on, are. Const., § 1918.

OBLIGATION OF CONTRACTS, CONTRACTS BY THE STATE, *What are state contracts* — *Con.*

lottery licenses are, and irrevocable when acted on. Const., § 1920.
 none by providing special assessment to drain lands, that there will be no further assessment. Const., § 1921.
 grants of swamp lands to the state are, when accepted. Const., § 1922.
 acts in respect to taking up and liquidation of old debt are no part of its obligation. Const., § 1923.
 grants of ferry privileges by court, not, when power of repeal reserved. Const., § 1924.
 an act providing method of determining the validity of bills receivable for taxes, held not a. Const., § 1927.
 act providing for receipt of bank bills for taxes does not apply to debts due the state as a trustee. Const., § 1928.
 such a law is a contract. *Id.*; Const., §§ 1929–30.

c. *Public offices.*

right to, not a contract; the legislature has absolute power over them. Const., § 1801.
 of state canal commissioners, not a contract relation; act appointing them may be repealed. Const., §§ 1773, 1827–29.
 a geological commissioner under contract with the governor under a state law is not a public officer, and his position cannot be abolished by law. Const., §§ 1774, 1778, 1830–32.

d. *Construction of.*

the rule is strict; no presumption is made in favor of the grant. Const., § 1803.

8. STATE INSOLVENT LAWS.

congress may adopt, for bankruptcy proceedings, state exemption laws. Const., §§ 1746, 2004.
 until congress acts, the states may pass insolvent laws, prospective only. Const., §§ 1934, 1935–36, 1937–39, 1940–2003, 1950, 1958, 1966, 1978–74, 1981, 2004–6, 2007, 2017–18.

laws discharging prior debts are void. Const., §§ 1938, 2017–18.

M'Millan v. McNeill, 4 Wheat., 209, explained. Const., §§ 1940; 1981, p. 257.

do not affect contracts made in other states, whether before or after their passage, not having extraterritorial force. Const., §§ 1940–41, 1956, 2003, 2011–16.

a discharge of A, under the laws of one state, does not affect a contract made by him in another, controlled by its laws. Const., §§ 1940–45, 1996–97, 2000, 2011–16.

so under English bankrupt law. *Id.* Cases reviewed. Const., § 1998.

analogy between bankrupt and limitation laws. Const., § 1949.

Sturges v. Crowninshield explained and affirmed. Const., §§ 1957, 1975.

analogy to legal tender laws. Const., §§ 1964, 1972, 1980, 1983.

the prohibition applies to private rights, not to bankrupt laws. Const., § 1971.

operate only on contracts and property of persons subject thereto by residence and citizenship. Const., §§ 1999, 2011–16.

4. LAWS AFFECTING CORPORATIONS.

a. *In general.* See *Corporations*, 2.

the legislature retains its power over public corporations, including municipalities. Const., § 2084.

alterations of the charter, accepted by the corporation, are not prohibited. Const., § 2121.

private charters are executed contracts, and cannot be altered unless the power is reserved. Const., §§ 2030–37, 2118–32.

railroads are subject to control as to rates unless protected by their charters. Const., § 2143.

a state cannot, by granting charters, bargain away its police power. Const., § 2163.
 under this power, and in favor of public health or morals, it may affect contracts. Const., §§ 2165–69.

authority of a bank to receive and dispose of notes cannot be repealed so as to impair the contract of the state with the bank, and of the bank with the transferee. Const., §§ 2053, 2181–82, 2187.

the power of eminent domain is superior to all private vested rights. Const., § 2189.
 a dissolution cannot impair contracts. Const., § 2204.

repeal of charter does not impair contracts; assets cannot be divided unequally among creditors. Const., § 2205.

vested rights cannot be taken away even under the reserved power. Const., §§ 2132, 2207.

regulating charges, valid when. Const., § 2208.

grants of monopolies strictly construed. Const., § 2218.

railroad may be crossed by subsequent one under eminent domain. Const., § 2214.
 may be compelled to restore a station abandoned under a law allowing it. Const., § 2216.

b. *What are contracts affecting corporations; what are not.*

various cases considered. Const., § 2061.

in granting a charter, a contract may be made by reference to a prior act, and a third contract by reference to the second act. Const., §§ 2024, 2092–98.

OBLIGATION OF CONTRACTS. LAWS AFFECTING CORPORATIONS, *What are contracts affecting corporations: what are not — Continued.*

- the charter of Dartmouth College is a contract. Const., §§ 2105, 2112.
 and was supported by a valuable consideration. Const., § 2112.
 are those respecting property and valuable objects, or conferring legal rights. Const., § 2099.
 private charters are. Const., §§ 2035, 2101, 2119, 2127, 2138, 2161, 2188, 2197, 2217.
 charter from English crown is a. Const., § 2111.
 the rights of college trustees are within the protection. Const., § 2115, pp. 887-88.
 a charter of a turnpike company is not a contract that there shall be no rival. Const., § 2211.
 the charter of a lottery company is not a contract, but a license. Const., §§ 2047, 2048, 2161-64. *Contra*, § 2215.
 when a bank may take notes, it is a part of the contract that it may sell them. Const., § 2181.
 a charter creating a shareholder's liability cannot be repealed as against debts contracted before repeal. Const., §§ 2055, 2191-92.
 but a clause for their non-liability may be changed, under the reserved power. Const., §§ 2056, 2194-96.
 stockholder coming in after repeal not liable. Const., § 2212.
 act as to surrender of charter and organization of new company held not a. Const., § 2206.
 contract in charter against competing railroad construed. Const., § 2210.
 upon a compromise, and additional rights granted, a contract arises. Const., § 2240.
bridges; if a toll bridge charter contains no provision as to authorizing any other bridge, a competing one may be authorized. Const., §§ 2020, 2061-62.
 the Charles River Bridge charter contained no such provision; it was competent to authorize the Warren Bridge. Const., §§ 2058-82.
 grant to a turnpike company of the monopoly of building before railroads were known, within certain limits, does not exclude right to authorize railroad bridge, confined to the passage of cars. Const., §§ 2023, 2087-92.
 franchises for, are contracts, and cannot be impaired. Const., § 2090.
 a bridge charter providing that no other shall be built within certain limits is a contract; and providing that it shall not be lawful to build such other, prohibits the legislature from authorizing it. Const., §§ 2025, 2097.
 a toll bridge may be taken and laid out as a highway. Const., §§ 2054, 2188-90.
ferries; exclusive privileges are destroyed if the grantees abandon them and erect a bridge in the same place. Const., §§ 2020, 2059.
 what will not amount to an assignment of such privileges to the bridge company. Const., § 2060.
 a grant to a city to maintain a, is not a contract, especially where the grant is to continue during the legislative pleasure. Const., §§ 2032, 2083-86.
 a contract is implied when the language used is inconsistent with any other theory. Const., § 2241.
 rules for construing charters as contracts. Const., § 2270.
 that an acceptance of the charter is made a condition precedent implies that it is to be binding as a contract. Const., § 2239.
public laws, corporations, rights, etc. See supra, 2.
 do not involve contracts; the legislature has complete control over municipalities. Const., § 2084.
 the Dartmouth College charter is a private one, and a contract. Const., §§ 2026, 2102, 2105.
 charters of public corporations, in which the government or state alone is interested, are not contracts. Const., § 2100.
 the fact that a corporation is created for educational or charitable purposes does not make it, *per se*, a public corporation. Const., §§ 2102, 2109.
 if political power be granted, or an institution for administrative purposes created, or its funds be public property, the power may be recalled. Const., §§ 2028, 2100, 2108.
 where property has been clothed with a public interest, the legislature may regulate charges for its use. Const., §§ 2083, 2133, 2137.
 and may determine what is reasonable. Const., § 2137.
 the civil institutions of the state may be regulated; the charter of a lottery company may be repealed. Const., §§ 2047-48, 2161-64.
 a corporation is not public because its purpose is to benefit the public. Const., § 2247.
impairing, what.
 the acts of New Hampshire increasing number of trustees of Dartmouth College, and giving a public board control thereof, are void. Const., §§ 2029, 2107.

c. *Reserved power.*

- none in the Dartmouth College charter. Const., § 2117.
 under it, contracts made by corporations with individuals may be affected by altering the charter. Const., §§ 2030, 2118-26.

OBLIGATION OF CONTRACTS, LAWS AFFECTING CORPORATIONS, *Reserved power* — Con.

a provision that a charter shall not be modified, except by legislative act, is an implied reservation of. Const., §§ 2032, 2122.

under it, the grantee and another corporation may be merged. Const., §§ 2033, 2123-24.

such merger does not destroy the reserved power. Const., §§ 2034, 2125.

a reservation in a charter is continued by an amendatory charter. Const., § 2125. the corporate board of control may be changed. Const., § 2037.

the grant of a charter is qualified by, and the latter may be constitutionally modified. Const., § 2130.

may exist in a constitution or a prior law. Const., § 2131.

vested rights cannot be destroyed under it. Const., § 2132.

effect of, as to regulating charges. Const., §§ 2133, 2145.

remains where the corporation is consolidated with a foreign corporation, where the act provides that the new company shall be subject to state laws. Const., § 2134.

provision of charter, that such compensation may be charged as the company deems reasonable, subject to legislative control. Const., §§ 2040, 2133.

of legislature, not affected by its non-user for twenty years. Const., §§ 2042, 2138-42.

railways may be divided into classes, and maximum rates fixed. Const., §§ 2043, 2142.

it is immaterial that the company had pledged its income, or leased its road.

Const., §§ 2044, 2140.

a new company succeeding by consolidation to the franchises of a former one subject to, is itself subject to. Const., §§ 2045, 2144.

the question as to what are reasonable rates is a legislative one. Const., § 2146. construction of clause that franchises shall not be revoked so as to injure creditors or corporators. Const., §§ 2146-47.

a state is not estopped from regulating rates by voting as a stockholder. Const., § 2148.

may exist in favor of city, which approves the location of a railway in a street, to prohibit running thereon. Const., §§ 2046, 2158-60.

held not repealed by certain legislation. Const., § 2166.

the charter of a beer company affected by, may be repealed. Const., §§ 2166-68.

under it, any change may be made which will not defeat the object of the grant or vested rights. Const., §§ 2051, 2170-76.

a company authorized to build a dam may be compelled to maintain fishways, when. Const., §§ 2051, 2170-76.

vested rights cannot be destroyed under. Const., §§ 2174, 2203.

charters depending on acts containing such power are subject thereto. Const., § 2194.

in an act, extends to any part of it. Const., § 2195.

effect of a saving constitutional clause. Const., § 2196.

an act reserving such power as to all subsequent charters is not binding on subsequent legislatures. Const., § 2198.

general reservation by law is equivalent to a reservation in each charter. Const., § 2199.

no reason need be given for the exercise of. Const., §§ 2200, 2201, 2203.

street railway charter may be repealed. Const., § 2202.

power to revoke for misuse or abuse does not authorize repeal on any other ground. Const., § 2209.

exemption of corporation from, not lost by amendment increasing its powers. Const., §§ 2224, 2273-75.

5. EXEMPTION FROM TAXATION.**a. In general.**

an exemption is merely a contract; it does not bind future legislatures. Const., § 2248.

when a contract is given a certain effect, no subsequent act can affect its validity. Const., § 2258.

the merger of corporations having different exemptions gives the new company only the lesser privilege. Const., §§ 2223, 2273-75.

must be shown beyond all well founded doubt. Const., §§ 2269, 2280.

an exemption from "taxation" includes all forms thereof. Const., § 2298.

a sum collected from a corporation to pay state debts contracted on its account is a tax. Const., § 2302.

is strictly construed against the relinquishment of the power of taxation. Const., §§ 2299, 2303, 2343.

"property" includes rolling stock, real estate and railroad franchise, when. Const., § 2304.

and includes after-acquired property. Const., §§ 2235, 2305-7.

a cotton press devised to a charitable corporation held exempt. Const., § 2307.

when a street railway company is required by ordinance to keep a street in repair, it is not liable for a new assessment. Const., §§ 2337, 2308-11.

OBLIGATION OF CONTRACTS, EXEMPTION FROM TAXATION, *In general—Continued.*

- the interpretation of a contract by the acts of the parties is controlling, in cases of doubt. Const., § 2313.
- unless the exemption is expressed in the charter the corporation may be taxed. Const., §§ 2241, 2321-24.
- a legislature has the power of perpetual. Const., § 2342.
- does not pass to the grantee, when. Const., § 2347.
- b. *What are contracts.*
- a contract by a state, that a corporation shall not be taxed beyond a certain rate, is violated by an increase of taxation. Const., §§ 2318, 2225, 2246-53, 2276-82.
- a stipulation in a banking law that banks shall pay a certain rate is a contract. Const., § 2246.
- authorities reviewed. Const., § 2249.
- bank charter construed not a contract. Const., §§ 2260-62.
- provision held to protect only against future discrimination in taxation. Const., § 2263.
- a provision in a street railway charter is not, that it shall pay no more taxes than other companies. Const., §§ 2221, 2261-72.
- but an exemption from taxation is a contract. Const., § 2266.
- it must be expressed in clear terms. Const., §§ 2269, 2329.
- imposing a license fee is an exercise of police power. Const., § 2268.
- when a certain rate is stipulated "in lieu of all other taxes," a contract is made. Const., § 2283.
- cases cited as to contracts. Const., § 2284.
- a general bounty and exemption, to encourage salt manufacture, is not a contract. Const., §§ 2220, 2283-87.
- a legislature has power to make, exempting property from taxation. Const., §§ 2227, 2285, 2293.
- the exemption by act of the property of a charity, so long as it should belong to it, is not a contract. Const., §§ 2223, 2288.
- but a law exempting it without qualification is perpetual, and cannot be revoked. Const., §§ 2229, 2289-94.
- a subsequent constitution, or law thereunder, cannot revoke it. Const., §§ 2236, 2303-11.
- construction of legislative contracts. Const., § 2291.
- a state contract with Indians, exempting lands, on consideration, cannot be impaired. Const., §§ 2231, 2295.
- what is a consideration for, what not. Const., §§ 2223-29, 2288-90, 2309.
- a conditional grant of land to a state, and its acceptance, are. Const., § 2296.
- so of a law exempting swamp land from taxation with a view of reclaiming it. Const., § 2297.
- so of a law exempting a railroad until completion, or until it pays a dividend, limited as to time. Const., §§ 2233, 2299-2302.
- generally exempting a railroad, its property and shares. Const., §§ 2234, 2303-4.
- an ordinance prescribing duties of street railway company as to grading, etc., it cannot be assessed for a new pavement. Const., § 2312.
- allowing foreign insurance company to do business on compliance with laws and paying license fee, does not imply a contract of exemption. Const., §§ 2242, 2325-27, 2348.
- an exemption in a charter is, but it must be clear beyond reasonable doubt. Const., §§ 2243, 2328-35.
- stipulating a fixed tax does not prohibit a further one. Const., § 2330.
- a provision in a consolidation act for a license tax, not a. Const., §§ 2244, 2330.
- a contract arises upon a compromise, grant of rights and fixing basis of taxation. Const., § 2340.
- purchasers of public lands could not be taxed for five years after sale, in Indiana. Const., § 2346.
- certain railway aid acts held not to make a contract. Const., § 2349.
- a specific provision that no greater tax will be imposed is a. Const., §§ 2350, 2352.
- does not apply to extension of charter. Const., § 2351.
- and also giving one corporation the same privileges granted to another having such an exemption. Const., § 2353.
- also requiring a bank to set off a certain sum agreed to be in lieu of taxation. Const., §§ 2354, 2356.
- also a fifteen-year exemption, and tax on shares thereafter. Const., § 2355.
- c. *The reserved power.*
- contract not to tax beyond a certain rate subject to be repealed under. Const., §§ 2222, 2266-72.
- condition of making full indemnity attached to, construed. Const., §§ 2235, 2305-7.
- an exemption may be revoked under it. Const., §§ 2239, 2240, 2316, 2317-20, 2344.
- existing by general law, a subsequent exemption, intended not to be affected by the reserved power, is a contract. Const., §§ 2245, 2336-41.
- statute declaring, does not necessarily apply to supplements to existing charters. Const., § 2338.
- the power must be clearly made out. Const., § 2345.

OBLIGATION OF CONTRACTS — *Continued.*

6. CHANGING REMEDIES.

valid, if the law binding the parties to perform is not impaired. Const., §§ 1620, 1643, 1650-55, 1993.
 laws giving additional remedy, or lien, valid. Const., §§ 1631, 1644-49.
 valid, though applying to past, as well as future, contracts. Const., § 1645.
 the remedy is part of the obligation. Const., §§ 1620, 1651-63, 1671, 1755.
 laws tending to weaken or lessen the means of enforcement of the duty of performance are void. Const., §§ 1674, 1675, 1678.
 or make them less certain and direct. Const., §§ 1677, 1890.
 remedies may be modified or others substituted, if a sufficient one be left or provided. Const., § 1676.
 law enabling banks to sue on notes to cashier, valid. Const., § 1673.
 new remedy in nature of bill of review, valid though retrospective. Const., § 1702.
 by appeal, when valid. Const., § 1704.
 the remedy against illegal taxes may be changed. Const., § 1902.
 laws requiring claimants under void tax deeds to quitclaim as a condition of recovering money paid, valid as only modifying the remedy. Const., §§ 1825, 1826.
 when the remedy is taken away the right is gone also. Const., § 1879.
 instances of laws affecting the remedy only. Const., §§ 1880, 1900.
 whether a remedy given after a contract is made may be taken away before rights vest under it. Const., § 1899.
 an act which is a mere gratuity may be repealed. Const., §§ 1892, 1913.
 it seems that a remedy only to have judgment, but without enforcement, may be taken away. Const., §§ 1794, 1898, 1899.
 the particular mode of making service on a corporation may be changed. Const., §§ 1798, 1905, 1906.
 an act substituting payment from the treasury for *mandamus* upheld. Const., § 1919.
 the creditor's right is subject to modification by construction, and by laws conducing to public policy. Const., § 1963.

7. LIMITATION LAWS.

do not impair the obligation of contracts. Const., §§ 1669, 1751, 1939, 1948.
 cannot take away *all* remedy. Const., § 1681.
 it seems that the question of reasonable time is not for the legislature, but subject to the revision of the courts. Const., §§ 1682-83.
 a barred claim cannot be revived. Const., § 74.
 actions on tax deeds may be barred within prescribed time, though grantee could not sue within such time. Const., § 1713.
 on void bills of unauthorized association, may be given. Const., § 1732.
 duration of judgment lien may be limited. Const., § 1761.
 a law, limiting the time of the exercise of a license to raise public money by a lottery, is valid. Const., §§ 1781, 1852-53.
 so of limitation laws as to any franchise. Const., § 1853.
 act limiting time of appeal, held not to apply to existing judgments. Const., § 2735.
 if reasonable time given for suing existing claims, the law is valid. Const., § 2736.

OBSCENITY.

deposit in mails of obscene literature may be forbidden. Const., § 112.

OFFICE. See *Obligation of Contracts*, 2, c.

private, in a college, is a contract, and cannot be impaired. Const., § 1728.

OFFICERS. See *Constitution of United States*, 3, j; *Obligation of Contracts*, 2, c.

speedy trial of right to office, without jury, valid, and "due process of law." Const., §§ 670-71, 693-94.

federal, effect of their treason, under fourteenth amendment, see *Constitution of the United States*, 8.

acting under unconstitutional or void acts, are personally liable. Const., § 2365.

OHIO.

act imposing toll on passengers in mail coaches, held void. Const., § 253.
 its sovereignty was not impaired by its agreement not to tax public lands. Const., § 8145.

ORDINANCE OF 1787. See *Constitutional Law*, 9.ORDINANCES. See *Municipal Corporations*.OVERRULING DECISIONS. See *State Decisions*.OYSTERS. See *Regulation of Commerce*, 1, d.

state may prohibit persons, not its citizens, from planting in its tidewaters. Const., §§ 822-24.

P.

PARDON. See *Constitution of the United States*, 6, c.PARI MATERIA. See *Construction of Statutes*, 3.PAROL EVIDENCE. See *Evidence*, 5.

PARTIES.

officers of United States, to represent her in a foreclosure suit. Const., § 249.

PASSAGE OF STATUTES. See *Statutes*.**PASSENGERS.** See *Regulation of Commerce*, 8.**PATENTS.** See *Constitution of the United States*, 3, m.

for inventions, do not exempt articles made under them from state taxation. Const., § 1887.

nor interfere with state police power. Const., § 1388.

laws for, are liberally interpreted. Const., § 2823.

PAUPERS.

as to police power of the states to exclude foreign, see *Regulation of Commerce*, 1, c.

PEDDLERS. See *Regulation of Commerce*, 5.**PENAL LAWS.** See *Construction of Statutes*, 14.**PENALTIES.**

acts converting, into agreements for just compensation, do not impair contracts. Const., § 1948.

PENNSYLVANIA.

act providing punishment by courts martial for refusing to obey call to militia, by the president, is valid. Const., §§ 129, 161-199.

corporation laws of, reviewed. Const., § 2129.

the Christian religion a part of the common law of, in a qualified sense. Const., § 3109.

PENSIONS. See *Crimes*.

congress has power to grant, and has exercised it from the earliest times. Const., §§ 484-85.

referable to the power to make war. Const., § 493.

construction of embezzlement act. Const., § 446.

congress may secure pensioners in enjoying their pensions, both before and after reaching their hands. Const., §§ 488-90, 495.

pensioners are wards of the United States. Const., § 490.

are secure from state process. Const., § 491.

conditions to payment of, attached; frauds against, punished. Const., §§ 492-93, 495.

PETITION AND DISCUSSION.

provision as to, does not authorize congress to punish the disturbance of assemblies. Const., § 108.

PILOTS. See *Regulation of Commerce*, 2, c.**PLACE OF TRIAL.**

law changing to different district not *ex post facto*. Const., §§ 567, 579-81.

PLEADING. See *Criminal Pleading*.

under *non assumpsit*, the validity of the consideration of a note is raised. Const., § 521.

construed against the pleader. Const., § 805.

foreign laws must be pleaded. Consuls, § 15. See *Foreign Laws*.

POLICE POWER. See *Constitution of the United States*, 3, n; *Regulation of Commerce*, 1, c.**1. IN GENERAL; WHAT IS.**

law that theater seats not marked reserved, unless actually sold, is void. Const., § 111.

deposit of obscene literature in mails may be forbidden. Const., § 112.

regulation of test of inflammable oils is, and cannot be done by congress. Const., § 266.

state cannot exercise on subject exclusively confided to congress. Const., § 294.

may be exercised in respect to Chinese and Chinese immigration. Const., §§ 316, 318.

but law making no distinction between public prostitutes and mere unchastity, or intemperance, is void. Const., § 318.

extends to all regulations affecting health, good order, morals, peace and general safety. Const., § 776.

states may regulate the sale of liquors. Const., § 802.

classes of persons, like free negroes, esteemed mischievous, may be subject to regulation. Const., § 849.

though an act be passed in pursuance of, it is void if unconstitutional. Const., § 993.

may not be so exercised as to prohibit interstate commerce, but only to the extent of self-protection. Const., §§ 1034-65.

a law prohibiting the importation of cattle is an attempt to regulate commerce, and not a quarantine regulation. Const., § 1065.

is a sovereign power, to promote the general good. Const., § 1306.

of the United States, includes right to know the character of every foreign immigrant. Const., § 1307.

of the states, is all that is necessary to their internal government. Const., § 1308.

source of; rights of members of society. Const., § 1351.

POLICE POWER, IN GENERAL; WHAT IS — Continued.

patent laws do not interfere with. Const., § 1388.
 exercise of, in European governments. Const., § 1516.
 a state cannot bargain away its. Const., § 2162.
 imposing license fee on street railway company is an exercise of. Const., § 2268.
 distribution of, between state and federal governments. Const., § 2499.
 of the state, acts of congress cannot supersede. Const., § 2500.

2. WHERE LOCATED.

congress cannot exercise within the states, but only in places subject to its jurisdiction.
 Const., § 266.
 as to the powers of the states, see *Regulation of Commerce*, 1, c.

3. PUBLIC HEALTH.

the business of landing and slaughtering animals in a large city may be granted to a single corporation. Const., §§ 754-56.
 the legislature may confer same power on a private corporation as on an already existing municipal corporation. Const., § 757.

4. SUNDAY LAWS.

it seems that a state may prohibit sales of liquor on Sunday, even by an importer, in the original packages. Const., § 1508.

POLITICAL ASSESSMENTS. See Const., §§ 471, 472.

PORTS. See *Regulation of Commerce*, 1, h; 2, l.

PORTWARDENS' FEES. See *Regulation of Commerce*, 8.

POSSESSION.

civil and common law as to rights of possessor compared. Const., § 197.

POSTMASTER-GENERAL.

mandamus to, lies to enforce ministerial duty. Const., § 6.

POSTOFFICES.

and post-roads, see *Constitution of the United States*, 3, q.

PRACTICAL CONSTRUCTION. See *Construction of Statutes*.

PRACTICE.

under enforcement act, see *Equal Protection of the Laws*, 8, 4.

PRESIDENT, THE. See *Constitution of the United States*, 6.

action of, construing the law, and in discretionary matters, final, when. Const., §§ 2424-27.

PRESUMPTION. See *Evidence*, 2.

PRIVILEGES AND IMMUNITIES. See *Consuls and Ministers*, 5.

PRIVILEGES AND IMMUNITIES OF CITIZENS. See *Equal Protection of the Laws; Suffrage*.

1. IN GENERAL.

origin and history of the thirteenth, fourteenth and fifteenth amendments. Const., §§ 761-64, 798.

the phrase "subject to its jurisdiction" was intended to exclude children of foreign consuls, etc. Const., § 766.

general effect of the fourteenth amendment; power of congress to enforce it by legislation. Const., §§ 770-71, 797.

grants of exclusive privileges. Const., §§ 777-78.

monopolies are, in general, void; definition of monopoly; common law doctrines. Const., §§ 787, 793.

federal courts can relieve United States citizens whose rights are abridged by the state. Const., § 795.

this provision does not protect a citizen in the courts of his own state against its laws. Const., § 816.

classification of privileges under fourteenth amendment. Const., § 886.

article IV, section 2, is a restriction on the states, not on their citizens. Const., § 918.

confiscation by Confederate States of debts due from state to United States citizens, void. Const., § 1714.

the fourteenth amendment protects United States, and not state, citizens. Const., §§ 731, 768, 797.

merely guarantees pre-existing protection to citizens. Const., § 810.

protects only against acts of states and not of persons. Const., §§ 868, 915, 981.

so of article IV, section 2. Const., § 918.

does not warrant § 5519, R. S. U. S. Const., § 916.

is to be liberally construed to secure equal civil rights to the colored race. Const., §§ 868-69, 872, 920, 941-62.

is prohibitory, and implies existence of rights and immunities. Const., § 926.

removal of causes under, see *Equal Protection of the Laws*, 3.

PRIVILEGES AND IMMUNITIES OF CITIZENS, IN GENERAL—*Continued.*

- fourteenth amendment; causes which led to its adoption. Const., § 958.
 grants equality of protection but not equal privileges. Const., § 890.
 no other constitutional provision tends so strongly to make us one people. Const., § 1054.
2. WHO ARE "CITIZENS."
 citizenship considered and defined; double citizenship. Const., § 799.
corporations are not, for the purposes of this provision, citizens. Const., §§ 788, 837, 1012, 1052-53.
 foreign corporation may be discriminated against, in any manner. Const., §§ 838, 839, 1052-59.
 but held that a corporation is a "person," in an act passed under the fourteenth amendment. Const., § 840.
- of the United States.*
 one may be, and not be a state citizen, or reside in any state. Const., § 767.
 who are. Const., §§ 781, 807, 1159, 1598.
 free negroes formerly held not to be, under article IV. Const., § 850.
 women are; rights not affected by fourteenth amendment. Const., §§ 741, 806-15.
 colored people are, and have same civil rights as the whites. Const., §§ 1159, 1597.
 object of first clause of fourteenth amendment. Const., § 1595.
 Indians not, nor any person not born within her jurisdiction. Const., § 1596.
- of the states.*
 residence gives citizenship, in general. Const., §§ 742, 816-18, 1593.
 are the people composing the community, who have submitted themselves to its government. Const., § 899.
3. PRIVILEGES OF STATE CITIZENS.
 are defined in Civil Rights Act. Const., § 782.
 are the fundamental rights of citizens of free states. Const., §§ 782, 829, 896-88, 1055.
 grants of a monopoly of any trade, business, etc., are void. Const., §§ 783-86, 841.
 how far occupations may be regulated. Const., § 789.
 the rights attaching to marriage are not; a state may confine marital rights of property to resident wives. Const., §§ 746, 819.
 a state may prohibit persons not its citizens from planting oysters in its tidewaters. Const., §§ 822-24, 842.
 this is not strictly a privilege of citizens, but a right of grant or control of state property. *Id.*
 they are to pass from one state to another, sell goods therein, and be subject only to the same tax as imposed on residents. Const., §§ 750, 825-28.
 act exacting higher license fee from non-resident than resident traders is void. Const., § 751.
 right of transit, stoppage, carrying on trade, etc. Const., § 893.
 a state is not bound to extend to non-citizens the advantages secured to its own; it is only fundamental privileges that are protected. Const., § 829.
 the provision was intended only to prohibit discrimination. Const., § 830.
 right of security in one's house, not a privilege secured by the constitution. Const., § 843.
 right to use highways of another state, protected. Const., § 844.
 right to sue in federal courts, protected. Const., § 845.
 non-residents may be taxed the same as residents. Const., § 843.
 it may be provided that statutes of limitation shall not run while defendant a non-resident. Const., § 852.
 a city may tax the sale of ale or beer not there made. Const., § 851.
 marriage between blacks and whites may be prohibited. Const., §§ 854-55.
See Equal Protection of the Laws.
 citizens of another state have no higher or greater privileges than those enjoyed by citizens of the state in question; the provision refers to the privileges given or withheld by the state to which a citizen goes, and not to those from which he comes. Const., §§ 831, 816, 893.
 a state may abridge the privileges of its own citizens. Const., § 895.
 it seems that prosecutions for unlawful marriage are valid in one state, though the parties were married in another where such marriage is lawful. Const., §§ 891, 893.
 but a marriage contracted out of a state, for the purpose of evading its laws, not protected by the federal constitution. Const., § 894.
4. PRIVILEGES OF UNITED STATES CITIZENS.
 effect of fourteenth amendment was to give colored people full rights of citizenship. Const., § 766.
 object of, was to protect United States, and not state, citizens. Const., § 768.
 before the amendment it was doubtful whether a resident of the District of Columbia or of the territories was a citizen of the United States. *Id.*
 act creating corporation for slaughtering animals in New Orleans, sustained. Const., §§ 739, 750, 751, 752-801. *See* § 841.
 effect of the fourteenth amendment. Const., §§ 770, 784, 798.

PRIVILEGES AND IMMUNITIES OF CITIZENS, PRIVILEGES OF UNITED STATES CITIZENS— *Continued.*

to emigrate to, and become a state citizen in, another state; carry on trade there, without discrimination, etc. Const., § 888.

to visit seat of government, share offices, with free access to seaports, public buildings, etc. Const., § 772.

so of protection on the high seas. *Id.*
prosecution and regulation of occupations, granting monopolies, etc. Const., §§ 785-90.
citizens have the right to prosecute lawful employments. Const., § 790.

and to go to any state they choose. *Id.*
fundamental privileges of citizens discussed. Const., § 791.

the right to sell liquor is not among the. Const., §§ 740, 809-4, 851.

quære, whether prohibitory law void, as to liquor owned at its passage. Const., § 804.

the fourteenth amendment did not affect the citizenship of women. Const., §§ 741, 806-15.

the right of suffrage is not a privilege of women, and its restriction to males is constitutional. Const., § 809.

this provision does not confer on women the right to practice law. Const., §§ 744, 818.

the right to practice law is not one of the. Const., §§ 748-45, 818.

the right to practice law may be regulated by the state; it is not a privilege of United States citizenship. Const., § 818.

congress has, in general, no power of legislation in respect to such privileges, which are not created, but simply guarantied, by the constitution. Const., §§ 833-34.

but may provide for removal of cases against persons to whom equal protection of the laws is denied. Const., § 835.

colored persons denied trial by a jury partly of their own color, may remove. *Id.*
the supplemental civil rights act, securing privileges to state citizens, void. Const., § 836.

congress may protect state citizen in his rights as a citizen. Const., § 836.

has express authority in the fourteenth amendment to enforce its provisions: one method of doing so is by the removal of causes. Const., §§ 835, 873, 927, 941-62.

the civil rights bill included white citizens. Const., § 846.

right of trial by jury not one of the. Const., §§ 690, 847.

provision of city charter of Washington, fixing terms on which free negroes might become residents, valid, as a police regulation. Const., § 849.

a state judge may be punished for violating an act of congress as to discriminations in selecting juries. Const., § 948.

5. WHAT ARE "PRIVILEGES AND IMMUNITIES."

act requiring butchers to land and slaughter animals at a certain place does not deprive them of. Const., §§ 739, 758.

are fundamental, belonging to citizens of free governments, and include the protection thereof in acquiring and enjoying all civil rights. Const., §§ 769, 1000.

right to prosecute trades, etc., is one of the. Const., §§ 785-89.

the court declines to define them; they are those belonging to citizenship. Const., §§ 747-48, 820, 822.

PROBATE LAW.

law setting aside decree and granting re-trial not an *ex post facto* law. Const., § 590.

domicile of deceased determines *situs* of his property. Const., § 601.

PROHIBITIONS ON THE STATES. See *Constitution of the United States*.

PROHIBITORY LIQUOR LAWS. See *Liquors*.

quære, whether law forbidding sale of liquor owned when law passed is valid. Const., §§ 721, 804.

when charter of beer company may be repealed. Const., §§ 2165-69.

PROMISSORY NOTES. See *Bills and Notes*.

PROPERTY. See *Definitions; Due Process of Law; Eminent Domain*.

PROTECTION TO PROPERTY. See *Due Process of Law; Obligation of Contracts; Vested Rights*.

PROVISOS. See *Construction of Statutes*, 2, d.

PUBLIC AGENT.

of a state or government, duration of his authority. Const., § 3219.

PUBLIC GRANTS. See *Constitution of the United States*, 3, l.

PUBLIC LANDS. See *Constitution of the United States*, 3, l.

acts on, all in *pari materia*. Const., § 2915.

PUBLIC OFFICERS. See *Obligation of Contracts*, 2, c; *Officers*.

PUBLIC OPINION. See *Construction of Statutes*.

PUBLIC PROPERTY. See *Constitution of United States*, 3, 1.

PUNISHMENTS. See *Constitution of United States*, 4, j; *Cruel Punishments*.

Q.

QUARANTINE. See *Police Power; Regulation of Commerce*, 1, c.

R.

RAILROADS. See *Corporations; Obligation of Contracts*, 4.
as to regulation of rates, see *Corporations*, 2; *Obligation of Contracts*, 4, c.
charters as contracts, reserved power, etc., see *Obligation of Contracts*, 4.

RECORDS.

charge is part of record; when opinion of court is part of. Const., § 1631.
separate, loose papers, wholly unauthenticated, do not constitute a judicial record.
Consuls, § 127.
what is a proper transcript of. Consuls, § 128.

REDEMPTION.

state laws for, bind federal courts. Const., § 3034.

REGULATION.

and control of corporations, see *Corporations*, 2; *Obligation of Contracts*, 4.

REGULATION OF COMMERCE.

1. IN GENERAL.

a. Miscellaneous.

the object of the provision was to secure commercial freedom between the states, but not to interfere with private contracts. Const., §§ 1031, 1060-61.
a contract as to commerce is not affected by a subsequent exercise of the regulative power of commerce by which it becomes more burdensome. Const., §§ 1031, 1060, 1061.
the provision does not imply a surrender of the state police power, but the latter is restricted to self-protection. Const., §§ 1033, 1062-65.
difficulties of conflicting state regulations stated. Const., § 1141.
the concurrent power of the states and congress. Const., § 1188. See § 1260.
not analogous to concurrent power of taxation. Const., § 1189.
analogy of power to lay duties. Const., § 1190.
of inspection laws. Const., § 1191.
of quarantine laws, and the slave trade act of 1803. Const., §§ 1192-93.
of the pilotage act of 1789. Const., § 1194.
does not extend to national matters, or those admitting of a general system of regulation. Const., § 1261.
existence of, denied. Const., §§ 1285-90. See §§ 1174-76.
cases reviewed on concurrent power. Const., §§ 1370, 1485, 1498, 1512.
the compact between Virginia and Kentucky, though assented to by congress, declaring the perpetual freedom of navigation of the Ohio, did not bind congress; and it might legalize a bridge already constructed. Const., §§ 1122-23, 1203-12.
when congress has adopted a system of harbor improvements the supreme court cannot interfere. Const., § 1218.
quære, whether congress may remove paupers, vagabonds, etc., or whether this is the exclusive right of the states. Const., § 1312.
state laws must be directly in conflict with commercial power of congress, and not remotely affecting it. Const., § 1508.

b. Power of congress.

not to regulate commerce wholly within a state. Const., §§ 1051, 1161.
to regulate the commerce of corporations. Const., §§ 1029, 1058.
is exclusive; so when the subjects of are national, or admit of a uniform plan. Const., §§ 1066-67, 1071.
is sovereign, and not wholly conferred by the constitution. Const., §§ 1068-69.
is limited, it seems, by other constitutional provisions as to state power. Const., § 1070.
authorizes legislation to promote foreign or interstate commerce. Const., § 1137.
extends to regulation of passenger transportation. Const., § 1144.
implies power to control all instruments of commerce. Const., § 1147.
state regulations superseded by congressional action. Const., § 1148.
limited by nature of subject, and by police power of state. Const., § 1161.
and to intercourse with other states and countries. Const., § 1163.
to determine when its full powers shall be used. Const., § 1195.
review of cases as to. Const., § 1178.

REGULATION OF COMMERCE, IN GENERAL. *Power of congress—Continued.*

to regulate all foreign commerce. Const., § 1184.
 includes the power to prescribe rules. Const., § 1187.
 is not limited by a compact between states, assented to by it, declaring a river to be free. Const., §§ 1122, 1203-12.
 to improve rivers and harbors, is undoubted. Const., § 1214.
 the embargo of 1807 was constitutional. Const., § 1238.
 whenever the subjects to be regulated are national, or admit of one uniform system of regulation, congressional power is exclusive. Const., §§ 1261, 1282, 1317-18, 1341, 1380-81, 1391. See § 1485.
 cases discussed. Const., § 1262.
quære, whether congress may regulate fares on interstate railways. Const., § 1267.
 or remove paupers, etc. Const., § 1312.
 cannot extend to state internal regulations, or its police power. Const., § 1517.

c. *Power of the states.*

act of congress of July 24, 1866, prohibits state telegraph monopolies. Const., § 1040.
 operation of, not limited to United States military and post roads. Const., § 1041.
 cannot grant monopoly of telegraph lines. Const., §§ 1042, 1044.
 their police power is not surrendered, but may be exercised to interfere with commerce only for self-protection. Const., § 1084. See §§ 1141, 1292.
 may control their internal commerce. Const., §§ 1138, 1291.
 stated in general. Const., § 1141.
 superseded by congressional action. Const., § 1148.
 some powers are exclusive of state action; others may be exercised on non-action of congress; among the latter are regulations of pilotage, ports, dams, bridges, etc. Const., § 1171.
 of the first class are the purchase, sale and exchange of commodities with foreign countries or between the states. Const., § 1177. See §§ 1285, 1287-89.
 as to these, the non-action of congress is, *per se*, a declaration of commercial freedom. *Id.*; § 1383.
 to exercise rights over navigable rivers, subject to action by congress. Const., § 1215.
 internal commerce wholly within state power, though carried on upon public waters of the United States. Const., § 1218.
 may regulate ferries, roads, inspections, etc., so long as laws of congress not directly infringed. Const., § 1221.
 as to foreign and interstate commerce, the power of congress is exclusive; there is no concurrent power in the states. Const., §§ 1285, 1287. See §§ 1174-76, 1300.
 includes many things affecting commerce, such as taxation of property employed in. Const., §§ 1035, 1294. See *post*, 3, b, c.
 cannot regulate foreign commerce or navigation. Const., § 1301.
 may remove paupers, etc.; *quære*, whether congress may do so. Const., § 1312.
 difficult to determine where state power begins. Const., § 1382.
 if congress authorizes the importation of liquors, no state can prohibit it. Const., § 1483.
 not expressly excluded from exercising commercial power. Const., § 1545.
police power.

in the absence of commercial regulation by congress the states may pass police, health, inspection and quarantine laws. Const., § 1075.
 and prohibit sales of articles dangerous to public health or morals. Const., § 1516.

was not taken away by the constitution. Laws affecting health, etc., may be passed, though commerce indirectly affected. Const., §§ 1078, 1274, 1279, 1298.

act of New York, for summary removal of persons settling on Indian lands, valid. Const., § 1079.

for registration of immigrants from foreign ports, valid. Const., §§ 1251, 1274-88.

authorities reviewed. Const., § 1276.

being intended to protect her from foreign paupers, is valid. Const., § 1279; but see § 1333.

although it seems congress has legislated on the subject. Const., §§ 1277, 1282.

this case limited and explained. Const., § 1316.

the doctrine criticised. Const., § 1333.

and denied and limited. *Id.*; § 1316.

except to guard against diseases and paupers, a state cannot prohibit immigration of foreigners. Const., § 1295.

a state may deny foreigners the right to land unless they give bond against becoming paupers, but cannot exact a tax for every passenger. Const., § 1296; but see §§ 1338-40.

they cannot exact bond from master against passengers becoming paupers, or commute same by payment of small sum for each. Const., §§ 1333, 1336-37.
 is one of the means used by a sovereignty for the general good. Const., § 1307

REGULATION OF COMMERCE, IN GENERAL. *Power of the states — Continued.*

- the states have retained all that is necessary to their internal government. Const., § 1308.
- they may exclude fugitives from justice, paupers or vagabonds. Const., §§ 1310, 1320.
- they have no discretion in the exclusion, and can act only in self-defense. Const., § 1313.
- and commerce, distinguished. Const., § 1318.
- states have sole power to determine who are likely to be obnoxious to their citizens. Const., § 1321.
- they may remove such persons; *quære*, whether congress may do so. Const., §§ 1312, 1320.
- law of California allowing her officer to board foreign immigrant vessel, and exact bond for every person he decides to be or likely to become insane, a pauper, etc., is void. Const., §§ 1254, 1343, 1344.
- a state may compel railway companies to post table of rates annually and prohibit them from exceeding them. Const., §§ 1348, 1364.
- the patent laws do not interfere with state power to regulate dangerous occupations. Const., § 1388.
- a state may exclude dangerous articles, and thus exclude the products of other states. Const., § 1399.
- port charges may be valid under. Const., § 1419.
- duties on tonnage to raise revenue to enforce quarantine laws are void. Const., § 1445.
- a state cannot, to prevent pauperism and crime, prohibit the importation of liquors authorized by congress. Const., § 1433.
- but it may prohibit the sale thereof at retail, as the original packages are then broken up, and their character as imports ceases. Const., §§ 1434, 1488, 1439.
- stated and explained. Const., § 1488.
- great latitude allowed in the exercise of. Const., § 1490.
- but must not interfere with foreign commercial power of congress. Const., §§ 1491, 1497.
- whether treaty stipulations override police power. Const., § 1504.
- it seems that laws prohibiting sales of liquor on Sunday are valid, even though this might conflict with an importer's sales. Const., § 1508.
- liquor license laws, how far sustained. Const., §§ 1481-1518.
- state license fees, see post, 5, 7.*
- depending on non-action of congress.*
- as to exclusive power of congress, see *supra*, 1, b.
- how far the states may regulate commerce till congress acts. *Id.*; Const., §§ 1485, 1493.
- failure of congress to act equivalent to a declaration of freedom of commerce. Const., §§ 1074, 1142, 1379-83, 1177; but see §§ 1485, 1493.
- in such case the states may pass laws affecting interstate commerce. Const., § 1075.
- may build dam or bridge on navigable stream before action by congress. Const., §§ 1141, 1164-1176, 1287.
- as to dams and bridges, see *infra*, 2.
- act making enrolled vessels ships of the United States, and giving them the exclusive rights of the coasting trade, is such an exercise of the power by congress, that a state cannot give a monopoly of steam navigation. Const., §§ 1160, 1197.
- carrying on system of harbor improvements is action by congress. *Wisconsin v. Duluth*, Const., §§ 1212-13.
- as no act of congress existed as to Wisconsin river, and no boats licensed or ports established thereon, the state might dam it. Const., § 1223.
- congressional acts for the survey of, and appropriations for improving a river, but showing an intention not to interfere with obstructions by state, will not prevent state action. *Id.*
- assenting to compact declaring freedom of river, and licensing vessels, establishing ports, etc., thereon, amounts to congressional action. Const., § 1241.
- See § 1229.
- power of congress to authorize international bridge. Const., § 1242.
- as to what are concurrent state and national powers, see *supra*, 1, c.
- port charges valid, congress not having acted, if not duties on tonnage. Const., § 1419.
- so of wharfage. Const., § 1427.
- the mere grant of power to regulate commerce between the states is not an absolute prohibition on the states. Const., § 1485.
- may regulate charges on domestic railways until congress acts. Const., § 2135.
- d. *What is commerce; what is not.*
- state may tax legacies, when legatee neither resident nor United States citizen. Const., §§ 1024, 1034.
- exchange and foreign bills, not; state may tax former, and broker dealing in latter. Const., §§ 1025, 1085-87.

- REGULATION OF COMMERCE. IN GENERAL, *What is commerce; what is not* — Continued.**
- the telegraph is included in; state cannot lay tax on each message. Const., §§ 1028, 1099. See §§ 1039, 1051.
 - instruments of commerce are not, and are taxable as property, or as a trade or business. Const., § 1035.
 - not confined to those instrumentalities known when constitution adopted, but embraces new developments; it includes the telegraph. Const., §§ 1027-28, 1038, 1099.
 - includes commercial intercourse. Const., §§ 1037, 1188-1201, 1293, 1380.
 - issuing insurance policies is not; states may regulate or exclude foreign insurance company. Const., §§ 1030, 1059.
 - vesting jurisdiction in federal courts over commerce and navigation, not. Const., § 1036.
 - state law prohibiting non-resident from planting oyster beds, not a regulation of. Const., § 1091.
 - state may regulate its fisheries, though vessels engaged in coasting trade may be affected thereby. Const., §§ 1092, 1093.
 - states might prohibit importation of slaves for sale. Const., § 1095.
 - includes navigation. Const., §§ 1143, 1183, 1293, 1380.
 - a state may dam the entrance to a tide water marsh and creek, connected with a navigable river, to secure the public health. Const., §§ 1162, 1174-76.
 - congress may legalize a bridge between two states, as a post-road. Const., §§ 1203, 1204.
 - declaration of freedom of rivers, in compact admitting a state, valid. Const., § 1229.
 - includes the transportation of articles of barter or sale. Const., § 1257.
 - law requiring registry of immigrants from foreign port not a commercial, but a police, regulation. Const., §§ 1251, 1274-83. See § 1316.
 - a state law imposing tax on each passenger landed by master of vessel employed in foreign or coasting service, void. Const., §§ 1252, 1294-1335.
 - defined and considered. Const., §§ 1299, 1318.
 - persons are the subjects of. Const., § 1318, p. 684.
- e. *What is foreign commerce.***
- broker dealing in foreign bills may be taxed by state. Const., § 1035.
 - congress may prescribe what shall constitute American vessels, character of seamen, etc. Const., § 1033.
 - California act forbidding exhumation, not void, as applying to removal of dead to China. Const., § 1097.
 - may include voyage between ports of a single state, but on the high seas. Const., § 1132.
 - defined. Const., § 1184.
 - congress may punish conspiracies to destroy property on the high seas. Const., § 1226.
 - and thefts from vessels. Const., § 1227.
 - the embargo of 1807 was constitutional. Const., § 1228.
 - in peace, in war, and in respect to neutrals, considered. Const., § 1299.
 - it seems that the business of importing is, and that the importer cannot be required to pay a license for selling original packages. Const., § 1470.
 - imports and exports solely relate to, see *post*, 7, b, c.
 - state liquor license laws. Const., §§ 1481-1518.
- f. *What is interstate commerce; what not.***
- a monopoly of telegraph wholly within a state, but so situated that no other line can reach important points, is, and cannot be conferred by a state. Const., § 1039.
 - transportation or communication between persons in one state, not. Const., § 1051.
 - importation of cattle into a state is; state cannot prohibit or burden it. Const., §§ 1032, 1062-65.
 - but the police power may be exercised, for self-protection. Const., §§ 1084-85.
 - it is commerce between two or more states. Const., §§ 1072, 1185.
 - admiralty and maritime jurisdiction are commercial powers; railroads in two or more states are instruments of. Const., §§ 1072-78.
 - law abrogating common law liability for wrongful exclusion from cars running between two states, void. Const., § 1037.
 - states may provide liability for death on interstate railroad. Const., § 1089.
 - the carriage of goods on river entirely within one state, but destined for other states, is. Const., §§ 1103, 1139.
 - state law requiring owners of public conveyances, on land or water, to afford equal accommodations, void so far as affecting coasting trade between states. Const., §§ 1111, 1142.
 - stopping at intermediate ports does not affect interstate character of trip. Const., § 1156.
 - act of New York, giving steamboat inventor a monopoly of steam navigation on the waters of the state for a term, is void. Const., §§ 1116, 1197.
 - the power of congress extends within the territorial limits of a state. Const., § 1186.

REGULATION OF COMMERCE, IN GENERAL, *What is interstate commerce; what not*—Con. act of Maine, for exclusive rights on the Penobscot above impassable falls and dams, valid. Const., §§ 1121, 1202.

internal commerce, though transacted on waters of United States, is not. Const., § 1218.

vessel plying between ports of same state not subject to government inspection, though she sometimes carries good from without the state. *Id.*; but see §§ 1219–20.

navigation on public river between ports of same state, *ia*. Const., § 1219. See § 1218.

a tax on bills of lading of bullion destined for points beyond, is void. Const., § 1472, p. 801.

g. *What are exports from state.* See *post*, 7.

h. *Preferences to ports of one state.*

state regulation of warehouse charges does not amount to. Const., § 1076.

laws directly giving preference only prohibited, and not giving incidental preferences. Const., §§ 1077, 1211.

act declaring bridge lawful, which impedes navigation, not a preference. Const., § 1129.

erection of bridge giving one city an advantage over another, not within this provision. Const., § 1210.

the power of congress to regulate commerce is hereby limited, and the states are also prohibited to destroy commercial equality as to ports. Const., § 1297.

object of provision was perfect equality in commerce and navigation, among the states. Const., § 1302.

and it limits only the power of congress, and not of the states, as to their domestic affairs. Const., § 1361.

laws affecting pilots are not. Const., § 1543.

i. *Commerce with Indian tribes.*

laws of Georgia, assuming control over Indian country, void. Const., § 1080.

sale of liquor to Indians may be forbidden by congress. Const., § 1081.

the decision of the executive and other political departments, that certain tribe exists, followed by the courts. Const., § 1082.

congress cannot punish crime on an Indian reservation within a state. Const., § 505.

2. ON NAVIGABLE WATERS.

a. *In general.*

power extends to places and things not wholly within state jurisdiction; a regulation licensing steamboats does not affect state ferry; includes power to determine character of vessels, seamen, etc. Const., §§ 1083–85, 1183.

quare, whether state suing to remove obstruction authorized by congress must not show special damage. Const., § 1181.

section 4283, R. S., applies to commerce on high seas, though *termini* of voyage in a single state. Const., § 1133.

as to ports, harbors, pilotage, buoys, beacons, slips, dams, bridges, etc., the states may act, unless congress has acted, and then when not in conflict with such action. Const., §§ 1088, 1171, 1177.

the power of congress fully includes navigation, except that wholly within a state. Const., § 1183.

a law of New York giving inventor of steamboat exclusive right to navigate state waters, conflicting with acts of congress, is void. Const., §§ 1195–97.

state may improve river of the United States, but must not interfere with works authorized by congress. Const., § 1225.

b. *Ships and vessels.*

local authorities may make regulations for local safety and convenience, as to lights, anchorage, slips, etc., not conflicting with federal law or admiralty jurisdiction. Const., §§ 1088, 1369.

coasting vessel may not interfere with exclusive right of interstate ferry. Const., § 1090.

act of congress for recording mortgages on, and making the record notice, valid. Const., § 1094.

entire commercial marine within power of congress; state act requiring enrollment before leaving port, void. Const., § 1096.

congress may determine what shall constitute American vessel. Const., § 1083.

steamers enrolled and licensed, plying between different states, are vessels of the United States. Const., § 1146.

and may navigate all navigable waters of the United States. Const., § 1217.

state act requiring filing of statement, setting forth name and conditions of ownership of, void. Const., § 1157.

state act requiring enrolled vessel engaged in coasting trade to extend equal privileges to colored and white persons, void. Const., §§ 1111, 1142, 1150–53.

Coger v. Packet Co., 37 Ia., 145, distinguished. *Id.*

congress has regulated interstate commerce by licensing and enrolling, engaged in coasting trade. Const., §§ 1160, 1197.

REGULATION OF COMMERCE, ON NAVIGABLE WATERS, *Ships and vessels*—Continued.
and a state cannot grant a monopoly of steam navigation on its waters. Const., § 1197.

it is the enrollment, not the license, which determines its American character. Const., § 1198.

the power of congress extends to passenger vessels. Const., § 1199.

the license for the coasting trade authorizes passenger transportation. Const., § 1200.

power of congress not restricted to sailing vessels. Const., § 1201.

whether inspection laws of congress apply to vessels engaged wholly in internal commerce. Const., §§ 1218-20.

passenger vessels are within congressional power. Const., § 1281.

no discrimination as to wharf rent can be made against vessel carrying the products of other states. Const., § 1396.

c. *Bridges.*

congress may declare bridge impeding navigation to be lawful, and require vessels to respect its elevation. Const., §§ 1129, 1203-12.

a state may authorize erection of, over navigable stream wholly within its own limits, but congress may interpose by general or special law and remove them, and punish future erection of. Const., §§ 1112, 1164-70.

question of expediency of, is for the state. Const., § 1167.

congress might legalize a bridge over the Ohio, though it was declared by the Virginia and Kentucky compact to be forever free. The assent of congress to such compact did not bind. Const., §§ 1123, 1203-12.

it seems that though the power to authorize, regulate, legalize or destroy bridges is within the power of congress, it cannot build them. Const., §§ 1230-35.

relative powers of congress and the states. Const., §§ 1235-38.

making a bridge a post route, and declaring it a legal structure by congress, legalizes it in all respects. Const., § 1239.

a draw-bridge is not an obstruction to navigation. Const., § 1240.

the construction of Wheeling bridge by a state was unauthorized, congress having licensed vessels, established ports, etc., on the Ohio. Const., § 1241.

city regulations for opening and closing draw-bridges at certain hours in Chicago, requiring them to be closed every ten minutes, held valid. Const., § 1243.

as to non-action by congress, see *supra*, 1, c.

d. *Wharves.* See post, 6.

power of states over port regulations depends on non-action of congress. Const., §§ 1171, 1427.

but if the exercise of the power becomes oppressive, the federal courts will interfere. Const., § 1428.

no discrimination in rent of, against vessel carrying products of other states. Const., § 1396.

wharfage may be charged to all using, if it does not exceed a fair return for the use of the property. Const., § 1398.

vessels may be required to pay for the use of, but charges for entering port, based on tonnage, are void. See post, 7. Const., §§ 1416-17.

wharfage may be based on tonnage. Const., §§ 1421-22, 1440, 1443.

vessels using wharf boats must pay wharfage, when. Const., § 1430.

wharfage charges are valid, and canal boats may be exempted therefrom, not discriminating between persons. Const., §§ 1437-38.

discrimination in favor of state canal boats, void. Const., § 1439.

the purpose for which a city spends the money collected is immaterial. Const., § 1441.

for unimproved as well as improved wharves, valid. Const., §§ 1442-43.

but charges on vessels anchoring in the port, whether touching at a wharf or not, are invalid. Const., § 1444.

e. *Pilotage.*

state laws concerning, are valid. Const., §§ 1100, 1546.

depend on non-action of congress. Const., § 1171.

New York system of regulation of, held valid. Const., § 1101.

so of elaborate system of California. Const., § 1102.

laws concerning, are beneficial; a law imposing half-pilotage on vessels refusing a pilot is valid. Const., §§ 1541-42.

not an impost, or preference of ports of one state. Const., § 1543.

nor in conflict with commerce clause. Const., § 1544.

f. *Mariners.*

congress may determine national character of seamen. Const., § 1083.

Louisiana act prohibiting free colored seamen coming into the state is void. Const., § 1098.

g. *Extent of congressional power.*

may regulate commerce on high seas between ports of a single state. Const., §§ 1107, 1132-33.

h. *What are navigable waters of the United States.*

common law doctrine of ebb and flow, no application; navigability in fact is the test. Const., §§ 1110, 1134-35.

REGULATION OF COMMERCE. ON NAVIGABLE WATERS, *What are navigable waters of the United States — Continued.*

are those so connected as to form, with other navigable waters, a continuous line of travel between states or countries. Const., §§ 1109, 1134-35.
Grand river, Michigan, one of the. Const., § 1136.

i. Dams.

state may dam the entrance of a tide-water creek and marsh of the Delaware to preserve public health. Const., §§ 1162, 1174-76, 1287.
unless congress has acted. *Id.*
and may authorize, or other obstructions, across or in navigable stream wholly within its limits, if congress has not acted. Const., §§ 1113, 1171-73.
Wisconsin might authorize dam, though its constitution provides for the freedom of rivers flowing into the Mississippi. Const., § 1222.
nor is such act prohibited by the ordinance of 1787 containing a like clause. Const., §§ 1223-24.
as to non-action of congress, see *supra*, 1, c.

j. Bays and harbors.

congress may leave details of improvement in, to the secretary of war. Const., §§ 1106, 1130.
a state may provide for cutting a channel in a bay, and that an adjoining county shall pay for it. Const., §§ 1115, 1177.
if acts of congress not in conflict. Const., § 1177.
when congress has adopted a system of improvement of, the courts cannot interfere. Const., § 1213.

k. Canals.

though so constructed that injunction would lie, yet if afterwards adopted by congress the courts will not interfere. Const., §§ 1124, 1213-14.

l. Ports. See *post*, 7.

power of states over, depends on non-action of congress. Const., § 1171.
and extends to all regulations to secure local safety and convenience, not conflicting with laws of congress or admiralty jurisdiction. Const., § 1088.
charges of, are valid under the police power, and in return for benefits received; but they must not be duties on tonnage. Const., § 1419.
but charges for entering or departing are void. Const., § 1444.

m. Rivers.

compact between states as to navigation of, before admission, subordinate to power of congress. Const., §§ 1103, 1125.
congress has plenary power over. Const., §§ 1126, 1216.
may turn water into one of two channels. Const., §§ 1105, 1127.
and make structures tending to impede, but in effect assisting commerce. Const., §§ 1127, 1128.
may leave execution of details to officers. Const., § 1130.
this is not incompatible with the enjoyment of local rights of crossing, etc. Const., § 1217.

3. TAX ON TRANSPORTATION OF PASSENGERS OR PROPERTY.

a. In general.

constitutionality is to be determined by the subject on which burden laid. Const., § 1255.
difficulty of drawing the line between valid and invalid state taxation is great. Const., §§ 1263-68.
amount of, cannot influence course of decision as to its validity. Const., § 1273.
relative powers of the states and congress discussed. Const., § 1301.
the clause relating to the migration of persons historically considered. Const., § 1327.

b. What state taxation is valid. See *supra*, 1, c, as to police power.

state may tax corporate franchises, and exact fee for use of its highways. Const., §§ 1259, 1264.
tax on railway gross receipts, though partially affecting interstate transportation. Const., §§ 1246, 1263, 1345.
this is not taxing commerce, but property. *Id.*
requirement in railway charter to pay part of transportation receipts, though the road extends beyond the state. Const., §§ 1247, 1266.
to charge freight, toll or fare for the use of its own property. Const., § 1266, p. 627.
a city may impose a license tax on express company doing interstate business. Const., §§ 1248, 1268.
it seems that a capitation tax on all passengers going without or coming into a state is valid. Const., § 1270.
tax on all foreign passengers cannot be exacted. Const., § 1296.
taxation to execute inspection laws, see Const., § 1330.
is restrained only as to duties on imports and tonnage. Const., § 1331.

REGULATION OF COMMERCE, TAX ON TRANSPORTATION OF PASSENGERS OR PROPERTY —
Continued.

- c. — *what is invalid.* See *supra*, 1, c, as to *police power*.
 tax on all freight taken up without and brought within the state, or *vice versa*.
 Const., §§ 1244, 1256, 1258, 1260, 1345.
 it is immaterial that the levy is on *all* freight, internal and external. Const., § 1259.
 tax on persons carried through or out of a state. Const., § 1262.
 a capitation tax on all passengers going out of or coming into a state, payable by the carrier, is not void as a regulation of commerce, but tends to defeat the ends of government, and is void. Const., §§ 1249, 1270-71.
 law requiring master to pay state a certain sum for each passenger brought into port, and giving him a right to recover from each the sum paid on his account. Const., §§ 1252, 1284-1335, 1338-40.
 a state may compel foreigners to give bonds against becoming paupers, but cannot exact tax from all passengers. Const., § 1296; but see §§ 1338-40.
 right to tax does not arise until the subjects of taxation are within the jurisdiction. Const., § 1305.
 tax of \$3 on each foreign passenger, though to create a fund for alien paupers, is void. Const., § 1319, p. 686.
 a law of New York requiring a bond against passengers becoming paupers, etc., or in lieu thereof to pay a small sum for each, is void. Const., §§ 1253, 1336-42.
 this is a tax on the passengers, as much as if collected from them. Const., §§ 1336-37.
 immaterial that the law was not to operate until twenty-four hours after landing. Const., § 1342.
 a law of California allowing her officer to board all immigrant vessels, and demand bond for every passenger by him determined to be insane, a pauper, etc., void. Const., §§ 1234, 1343-44.
 tax on merchandise in transit, or on carriage of goods from and to points without the state, void. Const., § 1345.
 law requiring railway to return receipts from such sources, void. *Id.*
 tax on locomotives and cars mainly used in interstate transportation, void. Const., § 1346.

4. REGULATING CHARGES FOR USE OF PRIVATE PROPERTY.

- is not a deprivation of property without due process of law. Const., § 1352.
 a state may fix and regulate charges for storing grain in a warehouse, though intended for shipment to other states and countries. Const., §§ 1347, 1353-55, 1359-60.
 grain elevators are constructed for public use, and subject to public regulation. Const., § 1353.
 the fact that they were built before regulating statutes were passed, is immaterial. Const., § 1356.
 the question of what is a reasonable charge is legislative as well as judicial. Const., § 1357.
 various cases of regulation, when some special privilege is granted with the property, considered. Const., § 1367, pp. 733-34.
 railroad companies may be compelled to post tables of rates annually, and prohibited from charging a greater rate, by the states. Const., §§ 1348, 1368-70.
 and maximum rates of charges on road forming continuous line with a road in another state, may be fixed. Const., § 1371.
 railroads may be taxed. Const., § 2335.

5. DISCRIMINATION AGAINST PRODUCTS OF OTHER STATES.

- a state cannot discriminate against goods brought from other states. Const., §§ 828, 1473.
 a license on the business of selling goods is a tax on the goods themselves. Const., §§ 1372, 1379-80, 1386.
 a state act requiring peddlers of goods of other states to pay a license is void. Const., § 1373.
 or traveling salesmen. Const., §§ 1375, 1389-90.
 otherwise where the state supreme court held that the tax was without regard to the place of growth or manufacture of the goods. Const., §§ 1374, 1384-85.
 or where it was so in fact. Const., § 1401.
 exacting license fees of non-residents, higher than from residents, void. Const., § 825.
 United States patents do not exempt articles made under them from state taxation. Const., §§ 1376, 1387.
 license laws discriminating against foreign products are void; but one who is not injured thereby cannot complain. Const., §§ 1377, 1392-93.
 an ordinance requiring vessel laden with products of other states to pay wharf rent not exacted from vessels laden with home products, void. Const., §§ 1378, 1395-97.
 a state cannot empower a city to do what it cannot itself do. Const., § 1398.
 but in the exercise of the police power a state may exclude articles which it considers dangerous. Const., § 1399.
 federal jurisdiction to prevent discrimination extends to the interior of every state. Const., § 1400.

REGULATION OF COMMERCE, DISCRIMINATION AGAINST PRODUCTS OF OTHER STATES— *Continued.*

liquor licenses are valid if there is no discrimination against products of other states. Const., § 1402.

so of a tax on liquors, the product of other states. Const., § 1403.
a state may tax liquors brought from other states if it also taxes its domestic product the same. Const., § 1581.
a state, as the owner of its tide waters and land, may prohibit non-citizens from planting oysters therein. Const., § 824.

6. DUTIES ON TONNAGE. See PORTWARDENS' FEES, *post*, 8.

"no state shall, without the consent of congress, lay any duty on tonnage." Const., § 1404.

wharfage may be regulated according to the tonnage of vessels, but a tax at so much per ton, whether a vessel lies at a wharf or not, is not regarded as wharfage, and is void. Const., §§ 1405-8, 1416-17, 1418, 1420, 1409-10, 1413, 1429-30.

a tax, measured by the tonnage of vessels, without respect to the use of wharves, is void. Const., § 1416.

tonnage is a vessel's internal capacity in tons of one hundred cubic feet each. Const., §§ 1418, 1432.

port charges are valid under the police power if they do not amount to duties on tonnage. Const., § 1419.

distinction between wharfage and tonnage duties; former may be based on tonnage. Const., §§ 1421-22.

statutes void in part may be upheld so far as valid. Const., § 1423.

ordinance requiring all vessels to land at designated wharf, and to pay a reasonable fee therefor, is valid; at least until congress acts on the subject. Const., §§ 1411-12, 1425-26.

and a penalty for landing at any other place may be imposed. Const., § 1424.
the states may tax vessels at a valuation; but taxes at so much per ton is unconstitutional. Const., §§ 1414, 1431-36.

it is immaterial that vessels taxed are used in internal state traffic. Const., §§ 1415, 1436.

quarantine laws are valid; but duties on tonnage to raise revenue to enforce such laws cannot be laid. Const., § 1445.

7. DUTIES ON IMPORTS AND EXPORTS. See *supra*, 3.

a. *In general.*

bills of exchange are not imports or exports. Const., § 1036.

the business of importing or exporting may be taxed by states. Const., § 1036.
constitutional provisions. Const., § 1446.

a stamp tax on bills of lading on bullion destined for points beyond the state is void. Const., §§ 1448, 1465. See § 1472, p. 801.

a state law requiring importers to take out a license before selling imported goods in original packages is void. Const., §§ 1449, 1468, 1470, 1478-80, 1500.

an impost or duty is a custom of goods brought into a country. Const., §§ 1467, 1472.

is generally secured or paid before delivery to importer, but this is not important. *Id.*

history of the provision. *Id.*; § 1472.

the payment of duties implies a right to sell the goods. Const., § 1469.

a tax on the occupation of selling articles is a tax on the articles themselves. Const., § 1469, p. 798.

a state may tax the products of other states, sold only in the original packages, they not being imports. Const., §§ 1452, 1471-73.

laws in respect to entry, etc., of imported goods. Const., §§ 1474-75.

a tax on the amount of goods sold at auction is on the goods, not the auctioneer. Const., § 1478.

states cannot prohibit the sale of imported liquors in the original packages; otherwise of the sale thereof at retail. Const., §§ 1483-84.

the power to license or regulate includes power to prohibit. Const., § 1501.

liquor license laws are mere regulations of state internal commerce or police. Const., §§ 1503, 1506, 1510-14, 1518.

nor do they violate treaties. Const., § 1515.

laws tending to diminish consumption of foreign goods do not regulate commerce. Const., § 1509.

tax on railway gross receipts is not. Const., §§ 1263-64, 1527.

congress cannot tax exports; but a law requiring a stamp on exported tobacco merely to distinguish it, and protect it from taxation, is valid. Const., § 1530.

b. *What are imports.*

whether persons are. Const., §§ 1270, 1316, 1328.

"imports" and "exports" refer only to goods. Const., § 1525.

do not include goods simply brought from one state to another. Const., § 1394.

goods sold by "drummer" or traveling salesman are not. Const., § 1401.

REGULATION OF COMMERCE, DUTIES ON IMPORTS AND EXPORTS, *What are imports — Continued.*

are goods still in the original packages brought from another country, and not having become incorporated with the mass of the property in the country. Const., §§ 1450-51, 1467.

until they have been broken up, or gone beyond the importer's control, they are imports. Const., § 1468, note.

and a license tax cannot be exacted. Const., §§ 1454, 1478-80.

includes only those from foreign countries, and not the products of other states. Const., §§ 1452, 1471-72, 1493, 1526.

liquors imported, remaining in the cask, bottle, etc., in the original form, are. Const., § 1500.

salt purchased of the consignees, and resold in the original packages, ceases to be an import when it leaves the consignee's hands. Const., §§ 1453, 1474-75.

and where the goods were at the vendor's risk until delivered. Const., § 1476.

at what period of time goods are held to have become imports. Const., § 1476.

imported goods destined for interior points are in transit until they reach them, and not subject to taxation. Const., § 1482, p. 815.

imported liquors continue to be, while in original vessels; otherwise when sold at retail. Const., §§ 1456, 1488-84, 1487, 1492.

a state may prohibit the sale, in the original package or vessel, of liquor imported from another state, when congress has not directly acted. Const., §§ 1486, 1498-99.

and on the ground that this is not an import. Const., §§ 1498-94.

c. *What are exports.*

quære, whether passengers going out of a state are. Const., § 1270.

"imports" and "exports" relate only to goods. Const., § 1525.

logs in port awaiting shipment to a foreign country, having been inspected, are. Const., §§ 1447, 1464.

gold or silver coin in California, the subject of carriage without the state. Const., § 1465. See § 1472.

if destined for foreign ports. Const., § 1472.

articles of foreign, and not domestic, commerce are. Const., § 1493.

passengers not. Const., § 1523.

law regulating exhumation does not relate to. Const., § 1529.

are property only. *Id.*

d. *Power of congress. See Taxation.*

congress may restrain enjoining of taxation. Const., § 447.

and provide penalty for false valuation of imported goods. Const., § 448.

may require bonds of distillers and regulate situation of distilleries. Const., § 450.

may provide rate of taxation according to material used. Const., § 470.

the "succession tax" of 1864 is valid. Const., § 468.

power to collect includes all means appropriate. Const., § 683.

summary method of auditing and collecting collector's account, proper. Const., §§ 682-83, 728-29. See *Due Process of Law*, 8.

act for production of persons, books and papers before revenue commissioner is valid. Const., § 726.

duties, etc., must be uniform; states cannot destroy uniformity, in the absence of federal regulation, by taxing imports. Const., § 1303.

a state tax on passengers coming from foreign country is a revenue act, and void. Const., § 1304.

import includes tax on such passenger, as well as on his goods. Const., § 1309.

e. *Power of the states. See supra, b, c.*

sales by importer are exempt from state taxation, but the privilege does not extend to his vendee. Const., § 1477.

a license tax, discriminating against imports, is void; imports cannot be taxed until sold by the importer, or broken up and scattered. Const., §§ 1478-80.

to regulate their own internal traffic. Const., § 1481.

f. *Inspection.*

analogy of power of, to concurrent power of the states and congress to regulate commerce. Const., § 1191.

object of laws for. *Id.*

if a state exacts too much for, it belongs to the government and cannot be recovered back. Const., § 1329.

the scope of inspection laws is large, including imports and exports. Const., §§ 1461, 1521.

but their usual object is to fit goods for exportation. Const., § 1521.

is a right reserved to the states, but if it amount to taking duty it is void. Const., §§ 1458, 1459, 1519.

an inspection law imposing a duty is void if it exceed what is absolutely necessary for inspection. Const., §§ 1459, 1520-22.

and congress has power to decide whether it be excessive. Const., §§ 1460, 1520.

REGULATION OF COMMERCE, DUTIES ON IMPORTS AND EXPORTS, *Inspection—Continued.*
 a law of Texas permitting shipment of imported hides, after obtaining certificate of inspector, and paying a fee of six to ten cents each, is valid. Const., §§ 1458, 1522.
 a law of New York imposing a tax of \$1 on alien passengers, to provide for execution of inspection laws, is void. Const., §§ 1462, 1523.
 this provision has reference to merchandise only, not persons. Const., §§ 1463, 1524.

8. PORTWARDENS' FEES.

a state law providing that the master and wardens of a port should receive a fee on every vessel entering port, whether they performed any duty or not, is void as a regulation of commerce and tax on tonnage. Const., §§ 1532, 1535-38. See § 1100.
 making it unlawful for any other than the master and wardens of a port to survey hatches of incoming vessels, or of damaged goods, etc., is void. Const., §§ 1533, 1539-40.
 regulating pilots, and requiring half pilotage fees of vessel refusing a pilot, for the use of decayed pilots, valid. Const., §§ 1534, 1541-44, 1546. See § 1100.

REGULATING CHARGES. See *Regulation of Commerce*, 4.

RELATION.

fiction of, not allowed to operate injuriously. Const., § 2713.
 approval of law does not relate back to time of passage. Const., § 2715; but see §§ 2717-19.
 at common law acts took effect by relation on first day of session. Const., § 2731.

RELIGIOUS LIBERTY.

act admitting Louisiana does not give federal courts jurisdiction of questions involving. Const., §§ 473, 476-77.
 protection of, depends on state, and not federal, law. Const., § 475.
 guaranty of ordinance of 1787, superseded by admission of Louisiana. Const., § 477.
 it seems that the states may by law aid equally every sect, establish funds for the support of ministers, charities, burial, etc. Const., § 478.
 act forbidding polygamy, valid. Const., § 479.

REMEDIAL STATUTES. See *Construction of Statutes; Statutes*.

REMEDY. See *Constitutional Law*, 3.

what are remedies, see *Obligation of Contracts*, 6.

REMOVAL OF CAUSES. See *Constitution of the United States*, 7; *Jurisdiction*.

1. IN GENERAL.

from state courts, arising under fourteenth amendment, see *Equal Protection of the Laws*, 3.
 effect of valid petition is to make subsequent proceedings in state court void. Const., § 929.
 can be only before trial under § 641, R. S., and not after trial commenced. Const., § 932.
 but under fourteenth amendment the case may be removed and the judgment revised. Const., §§ 933-34.
 grounds of, under § 641, R. S. Const., § 937.
 meaning of "prosecution" in the removal act. Const., § 2497.
 none after trial and judgment in state court. Const., § 2501.
 what causes removable. Const., § 2503.

2. CONSTITUTIONAL LAW.

the judicial power extends to a prosecution against a revenue officer for murder when he justifies the killing as in self-defense, while doing his official duty. Const., §§ 2473-2500, 2649.
 and removal is proper in such a case. *Id.*; § 2516.
 congress has the power to authorize removal of cases arising under United States laws. Const., § 2477.
 acts of 1789 and 1815, considered. Const., § 2479; of 1833 and 1866, §§ 2480-81.
 cases cited and approved. Const., § 2482.
 both civil and criminal cases may be removed. Const., § 2483.
 state prosecution not removed simply because the accused was a federal officer. Const., § 2495.
 certain laws held constitutional. Const., § 932.
 any suit originally triable in the federal courts may be removed. Const., § 2496.
 the seventh amendment forbids any law authorizing the federal courts to retry cases tried in state courts. Const., §§ 2470, 2501-4.
 a law forbidding a foreign corporation to do any business within the state until it agrees not to remove suits against it to a federal court, is void. Const., §§ 2471, 2472, 2503-15.
 but the state may revoke its license for a breach of such agreement. Const., § 2512.
 local influence act of 1867, valid. Const., § 2517.

REPEAL OF STATUTES. See *Statutes*, 6.

REPUBLICAN GOVERNMENT. See *Constitution of the United States*, 6, 9, c.

RES ADJUDICATA.

decision on demurrer not, when same question presented by plea, when. Const., § 1648.

RESERVED POWERS. See *Obligation of Contracts*, 4, c.

RESOLUTIONS OF CONGRESS. See *Constitution of the United States*, 3, k.

RES PERIT DOMINO.

maxim applied. Const., § 1659.

RETROSPECTIVE LAWS. See *Legislative Power*, 8; *Vested Rights*.

REVENUE. See *Construction of Statutes*, 10; *Regulation of Commerce*, 7.

REVISED STATUTES. See *Construction of Statutes*, 11.

REVOLUTION, THE.

had no effect on existing contracts and property rights, when. Const., § 2116.

RHODE ISLAND.

constitutional right of trial by jury in. Const., §§ 2526-27.

guardians of property of non-resident infants may be constitutionally appointed.

Const., § 2611.

RIGHTS.

and remedies, inseparable. Const., § 1665.

RIGHT TO ASSEMBLE. See *Constitution of United States*, 4, f.

RIPARIAN RIGHTS.

on purely internal streams of a state. Const., § 1207.

RIVERS. See *Regulation of Commerce*.

ROMAN LAW. See *Constitutional Law*.

S.

SABBATH. See *Police Power*, 4.

prohibiting sale of liquor on, interfering with rights of importer, whether valid. Const., § 1508.

SALARIES.

a statute providing that the president shall not allow an officer more than a stated sum gives no absolute right to such sum. Consuls, § 20.

SCHOOL FUNDS.

Indiana constitutional provision as to distributing, construed. Const., § 2608.

SCHOOLS.

separate may be provided for colored and white children. Const., §§ 896-97.

constitutional provision as to establishment of, construed. Const., § 2599.

SEAMEN. See *Regulation of Commerce*, 2, f.

SEARCHES AND SEIZURES.

right of exemption from, existed prior to the constitution, and is not a "right, privilege and immunity" secured thereby. Const., § 80.

WHAT ARE; WHAT NOT.

summary process for collecting debt due the government is not. Const., § 81.

examining books, etc., by revenue officers, is not. Const., §§ 83, 86.

extradition for crime under treaties has no relation to. Const., § 88.

warrant for debt due as a penalty for violation of city by-law, is not. Const., § 85.

summary process by distress for debt due United States, not. Const., § 688.

REQUISITES TO ISSUE OF WARRANT.

oath describing person, made by officer on information of others, not sufficient. Const., § 84.

SEAS. See *High Seas*.

SECESSION.

state cannot withdraw from the Union by. Const., §§ 137-38.

SELF-ACCUSATION. See *Constitution of the United States*, 4.

SELF-EXECUTING PROVISIONS. See *Construction of Constitutions*.

SET-OFF.

obtained after rendition of judgment, may be made a. Const., § 1762.

SHAREHOLDERS.

IN GENERAL.

the government, as a shareholder, loses its sovereignty, and acts as an individual. Const., § 544.

PERSONAL LIABILITY OF.

constitutional provision that corporate debts shall be secured by, is not self-executing.

Const., § 58.

clause of, in charter is assented to by subscribing. Const., § 2192.

character of. Const., § 2193.

CONSTITUTIONAL LAW.

personal liability clause cannot be repealed so as to affect prior debts. Const., § 2191.
under the reserved power, a provision for non-liability may be changed. Const., §§ 2056, 2194-96.

one coming in after repeal is not liable. Const., § 2212.

SHIPS AND VESSELS. See *Regulation of Commerce*, 2, b.

SHOW.

law that seats shall not be marked reserved unless actually sold, void. Const., § 111.

SLAVERY. See *Constitution of the United States*, 3, 5, h; *Law of Nations*, 4.

SOVEREIGNTY. See *Constitution of the United States*, 2, 9; *Law of Nations*.

SPECIAL LAWS. See *Construction of Constitutions*, 14.

SPECIFIC PERFORMANCE.

when cannot be effected, equity will give alternative relief. Const., § 1182.

SPEEDY TRIAL. See *Constitution of the United States*, 4, e.

STATE CONSTITUTIONS. See *Constitutional Law; Construction of Constitutions; Construction of Statutes; Statutes*.

STATE COURTS. See *Constitution of the United States*, 7; *Jurisdiction*.

STATE DECISIONS—STATE LAWS.

1. STATE LAWS; IN GENERAL.

effect of the Revolution on colonial law. Const., § 3036.

cannot control the federal government. Const., §§ 3030, 3052.

federal courts must give full effect to. Const., § 3031.

are judicially noticed. Const., § 3032.

jurisdiction of federal courts not affected by. Const., § 3051.

what state laws are binding on federal courts.

limitation laws, redemption laws, and laws regulating land titles and remedies.

Const., §§ 3033-35.

practice laws may be adopted by federal courts. Const., § 3041.

when congress adopts a state law as a rule of decision, this is a re-enactment of a state statute if completely applicable to the case. Const., § 3053.

what state laws are not binding.

state chancery and admiralty practice. Const., §§ 3037-39.

nor practice laws, unless they be the construction of state statutes. Const., §§ 3039-40.

or are adopted under the act empowering the courts to regulate practice. Const., § 3041.

except such as are repugnant to acts of congress. Const., § 3043.

congressional laws supersede state practice laws. Const., § 3042.

laws allowing set-offs. Const., § 3044.

law forbidding suit against bank after receiver appointed. Const., § 3045.

state lien laws on domestic ships. Const., § 3046.

laws for the appointment of commissioners to decide certain questions. Const., § 3047.

laws compelling a reference in cases of long accounts. Const., § 3048.

laws requiring judges to give reasons for decisions. Const., § 3049.

penalty against officers in addition to damages. Const., § 3050.

laws allowing sureties of officers to be summarily proceeded against. Const., § 3050.

conditions, restrictions, etc., in state laws adopted by acts of congress, where a compliance therewith would depend in any way upon a resort to state officials. Const., § 3053.

judgments need not be docketed according to the state law. *Id.*

the words "common law," in the act of 1862 making state laws the rules of decision in federal courts, do not include criminal trials. Const., § 3056.

laws of the Confederate States. Const., § 3057.

laws as to controversies affecting citizens of other states. Const., § 3061.

STATE DECISIONS — STATE LAWS — *Continued.*

2. STATE DECISIONS; WHEN FOLLOWED BY FEDERAL COURTS.

upon question of conformity of state law with state constitution. Const., §§ 579, 2086, 2820, 3076-80.

question of construction of their own statutes. Const., §§ 1140, 1150, 1884, 2252, or state laws. Const., §§ 1885, 3033, 3040.

if the question of constitutionality is merely doubtful. Const., § 3076.

must not trench on any right secured by federal constitution or law. Const., § 3080.

are part of the obligation of contracts, see *Obligation of Contracts*, 1, c.

as to construction that the right to keep gambling table under a state statute is not a contract. Const., § 1688.

in the absence of state decisions construing its own laws, the federal courts proceed under the common law, and as the state courts would proceed. Const., §§ 3028-29.

"in all trials at common law" excludes admiralty and equity. Const., § 3054.

in cases depending on state laws, the federal courts adopt the construction of such laws by the state court. Const., § 3058.

if a construction is changed by the state courts, and settled, the federal courts will also change. Const., § 3059.

in cases as to land titles, depending on the state common law. Const., § 3060.

as to construction by state of a grant from the crown. Const., § 3075.

decisions must be *settled*. Const., § 3077.

as to what is a municipal "corporate purpose." Const., § 3081.

settling title to lands. Const., § 3082.

as to municipal power to issue bonds, when decisions conflicting. Const., § 3083. See § 3084.

3. WHEN NOT FOLLOWED.

changes of settled construction which have been acted on, and become part of contract obligations, are not. Const., §§ 1687, 1692.

relating to obligation of contracts, when. Const., § 1689. See §§ 1688, 1693.

decision on act under which bonds issued. Const., § 1690.

as to whether state statutes are contracts. Const., § 2259.

"in all trials at common law" excludes admiralty and equity. Const., § 3054.

dictum or gratuitous decision not followed, when. Const., § 3062.

nor the decisions of inferior courts. Const., § 3063.

nor decisions under private statutes giving special jurisdiction for the alienation of particular estate. Const., § 3064.

nor when rights *have vested* under statutes generally believed to be valid. Const., § 3065.

nor when the decision is not based on any reason peculiar to the state constitution, but on principles generally applicable. Const., § 3067.

municipal bonds; decision not followed, when. Const., §§ 3067, 3083-84.

nor as to the general rule as to the legal effect of judgments. Const., § 3068.

nor common law decisions. Const., § 3069.

nor as to cases under the twenty-fifth section of the judiciary act. Const., § 3070.

nor the construction of a state from which an act was copied, where the act is clear. Const., § 3071.

the decision must construe some statute or local provision. Const., § 3073.

state decisions do not act retrospectively on federal courts; former federal decisions stand. Const., § 3073.

not followed when federal questions involved. Const., § 3074.

the decisions must be *settled*. Const., § 3077.

STATES. See *Constitution of the United States*, 2, 5, 9-14, 19; *Constitutions of the States*; *State Decisions*.

as to when they may legislate, if congress does not, see *Constitution of the United States*, 5, c; *Jurisdiction*, 4; *Regulation of Commerce*, 1, c; *Taxation*.

suits by and against, see *Constitution of the United States*.

various definitions of the word. Const., § 142.

authority to sue shown by letter of ratification by governor pursuant to law. Const., § 140.

acts of seceding, in aid of rebellion, void. Const., §§ 125, 155-57.

otherwise of acts promoting internal peace and good order. *Id.*

in their *quasi* private character, see *Constitution of the United States*, 19.

can be sued by citizens only when they permit. Const., § 1896.

contracts by, see *Obligation of Contracts*, 2.

transfer of property of; if state imposes restrictions on, purchaser affected by notice. Const., § 154.

as holders of government bonds; acts of government could not prejudice their title thereto. Const., §§ 122, 160.

STATUTE OF FRAUDS.

does not impair the obligation of contracts. Const., § 1948.

does not form part of contract, but prescribes conditions of its existence. Const., § 1990.

STATUTE OF LIMITATIONS. See *Construction of Statutes*, 19; *Obligation of Contracts*, 7.

1. **IN GENERAL.**
 - suspension of, by congress, during the war, applies to state and federal courts. Const., § 238.
 - effect of. Const., § 1991.
 - act designed to bar street commissioners, not construed to bar land-owner. Const., § 2960.
 - congress may pass. Const., § 2418.
 - of states, binding on federal courts. Const., § 3033.
2. **CONSTITUTIONAL LAW.**
 - states may pass limitations of actions on foreign judgments. Const., § 92.
 - immaterial that no time to sue allowed in particular cases. *Id.*
 - on admission of Texas, existing limitation on judgments preserved. Const., § 272.
 - provisions that they shall not run against non-residents, valid. Const., § 852.
 - as to shortening limitation laws, see *Obligation of Contracts*, 7.
3. **CONFLICT OF LAWS.**
 - only that of the forum can be set up in bar. Const., § 2001.

STATUTES. See *Construction of Statutes*.

1. **IN GENERAL.**
 - acts having expired by limitation may be revived. Const., § 2681.
 - exceptions in,
 - are what would be otherwise included by the language used. Const., § 2618.
2. **ENACTMENT.**
 - constitutional direction as to style of laws held directory. Const., § 2682.
 - proof of existence is a judicial question. Const., § 2683.
 - bill establishing postal rates not one for raising revenue. Const., § 2684.
 - courts do not inquire into majority by which act passed. Const., § 2685.
 - but journals may be consulted. Const., §§ 2686, 2689-90, 2691.
 - they do not go behind the written law itself. Const., §§ 2687-88.
 - going behind printed law of territory. Const., § 2691.
 - vote of speaker is to be counted in determining necessary majority. Const., § 2693.
3. **APPROVAL.**
 - the president is only required to sign the bill. Const., §§ 2695, 2697.
 - he need not date his approval; extrinsic evidence admissible to show date. Const., §§ 2694, 2700.
 - analogy of English practice. Const., § 2698.
 - constitutional provision as to failure to approve within ten days includes bill presented to governor before adjournment, though the ten days expire thereafter. Const., § 2704.
4. **TIME OF TAKING EFFECT.** See *Obligation of Contracts; Ex Post Facto Laws; Vested Rights*.
 - must be published. Const., § 2666.
 - what are private and what public, see *post*, 12.
 - judicial notice taken of. Const., § 2701.
 - take effect from time of approval. Const., §§ 2705-7, 2708-14, 2715-16.
 - and approval does not relate back to time of passage. Const., § 2715.
 - petition in bankruptcy, filed at noon, not affected by repeal of bankrupt law approved on evening of same day. *Id.*; § 2722.
 - at common law acts took effect by relation to first day of session. Const., § 2721.
 - is a question of law. Const., §§ 2708-10.
 - doctrine that no fraction of a day is allowed is not invoked to do injustice. Const., § 2712.
 - but the general rule seems to be, especially as to remedial statutes, that they take effect from the day of passage, including the whole day. Const., §§ 2717-19.
 - law to take effect on certain day is considered as enacted on that day. Const., § 2720.
 - precise time of, may be inquired into, when. Const., § 2722.
 - Revised Statutes of 1874 considered as passed December 1, 1878. Const., § 2723.
 - when English rule of relation to first day of session is applicable. Const., § 2724.
 - of penal laws affecting trade, only when notice thereof received by local collector. Const., § 2725.
 - courts cannot change declared present operation of act to future operation. Const., § 2726.
 - when a forfeiture takes place at once on the law declaring it taking effect. Const., § 2727.
 - as to retrospective laws, see *Vested Rights*, 4.
5. **CONSTRUCTION.** See *Construction of Statutes*.
6. **REPEAL OF STATUTES.**
 - a. *In general.*
 - contemporaneous repeal and re-enactment do not interrupt continuity of law. Const., § 2656.
 - the law ceases when the reasons therefor cease, when, and when circumstances make it inoperative. Const., §§ 2672-74.
 - general phrases in a repealing act are limited by its subject-matter. Const., § 3006.

STATUTES, REPEAL OF STATUTES, *In general* — Continued.

by a general clause, not favored; apply only to inconsistent provisions. Const., § 8007.
 the word "repeal" may denote a partial, temporary or absolute repeal. Const., § 8009.
 repeal and re-enactment at same time continues the law without interruption. Const., § 8022.
 provision that repeal of repealing act shall not revive first act repealed applies to repeals by implication. Const., § 8023.
 the general rule is that repealing a repealing act revives former law, and this applies to implied repeals; the rule does not apply where the revived act has been otherwise changed. Const., § 8024.
 the expiration of a repealing act does not revive former law unless it was a repeal by implication. Const., § 8025.

b. *By implication.*

are not favored. Const., §§ 2981, 2983-84.
 when treasury account would be reopened, the repugnance must be clear. Const., § 2982.
 this is especially true of revenue acts. Const., §§ 2983, 2992.
 repugnancy must be palpable and absolute. Const., § 2984.
 private law not readily construed to repeal general one. Const., § 2985.
 as to repeals of repealing acts, see *supra*, a.
 as to effect of constitutional provision that a repealed act must be set forth, see *Constitutions of the States*, 3.
 of act of 1810, as to compensation of consuls, by acts of 1855 and 1856. Consuls, § 24.
 later statute on same subject as former one, introducing new modifications. Const., §§ 2986, 2989, 2993.
 the question of, depends much on circumstances. Const., § 2987.
 the statutes must cover the same ground, and be clearly repugnant. Const., § 2988.
 occurs where the later act appears to prescribe the sole rule. Const., §§ 2990-91.
 and when new conditions or requirements are imposed as to existing offenses. Const., § 2994.
 the absence of the usual clause for a limited repeal infers a repeal of the old law. Const., § 8008.
 statutes giving special jurisdiction not repealed by general statute on jurisdiction. Const., § 8011.

c. *Effect of repeal.*

repeal of law prohibiting certain things does not make them lawful. Const., § 8000.
 usury may be recovered back after repeal of usury law. Const., § 8001.
on past acts and contracts.
 a declaratory law, being an exercise of judicial power, has no effect on. Const., § 2996.
 done or made between act and repeal, valid. Const., § 2997.
 no effect on, made under repealed law. Const., § 2998.
 transactions in the nature of contracts protected. Const., § 2999.
 issue of bonds protected, when. Const., § 8002.
 vested right of school district to moneys not affected by change of boundary. Const., § 8003.
 so of lien on vessel. Const., § 8004.
on amendments.
 repeal of act carries its amendments. Const., § 2995.
on corporations.
 repeal of charter ends the corporation, and all future powers; but past acts and transactions, property, etc., remain. Const., § 8005.
on prior laws and customs.
 abrogated by later act. Const., § 8018.
on punishment.
 none after expiration of law creating it. Const., §§ 8014-16.
 unless preserved by saving clause. Const., §§ 8015, 8018.
 actions for penalties and forfeiture go with repeal of the statute. Const., §§ 8017-18.
on pending actions.
 for penalties and forfeitures defeated, unless saved by clause to that effect. Const., §§ 8017-18.
 repeal of bankrupt law a bar to prosecution of bankrupt for perjury before commissioners. Const., § 8019.
 defeated by repeal of statute establishing the jurisdiction. Const., § 8020.
 whether plaintiff's right to costs defeated. Const., § 8021.
 effect of. Const., § 1898.

7. STATE LAWS AND DECISIONS. See *State Decisions*.**8. AMENDMENT.**

construction of amendments. Const., § 2655.

STATUTES — *Continued.*

9. SCOPE OF THEIR APPLICATION.

do not include the government, when. Const., §§ 2629-40.
 Virginia act of 1875 did not affect northwest territory. Const., § 2650.
 federal laws were in force in Oregon territory only so far as applicable. Const., § 2651.
 limitation laws operate generally. Const., § 2653.
 laws of entail in Ohio held not applicable to corporations. Const., § 2654.
 have no extraterritorial force. Const., §§ 2669-71, 2665.
 nor do they apply to contracts between citizens and aliens. Const., § 2666.

10. WAIVER OF THEIR PROVISIONS.

possible when public policy not *affected*, otherwise not. Const., §§ 2675-76.

11. MISTAKES IN STATUTES.

may be cured by other language, but if descriptive words are erroneous, not so corrected, it is fatal. Const., §§ 2677-78.
 published copy gives way to enrolled law. Const., § 2679.
 in renewing patent, the descriptive words are essential. Const., §§ 2677, 2680.
 in title, cured by number of bill. Const., § 2392.
 effect of legislative mistake as to the existence of a right; omissions in acts cannot be judicially supplied. Const., § 2766.

12. KINDS OF.

public.

act for issue of railroad bonds by a county, is. Const., § 2642.
 if so declared, they are, and an amended act may be also. Const., §§ 2643, 2646.
 are notice to the world. Const., § 2644.
 act re-enacted by a, is. Const., § 2645.

private.

do not affect individual rights not assenting to or applying for them. Const., §§ 2643-49.
 as affecting publication; acts authorizing aid bonds, are. Const., § 2667.
 so of laws classified as such by public officers authorized to so classify them. Const., §§ 2667-68.

13. EVIDENCE CONCERNING.

judicial notice taken of, and of construction and time of taking effect. Const., §§ 2701-3.
 as to resorting to journals, and going behind printed copy, see *supra*, 2.
 proof of statutes is a judicial question. Const., § 2683.

14. UNCONSTITUTIONAL LAWS. See *Construction of Constitutions.*

in general; all laws presumed valid. Const., §§ 29, 31.
 declared so only when duty imperative. Const., §§ 30, 36, 38.
 legislative motive not considered. Const., §§ 32, 35.
 departmental and legislative action upheld if possible, in favor of contracts. Const., § 34.
 void, if their object be to override constitutional provision. Const., §§ 37, 40.
 duty and practice of the courts. Const., §§ 48, 49.
 law violating treaty, not thereby unconstitutional. Const., § 54.
 it is proper to consider the effect of the statute to determine its validity. Const., § 492.
 courts cannot so construe them as to confine them to constitutional limits. Const., § 1572.
 acts carrying out federal amendments construed with reference to the power thereby conferred on congress. Const., § 2974.
full court; four judges necessary, in federal supreme court. Const., § 26.
unjust provisions; are valid. Const., § 33.
spirit of the constitution.
 there are certain vital principles which legislatures have no power to violate. Const., §§ 533-34.
 but it seems acts violating may be valid, if unmistakably expressed. Const., § 597, p. 269.
 acts opposed to the ends for which the government was established are void, see *Taxation*.
judicial doubts; resolved in favor of validity; rule stated. Const., § 11.
 invalidity must be clear. Const., § 31, 39. See §§ 38, 1296, 1349, 1805.
 courts proceed with caution, and unusual deliberation. Const., §§ 49, 598.
 effect of tacit recognition of validity of law by federal supreme court. Const., § 52.
 every statute presumed valid. Const., § 1349.
 of two constructions, that making the act valid is preferred. Const., § 2848.
partial unconstitutionality; if provisions are independent of, and not conditions for each other, valid part upheld. Const., §§ 61-63, 2152.
 laws punishing the violation of trade-marks, being void as to *some*, not applied by implication to those within the commercial power. Const., § 2765.

STATUTES, UNCONSTITUTIONAL LAWS—Continued.

- effect of void provisions*; are not law, and impose no duty, obligation or liability. Const., §§ 40, 41.
- duty of persons in cases of doubt. Const., § 42.
- officers not protected in acting under. Const., §§ 43-45.
- proviso in void statute not effectual as a contract. Const., § 55.
- acts done under may be made valid by law; but the void law cannot be legalized. Const., §§ 72, 73.
- estoppel* to claim law unconstitutional; when doctrine applies, and when not. Const., §§ 46, 47.
- effect of declaring law void*; binds juries as well as courts. Const., § 51.

STAY LAWS. See *Obligation of Contracts*.**STOCK.**

- distinction between, and shares. Const., § 2281.
- shares may be taxed at corporate locality if charter so provides. Const., § 2333.

STOCKHOLDERS. See *Shareholders*.**STREET RAILWAYS.**

- charter of one company repealed and road conferred on another on just compensation. Const., § 67.
- this may be done under the reserved power. Const., § 2202.

STRICT CONSTRUCTION. See *Construction of Statutes*.**SUFFRAGE.** See *Constitution of the United States*, 5, 1; *Equal Protection of the Laws; Women*.

- right of, existed when constitution adopted; it, nor its amendments, has added such right to existing privileges. Const., §§ 811, 815, 908-9, 1576.
- history of right of. Const., § 811.
- the constitution does not recognize the right of, in women. Const., §§ 812, 1601-2.
- guaranty of republican government* does not secure right of, to women. Const., § 813.
- the fifteenth amendment simply prohibits discrimination against right of, on account of race and color. Const., §§ 909, 1550, 1558-86, 1604, 1609.
- history of. Const., §§ 761-64, 1588.
- not a necessary attribute of national citizenship, but there must be no discrimination. Const., § 908.
- indictments alleging conspiracy to prevent voting, not alleged to be on account of race and color, are bad. Const., §§ 863, 908, 910, 1569.
- section 5519, R. S. U. S., prohibiting conspiracies to deprive persons of equal protection of laws as to suffrage, etc., is void, as prohibiting act of persons, not states. Const., §§ 865-67, 916-19.
- congress cannot make it penal simply for an officer to refuse to allow a person to prove his right to vote. Const., § 1571.
- penal statutes concerning, strictly construed. Const., § 1570.
- it does not plainly appear from the enforcement act that inspectors of election were to be punished for refusing votes on account of race and color. Const., § 1571.
- its first section secures the voter against discrimination for race and color. Const., § 1575.
- power given to congress by. Const., § 1586.
- fifth section, not being confined to discrimination due to race and color, is unauthorized. Const., § 1608.
- fourth section unauthorized, for the same reason. Const., § 1610.
- effect of fifteenth amendment on Delaware constitution. Const., §§ 968-69.
- under the act of 1866, voters are protected at both federal and state elections. Const., § 1608.
- state elections may be contested in federal courts, when the contestant has been injured by the rejection of votes on account of race and color. Const., §§ 1605, 1607.
- how, when rejection on other grounds. Const., § 1606.
- quære*, whether the fifteenth amendment reaches the acts of individuals, or only of officers. Const., §§ 1608, 1611.

SUITS. See *Jurisdiction*.**SUMMARY PROCEEDINGS TO RECOVER LAND.**

- though the title cannot be impaired, yet this does not affect action for possession, when. Const., § 1744.

SUNDAY. See *Sabbath*.**SUPERVISORS.**

- of elections; appointment may be vested in federal courts. Const., § 244.

SUPREME COURT. See *Constitution of the United States*, 7; *Jurisdiction*.**SUPREME LAW.** See *Constitution of the United States*, 15.**SURETIES.**

- on consul's bond; liability of. Consuls, § 97.

T.

TAKING OF PROPERTY. See *Eminent Domain*.

TAXATION.**1. IN GENERAL.**

a state may authorize a tax for a "public purpose," as a railroad. Const., §§ 312, 462.
but not for a private purpose, as to found a manufacturing corporation. Const., § 461.

is a sovereign power and includes the power to destroy. Const., §§ 401, 1037, 2254.
property exacted by taxation may be redistributed to the tax-payers. Const., § 118.

congress may, by law, forbid the enjoining of taxation. Const., § 447.

and impose penalty of fifty per cent. for failure to pay direct tax on lands. Const., § 449.

what may be taxed as corporate property. Const., § 2282.

a concurrent power in the state and congress; both may tax a business. Const., § 456.
fairness of tax not considered. Const., § 457.

whether non-resident of city can be taxed for purely city purposes. Const., § 699.

the concurrent power of congress and the states defined. Const., § 1189.

assumpsit the proper remedy to recover back illegal taxes; preventive remedies. Const., §§ 1481, 1486.

on the faculties, trade and occupation of a bank is on the bank itself. Const., § 2384.

2. CONSTITUTIONAL LAW. See *Regulation of Commerce*, 3; *Obligation of Contracts*, 5.

congress may establish a bank, under power to tax, borrow money, levy war, etc.
Const., §§ 865, 884-90.

such bank, or its branches, cannot be taxed by a state, as such a power is destructive to the power to create and preserve the bank. Const., §§ 893, 898, 2382, 2387.

this is so, though congress may have power to tax state banks. Const., § 397.

a. By the states.

the taxing power of a state is limited by its territory and sovereignty. Const., §§ 394, 411. See § 1861.

it cannot impede or burden the operation of congressional laws. Const., §§ 367, 402, 405.

it cannot extend to means employed by congress to execute its powers. Const., §§ 395, 402, 1270-72.

stock issued to secure public loan, not taxed by a state. Const., §§ 368, 400, 408.
can an income tax by, levied by a state, though indirectly affecting federal loan?

Const., §§ 405, 407.

the real estate of the United States Bank was taxable; and also its shares in the hands of private citizens. Const., §§ 380-398. See § 407, p. 159.

it seems a mint or patent right is not taxable; but the money, or income of the patent, may be. Const., § 403, p. 160.

a tax on bank capital includes tax on United States bonds, or stock held by the bank, and is void. Const., §§ 408, 410, 416, 454.

such a tax is in violation of congressional power to borrow money. Const., §§ 368, 408-13.

but the state may tax the shares of the stockholders, and require the bank to pay the tax. Const., § 454.

but the fact that congress had aided a railroad by land grants and money, and the government has an interest in its income, does not prevent state taxation.

Const., §§ 370, 417.

congress might exempt it from such taxation as would impede its performance of service due the government. Const., § 418.

the exemption from state taxation need only be implied. Const., § 2363.

government currency not taxable by states. Const., § 419, p. 171.

personal property of United States, or of their officers or servants, cannot be seized for state tax. Const., § 451.

state tax on telegraphic messages prohibited, when company has accepted the provisions of title 65, R. S. U. S. Const., § 452.

property may be taxed, but not agencies to serve the United States, whereby such service is impeded. Const., § 417, note; § 419.

certificates of debt for money or supplies to United States exempt. Const., § 418.

so of bills of credit issued for circulation. *Id.*

how question of constitutionality determined. Const., § 459.

authorities on taxation reviewed. Const., § 434.

a state may tax its own residents on debts against non-residents. Const., §§ 376, 436.

this power is limited to persons, property and business within its jurisdiction. Const., §§ 377, 437-441.

bonds held by non-residents, secured by mortgage on local railroad, not taxable. *Id.*; Const., §§ 445-46.

state may tax public lands after sale but before patent. Const., § 455.

TAXATION, CONSTITUTIONAL LAW, *By the states—Continued.*

the power is concurrent; both the state and congress may tax a business. Const., §§ 456, 826.
 is to be determined not by the means employed, but the thing taxed. Const., § 458.
 state may authorize town to annex land, in order to take railroad stock. Const., § 463.
 law imposing taxes according to former assessment, valid. Const., § 653.
 the general system of taxation is included in "due process of law." Const., §§ 695-96.
 may levy unequal or unjust taxation, so far as federal law is concerned. Const., §§ 695-760, 701-709.
 or render personal judgment against land owner. Const., § 709.
 all such questions are for the state courts, unless federal constitution infringed. Const., § 710.
 summary collection of tax, without suit, valid. Const., § 711.
 notice to person taxed not strictly necessary. *Id.*
 limitations upon their power of taxing productions of other states. Const., § 827.
 may tax one county adjoining a harbor, for improving the latter, though benefiting the whole state. Const., §§ 1179-80.
 limitations on their power by congressional power to regulate commerce, see *Regulation of Commerce*, 3.
 other limitations. Const., § 1861.
 may tax ships as property, but a tax per ton is unconstitutional. Const., §§ 1431-1436.
 a city cannot tax its own debts so as to retain part of the interest thereon. Const., § 1857.
 changing remedies against illegal taxes. Const., § 1902.
 a state has the absolute power to select the objects of. Const., § 2251.
 right of taxation only waived by clear language. Const., § 2299.

b. *By congress.*

of national and state bank circulation. Const., § 419, p. 171; 426.
 history of. Const., §§ 419-20.
 limited only by the ends for which the power was granted, and that the independent self-government of the states be preserved. Const., § 420, p. 173.
 a wholesale power is granted, except as to exports, and that capitation or other direct tax must be laid according to the census. *Id.*; § 682.
 and duties must be uniform. Const., § 421.
 but it seems that the means and agencies employed by a state for its government, such as the execution of its legislative or judicial power, are not taxable. Const., § 425.
 is a state franchise taxable. *Id.*
 the salary of a state judicial officer not taxable. Const., § 464.
 but a railroad is, not being an instrument of state government. Const., § 465.
direct taxes are limited to land, personal property by general valuation and poll taxes. Const., §§ 872, 423-24.
 taxes on specific personal property, are not. Const., §§ 378, 422-23.
 the "succession tax" of 1864 not a direct tax, but an excise or duty. Const., § 468.
 nor is the tax on carriages of 1794. Const., § 469.
 whether a tax is excessive is for congress, not the courts. Const., §§ 374, 427.
 it seems that a tax on bank bills is not laid on property but on debts. Const., § 432.
 on bank paying out municipal notes, valid. Const., § 466.
 in the District of Columbia, depends on general powers granted by the constitution. Const., § 467.
 legislatures may discriminate between kinds of taxable property. Const., § 409.
power of is conferred by implication, by a constitution restricting power, within certain limits. Const., § 59.

3. CONFLICT OF LAWS. See *supra*, 2, a.

the domicile of the deceased fixes the *situs* of the property, till distribution, and not that of the legatees. Const., § 601.

4. EQUALITY AND UNIFORMITY OF; CONSTITUTIONAL PROVISIONS FOR

construction of Louisiana constitution. Const., §§ 1871-72.
 may be in proportion to debts of each city, etc. Const., § 1782.
 taxes may be commuted for what the legislature deems an equivalent. Const., §§ 2314, 2238.
 real property only cannot be taxed. Const., § 2589.
 property may be exempted from special taxation where not benefited. Const., § 2590.
 such provisions do not apply to municipal taxation. Const., § 2591.
 what is "uniformity," when several municipalities are consolidated, and their debt divided. Const., § 2592.
 several equalizing boards, necessarily differing in their valuations, may be created. Const., § 2593.

TAXATION: EQUALITY AND UNIFORMITY OF; CONSTITUTIONAL PROVISIONS FOR — *Continued.*
a special burden may be assumed by a county, on sufficient consideration. Const., § 2594.
construction of Illinois constitutional provision. Const., §§ 2595, 2597.
foreign corporations may be taxed higher than domestic. Const., § 2596.

TAX ON EXPORTS. See *Constitution of the United States*, 4, 1.

TAX ON TRANSPORTATION. See *Regulation of Commerce*, 3.

TAX TITLES.

CONSTITUTIONAL LAW. See *supra*, 4.

a contract is not impaired by requiring claimant under existing sale to give notice of application for deed. Const., §§ 1771, 1821.

law permitting recovery of money paid on void sales cannot be impaired. Const., §§ 1772, 1822-26.

TEMPERANCE LAWS. See *Liquors; Prohibitory Laws*.

TENNESSEE.

governor must approve acts before they become laws. Const., § 1891.

effect of repeal of law, on proceedings pending under it. Const., § 1893.

TERRITORIAL COURTS.

the distinction between federal and state jurisdiction does not exist in the territorial governments. Const., §§ 2438, 2441.

are created solely by the legislative department. Const., § 2439.

may exercise admiralty jurisdiction. Const., § 2440.

may have jurisdiction of offenses committed by Indians conferred on them. Const., § 2442.

TERRITORIAL LIMITATION. See *Law of Nations*.

TERRITORIES.

as to territorial government, see *Constitution of the United States*, 3, 1.

TEXAS.

history of her secession and reconstruction; transfer of bonds by her while in rebellion, illegal and void. Const., §§ 126, 143-160.

title of, to government bonds, not divested by transfer to aid rebellion. Const., §§ 126, 156-59.

effect of admission of, on old system of laws. Const., §§ 271, 272.

laws of, before admission, not affected by the federal constitution. Const., §§ 1775, 1833-34.

THEATER. See *Show*.

THIRTEENTH AMENDMENT. See *Constitution of the United States*, 5, h.

TIME. See *Statutes*, 4.

fiction of no fraction of a day not allowed to do injustice. Const., § 2712; but see §§ 2717-19.

TITLE TO ACTS. See *Construction of Statutes*, 2; *Constitutions of the States*.

when must contain but one subject, and that be expressed, see *Construction of Constitutions*, 10.

TONNAGE. See *Regulation of Commerce*, 6.

what is. Const., § 1418.

TRADE-MARKS.

congress cannot punish counterfeiting of, nor regulate use of. Const., § 263.

TRANSPORTATION. See *Regulation of Commerce*, 3.

TREASON. See *Constitution of the United States*, 8.

TREASURY AGENTS.

have no judicial power. Const., § 7.

TREASURY NOTES. See *Constitution of the United States*, 3, s; *Taxation*.

TREATIES. See *Constitution of the United States*, 18.

laws violating cannot therefore be held unconstitutional. Const., § 54.

but are void; treaty the supreme law of the land. Const., § 113.

TRIAL. See *Constitution of the United States*, 4, e.

practice on, by court without a jury. Const., § 522.

TRIAL BY JURY. See *Due Process of Law*.

state act for selection of jurors by commissioners appointed by judges is valid. Const., § 120.
 act for the production of books and papers in revenue cases held valid. Const., § 2558.
 not a privilege of national citizenship; trial without is "due process of law." Const., §§ 690, 847.
 injunction may be granted, and continued pending an issue at law. Const., § 2559.
 waiver of. Const., §§ 912, 2519, 2522-25, 2547.
 an act providing for the sale of land conveyed by the state, for duly established debts due it, is valid. Const., § 1848.
 an act giving a bank a summary process against its debtors who have agreed thereto, is constitutional. Const., §§ 2520, 2523.
 a law authorizing the seizure of liquors on search warrant, and providing for summary proceedings thereon, is void. Const., §§ 2521, 2526-40.
 right of, in Rhode Island. Const., §§ 2526, 2527.
 right cannot be subjected to the performance of a condition precedent. Const., § 2528.
 a law increasing penalty, on appeal, is void. Const., § 2581.
 what are criminal proceedings. Const., §§ 2532-35.
 provision does not apply to the states. Const., §§ 2541-46.
 equity and admiralty are not within the provision. Const., §§ 2544, 2550, 2551.
 act against shipmaster for penalty is a "suit at common law." Const., § 2553.
 resort must be had to the common law to define "trial by jury." Const., § 2543.
 right depends on neither legislative nor judicial discretion. Const., § 2545.
 an act prohibiting, in actions for services for more than \$20, is void. Const., § 2546.
 so of act providing for trial by police court without jury. Const., § 2548.
 it seems that condemnation proceedings need not include, the only question being the amount of compensation. Const., § 2557.
 commissioners may be lawfully empowered to decide as to reasonableness of rates of fare on railroad. Const., § 2549.
 proceedings under fugitive slave law were not required to include. Const., § 2552.
 jury are not made judges of law as well as fact. Const., § 2554.
 a military trial was unlawful in Indiana during the civil war. Const., § 2555.
 suits in court of claims need not include. Const., § 2556.
 facts once tried by jury not re-examined except by new trial. Const., § 3105.

U.

UNCONSTITUTIONAL LAWS. See *Statutes*, 15.

UNEQUAL AND PARTIAL LAWS. See *Constitutions of the States*.

UNIFORMITY. See *Taxation*.

UNITED STATES. See *Constitution of the United States*.

in its quasi private character, see *Constitution of the United States*, 19.

UNITED STATES BANK.

congress may establish, under its express power to execute granted powers, and its implied power to provide means for war, to tax, etc. Const., §§ 365-66, 890-98, 2861, 2868-2887.

a state cannot tax it, or its branch bank. *Id.*

USAGE. See *Construction of Statutes*, 4.

USURY.

laws respecting, not retroactive, do not impair contracts. Const., § 1989.

not part of contract, but simply conditions of its existence. Const., § 1990.

UTAH.

common law in force in. Const., §§ 3095-97.

V.

VAGABONDS.

as to state power to exclude foreign, see *Regulation of Commerce*, 1, c.

VENUE. See *Place of Trial*.

VESTED RIGHTS. See *Legislative Power; Obligation of Contracts*.

1. IN GENERAL.

title of eleemosynary corporation cannot be divested. Const., § 75.

the federal constitution does not prevent states from impairing. Const., § 78. See §§ 582-99, 1613, 1630-35, 2058-82.

unless contract impaired. Const., § 1721.

congress cannot authorize suit by attorney-general on cause of action belonging to a corporation. Const., § 242.

VESTED RIGHTS, IN GENERAL—*Continued.*

defined. Const., §§ 598-94.

retrospective law destroying estate, void. Const., § 643.

are sacred. Const., § 2277.

not destroyed by implication; right to sue for purchase money of slave not destroyed by his subsequent emancipation. Const., § 1641.

act of congress limiting canal tolls, thereby affecting rights of bond-holders, void. Const., § 1637.

right of administrators to sell may be taken away. Const., § 1720.

exist in remedies, or their equivalent, to enforce contracts. Const., § 1838.

rights under an act passed after the contract was made vest upon recovery of judgment and obtaining *mandamus*. Const., § 1892.

none in lands condemned until award paid or tendered. Const., § 1916.

as to the effect of repeals on past acts, contracts and vested rights, see *Statutes*, 4. c.

the reserved power over corporations does not authorize the destruction of. Const., §§ 2132, 2174, 2272.

the power of eminent domain is superior to. Const., § 2188.

none in any rule of the common law. Const., § 3111.

federal courts do not follow state decisions as to statutes under which rights have vested, under laws generally believed valid, in the absence of state adjudication. Const., § 3065.

2. EXPECTANCIES.

estates tail may be changed to fee simple. Const., § 76.

3. CHANGE OF REMEDIES. See *Obligation of Contracts*, 6.4. RETROSPECTIVE LAWS. See *Legislative Power*.

act validating grantee's title under deed, ineffectual for want of law authorizing wife to convey by power of attorney, is valid. Const., § 79.

the federal constitution does not prohibit states passing. Const., §§ 1633, 2019, 2058-82.

as to retroactive laws changing remedies, see *Obligation of Contracts*, 6.

statute not so construed as to allow plaintiff in ejectment to recover on title acquired pending suit. Const., § 2784.

are valid if merely remedial. Const., § 1684.

action on void bills, issued by unauthorized association, may be given. Const., § 1732.

do not necessarily impair contracts. Const., §§ 1821, 1850.

affecting rights, are prohibited. Const., § 1932.

laws ought not to retroact; a law as to wills does not operate on existing wills, unless the legislative intent is clear. Const., §§ 2723-29.

a statute limiting time for appeal held not to apply to existing judgments. Const., § 2735.

laws affecting national purposes, sacrificing individual rights acquired by war to such purposes, held retrospective. Const., § 2730.

power given to a city to "prescribe" regulations, held prospective. Const., § 2731.

defined; remedies and practice may be modified, and pending actions will be included. Const., § 2732.

law abolishing imprisonment for debt applies to pending actions. Const., § 2733.

5. LIMITATION LAWS. See *Obligation of Contracts*, 7.

6. WHAT ARE.

issue of tenant in tail have none till his death. Const., § 76.

none in judgment, so as to prevent rehearing and vacation. Const., § 77.

none to land condemned till payment of damages under a certain charter providing that on payment or tender the company shall be entitled, etc. Const., § 603.

law setting aside finding before payment, valid. Const., § 604.

VILLAGES. See *Municipal Corporations*.

VIRGINIA.

liability of wrongful occupant of land in 1789. Const., § 196.

compact with Kentucky, see *Constitutional Law*, 4.

the government organized at Wheeling soon after her secession was the lawful state government. Const., § 1552.

by ancient practice, interest on existing contracts may be lessened. Const., § 1783.

act confirming rights to church property, valid. Const., § 1747. See § 1748.

law of the Church of England was transplanted to the colony of. Const., § 3092.

VIS MAJOR.

loss by, falls on proprietor. Const., § 1639.

W.

WAIVER.

of privileges of consuls, etc., see *Consuls and Ministers*, 5.

WAR. See *Constitution of the United States*, 3, 1; *Law of Nations*.

an organized rebellion or insurrection is. Const., § 187.

WARRANTY.

of slave, before thirteenth amendment, is not thereby broken so as to make the vendor liable. Const., § 1591.
 that *status* of slave is that of a slave for life, refers to the time of making, and not to subsequent changes. Const., § 1637.
 against future event, valid, but not interpolated into a contract. Const., § 1688.
 loss by *vis major* falls on proprietor. Const., § 1689.

WATER RIGHTS.

states are sovereign over tide waters within their jurisdiction. Const., § 821.
 and fisheries, discussed. Const., § 2170.

WATER COURSES. See *Navigable Waters*.**WEIGHTS AND MEASURES.** See *Constitution of United States*, 3, g.**WESTERN RESERVE.** See *Connecticut; Ohio*.**WEST VIRGINIA.**

formation of state of. Const., § 1554.

WHARFAGE. See *Regulation of Commerce*, 2, d.**WISCONSIN.** See *Constitutional Law*.

power over its internal rivers; regulation of commerce. Const., §§ 1222-24.

WOMEN.

constitutional guaranty of republican government does not give right of suffrage to. Const., §§ 95, 818.
 were citizens prior to fourteenth amendment, which does not give them the right of suffrage. Const., §§ 806-15.
 nor does it give them the right to practice law. Const., § 818.

WRITS OF ERROR. See *Appeals*.

questions not brought to attention of lower court not considered. Const., § 692.
 adjustment of controversy pending, a ground of dismissal. Const., § 752.
 cannot be taken in name of other than person. Const., § 119.
 what questions may be reviewed. Const., § 1848.

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